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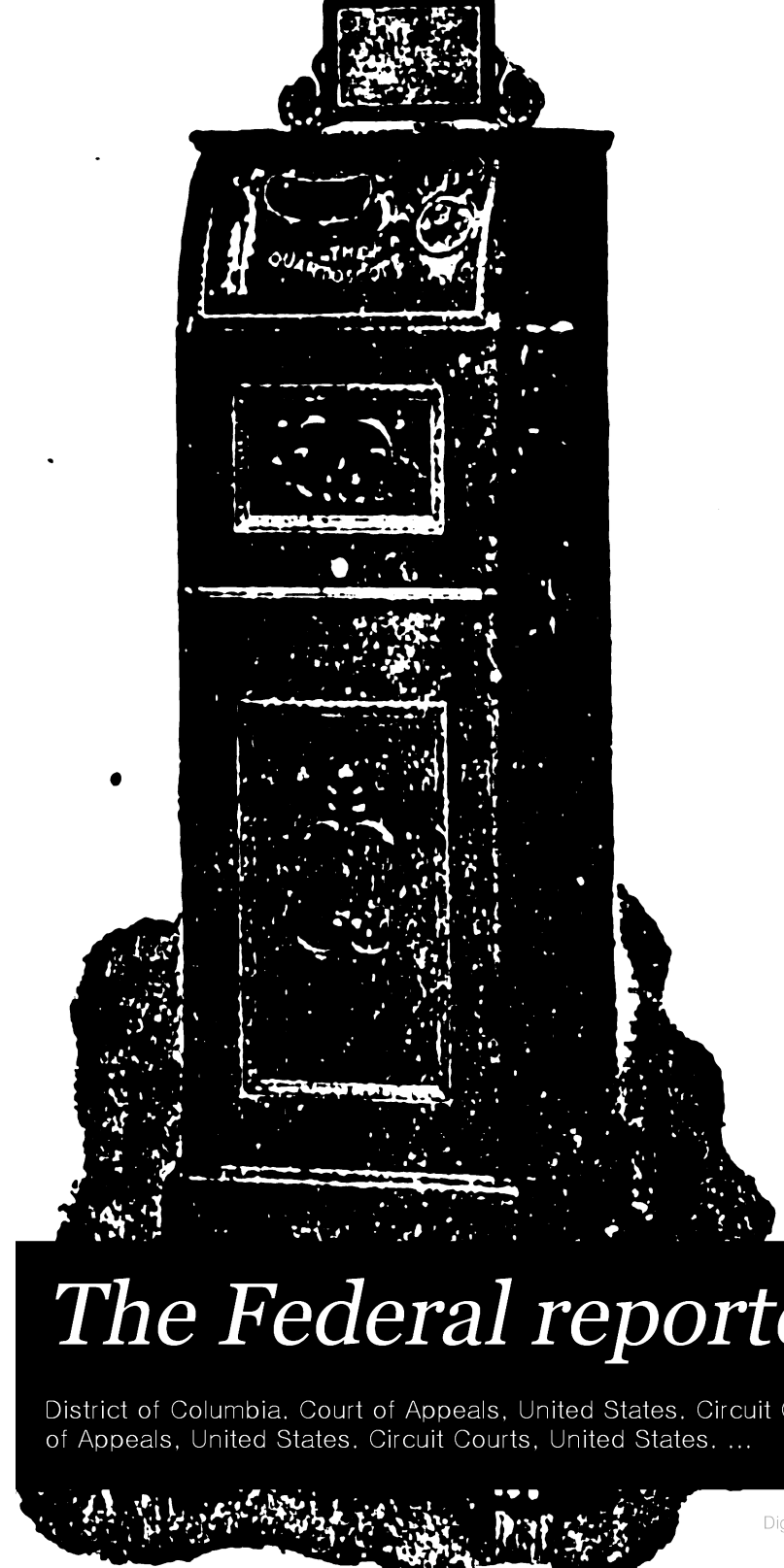
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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

VIRGINIA-CAROLINA CHEMICAL CO. v. HOME INS. CO. OF NEW YORK et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 415.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—ANCILLARY SUIT.
Several insurance companies separately issued policies on the same property of V., providing for proportional liability only for any loss, and V. brought separate actions at law thereon against them in a state court. The state court refused a motion to transfer the cases to the federal court; but in all of them, except one, in which there was involved less than $2,000, the amount necessary to give the federal court jurisdiction, complete records were seasonably filed in the federal court, which refused motions to remand. *Held*, that a bill in the federal court to enjoin further prosecution of the actions at law there or elsewhere, and to have the liability of the insurers determined and adjusted in equity under such bill, was ancillary to the actions at law, so as to be maintained without regard to the citizenship of the parties.[1]

2. EQUITY JURISDICTION.
Equity has jurisdiction, on the ground of inadequacy of remedy at law, to enjoin separate actions by insured against several insurers, and have their liabilities determined under the bill; their defenses being the same, and their liabilities, if any, proportional.

3. EQUITY—MULTIFARIOUSNESS.
A bill by certain insurers to restrain separate actions at law by insured against them and other insurers on their policies, under which their liability, if any, is proportional, and to which actions the same defense is interposed, and to have their liabilities determined in equity under the bill, is not multifarious; all the insurers having a common interest in defeating the claims of the insured.

4. FEDERAL COURTS—JURISDICTION—AMOUNT INVOLVED.
Where separate actions at law by insured against insurers on policies to which the same defense is interposed, and under which the liability, if any, is proportional, are removed to the federal court, with the exception of one in which the amount involved is not enough to give it jurisdiction, prosecution of this action, as well as of the others, may be

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[1] Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

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enjoined by a bill in the federal court to have the liabilities of insurers determined and adjusted by such court as a court of equity under such bill.[2]

Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston.

H. A. M. Smith, for appellant.

Augustine T. Smythe and Alexander C. King, for appellees.

Before GOFF, Circuit Judge, and JACKSON and PURNELL, District Judges.

JACKSON, District Judge. This case is now heard upon an appeal from the circuit court of the United States for the district of South Carolina. 109 Fed. 681. A bill was filed by the Home Insurance Company of New York and the German-American Insurance Company of New York against the Virginia-Carolina Chemical Company and 14 insurance companies, who were made defendants to the bill. The defendant the Virginia-Carolina Chemical Company had prior to the filing of this bill instituted actions at law in the court of common pleas of Charleston county, S. C., against each and all of its codefendants. Motions were made in each case before that court to transfer the several cases to the circuit court of the United States for the district of South Carolina, which were overruled, and the court retained the cases. Notwithstanding the refusal of the court of common pleas to transfer the several cases, the plaintiffs in this action, under the act of congress, seasonably took out the records in each case and filed them in the clerk's office of the United States court for the district of South Carolina, to be further proceeded therein before the circuit court of the United States. The object and purpose of this bill is to restrain the defendant insurance companies from the prosecution of these suits on the law side of the United States court, as well as elsewhere, to avoid a multiplicity of suits, and to have the cases all heard before the federal tribunal. The validity of these various policies of insurance is assailed for the reason that they were procured by fraud, misrepresentation, and concealment of the true value of the property insured; that the representations of the insured as to the value of the property were largely in excess of its value; that the various insurance companies, relying upon the good faith of the Virginia-Carolina Chemical Company, issued the policies upon the representation made by the defendant company. Various other grounds of relief are set up in the bill, which we deem it unnecessary to consider at this time, for the reason that the issues raised by the plea and demurrer of the defendants refer largely to so much of the bill as we now have under consideration.

The plea raises the question of jurisdiction, and the right of the plaintiffs in this action to maintain this case in the circuit court of the United States for the district of South Carolina, for the reason

[2] Jurisdiction of circuit courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75, and Shoe Co. v. Roper, 36 C. C. A. 459.

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that the plaintiffs are citizens of New York, and the defendant the Virginia-Carolina Chemical Company is a corporation of the state of New Jersey. If this were an independent and original bill, the ground raised by the plea, possibly, would be fatal to the maintenance of this action; but it is not an original bill. It is an ancillary proceeding to the actions at law pending on the law side of the court. It is, however, claimed that, inasmuch as this is an ancillary proceeding, the circuit court of the United States has full jurisdiction, without regard to citizenship, to furnish relief in the controversies on the law side of the court. The supreme court, in the case of Freeman v. Howe, 24 How. 460, 16 L. Ed. 752, held that:

"A bill on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it has arisen, and maintained without reference to the citizenship or residence of the parties."

In this case there are 14 original suits on the law side of this court, which the bill seeks to restrain and regulate, and to prevent any action that might work injustice to these defendants in the law actions. In the case of Dewey v. Coal Co., 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179, which was tried before the writer of this opinion, a suit was brought in the state court on the law side thereof, and removed to the United States court. After the removal of the case a cross bill was filed, raising certain questions to be litigated in the chancery proceedings. Objection was made that the court had no jurisdiction of the case, for the want of diverse citizenship, as appeared from the face of the bill. This objection was overruled by the court below, and the supreme court held that the objection was not well taken; the equity suit being the exercise of jurisdiction by the circuit court ancillary to that which it had already acquired in the action at law, which it might well entertain according to the rule in Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Pacific R. Co. v. Missouri Pac. Ry. Co., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498; Dewey v. Coal Co., 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179. Without further discussing the question of jurisdiction, we are of the opinion that the cases already cited dispose of that question, and that the bill filed in this case is properly an ancillary proceeding to the law actions, and for this reason we overrule the exceptions taken by the appellants to the jurisdiction of the court.

The main object and purpose of this bill is to prevent a multiplicity of suits, all involving the same legal questions, founded upon similar issues of fact; and for this reason in its nature it is ancillary to the actions at law. All the suits brought by the Virginia-Carolina Chemical Company against the various defendants seek to litigate the same legal right, and the legal liability of the defendant companies, if any there be, is the same; the only difference being the amounts involved in the various policies. The plaintiff, the Virginia-Carolina Chemical Company, in the actions at law sets up a common demand against all the defendants. The object and pur-

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pose of this bill is to determine the liability of the different defendants in a court of conscience, and, if the court should reach the conclusion that there is a liability on each of the policies mentioned, then the question would be, what is the extent of the liability? It is apparent from the policies in this case that, if there is any liability at all, then under the condition of the various policies the same must be apportioned, and in order to do that a reference should be made to a master to ascertain the amount of liability upon each policy. But, if the court should reach the conclusion that these policies were issued upon a false state of facts as to the value of the property insured, and that the insured could not recover upon them, then, under the terms and conditions of the policies, a court of equity, in the exercise of its powers, would enjoin the plaintiff on the law side of the court from the further prosecution of its demands.

This action might seem to savor of proceedings upon an original bill. Yet it is not an original bill; but, as we have said, it is an ancillary proceeding, founded upon proceedings at law, and, in fact, is but a mere continuation of them. If the cases at law were properly removed and transferred to the federal tribunal, then the bill, being an ancillary proceeding founded upon the pending law cases, derives its jurisdiction from the existence of those cases. It is claimed, however, that the proceedings are still pending in the state court. It is a matter of no importance whether they are or not, so far as this question is concerned. It is conceded that the motions to remove these cases were made, and that complete records in each case were filed in time in the federal court. It appears that motions to remand were made in the several cases before that tribunal, and that the court overruled the same. The judgments of the court in the several cases are still in full force and not appealed from, leaving all the cases to be tried before that tribunal; but, even if the orders refusing to remand the cases were appealed from, the only effect of the appeal would be to suspend all action in the court below until the appeals could be heard. The act of congress has been fully complied with in the transfer of the cases, and, the court having refused to remand them, they are by operation of law pending in the United States court, and any effort upon the part of the Virginia-Carolina Chemical Company to prosecute these suits in the federal or state courts is a violation of the injunction under the circumstances of this case. This court does not seek, nor does it claim the right, to restrain the state court itself from hearing the case of the Virginia-Carolina Chemical Company against the various defendants; but it holds that where the cases have been legally and properly removed from the state court to a federal court, which refused to remand the cases, the federal court has a right to restrain the defendant the Virginia-Carolina Chemical Company from the further prosecution of its actions at law in any court until the questions can be heard and determined in the ancillary proceeding. The cases removed are now pending and wholly within the jurisdiction of the federal court, and the state court has lost its jurisdiction. So far, then, as the question of the

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jurisdiction of the court is raised and presented by the pleadings in this case, we reach the conclusion that this bill can be maintained, for the reason that the remedy at law is inadequate and incomplete, and that the action of the court below in overruling all the exceptions to the jurisdiction must be sustained.

But exceptions are taken to the bill on the ground that it is multifarious. If we look to any general rule to determine whether or not a bill is multifarious, we answer that there is no inflexible rule or test by which to determine that question. It depends entirely upon the allegations of the bill and the facts set up in it. If it appears from the face of the bill that the defendants have the same defense, arising from a common interest in the matter of litigation, and that by one comprehensive suit in equity all the rights and interest of the defendants can be determined as between them and the Virginia-Carolina Chemical Company, then a bill in equity can be maintained. De Forest v. Thompson (C. C.) 40 Fed. 375; 1 Pom. Eq. Jur. pars. 245–269, inclusive; Jones v. Andrews, 10 Wall. 327–333, 19 L. Ed. 935. There are a number of authorities cited in the brief of the appellee to sustain this position, but we deem it unnecessary to discuss them. It appears from the face of the bill that there are 14 different actions brought by the Virginia-Carolina Chemical Company against these defendants. Equity has jurisdiction to prevent a multiplicity of suits, and to protect the defendants from unnecessary expense, though the Virginia-Carolina Company, so far as it is concerned, has an adequate remedy at law.

The question presented by the demurrer in this case is whether or not all the defendants can be joined in one suit. This bill upon its face alleges that the defendants have a common interest in the questions involved, though their liability may be different. If it appeared from the face of the bill that there was not a common interest in the subject of litigation, and that there was no connection the one with the other, then the exception taken to the bill should be sustained. But, as we have seen, all the defendant insurance companies have a common interest in defeating the claims of one party, the plaintiff in the actions at law. On one side is the Virginia-Carolina Chemical Company, the plaintiff in the actions at law, while on the other side are the 14 insurance companies, who deny their liability to the Virginia-Carolina Chemical Company upon their policies of insurance.

Another exception taken to the bill is that the allegations made in it are inconsistent, having a double aspect. In the view that we take of this bill we must dissent from that position. It is true that there is a prayer in the alternative, and it is equally true that the prayer of the bill may be considered as to whether it is multifarious or not. It is a well-settled principle that, when the pleader is in doubt as to the kind of relief that the complainant should have upon the bill, he may frame the prayer in the alternative, so that the court may grant whatever relief he is entitled to upon the facts stated. Story, Eq. Pl. par. 42. There are a number of authorities cited in the brief of the appellee to sustain this position, but we deem it unnecessary to refer to or discuss them. To support this

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position we find in 3 Enc. Pl. & Prac. 364, a number of cases cited, which sustain the principle as laid down by Judge Story in his Equity Pleading. Mr. Justice Harlan, of the supreme court, announced in Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141, "that the ends of justice must not be sacrificed to mere form or by too rigid an adherence to technical rules of practice."

It will be observed that we have so far disposed of all the errors assigned by the appellant, except the third, which states that the circuit court of the United States for the district of South Carolina can take no jurisdiction, either by original process or by removal, of the London Assurance Corporation, for the reason that the amount involved is less than $2,000, the jurisdictional amount of the United States court. It appears from the allegations of the bill that the London Assurance Corporation is one of 16 companies that issued policies of insurance upon the property of the Virginia-Carolina Chemical Company to the amount of $78,210. The twelfth paragraph of the bill alleges that by the terms of each of the insurance policies issued by the various companies upon the property described it was provided no company shall be liable under its policy for a greater proportion of any loss on the described property than the amount insured by each policy should bear to the whole insurance. This allegation of the bill, upon a demurrer to it, must be admitted as true; and, if true, it establishes such a relation between the 16 companies that insured this property as creates a liability, if the policies are valid, which can be better and more readily ascertained by a reference to a master to fix. For this reason it was proper that the London Assurance Corporation should be made a defendant to this bill, not only that the plaintiffs in this action, but all of the insurance companies who insured this property, should be protected in their rights from unjust and vexatious suits at law. It is a well-recognized principle in equity that a court of equity will entertain jurisdiction to prevent an unjust and unfair use of a resort to a court at law by a party which would deprive other parties of their just rights or subject them to vexatious suits. We are of the opinion that there is no error in the court below in awarding this injunction against the London Assurance Corporation.

We have now considered and disposed of all the assignments of error to the judgment of the court below. We fully concur in the able and exhaustive opinion of the learned judge of the court below, and find no error presented in the record.

Affirmed.

DAVIS v. MARTIN, U. S. Marshal, et al.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,018.

1. JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS.

Where a circuit court of the United States, in a suit for the foreclosure of a mortgage, has actually seized the property through its marshal, for the purpose of selling the same under the provisions of the mortgage, such court has jurisdiction of a suit by a third person, claiming

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ownership of the property, to enjoin its sale, as ancillary to the original suit, and regardless of the citizenship of the parties.[1]

2. ADMINISTRATORS—SALE OF REALTY—EFFECT ON MORTGAGES UNDER LAW OF LOUISIANA.
Under the law of Louisiana, as settled by the decisions of its supreme court, a sale of real property of a decedent to pay debts of the succession, under a warrant duly issued therefor by the probate court having jurisdiction, extinguishes mortgages given by the deceased on the property, leaving mortgage creditors to look to the proceeds in the hands of the administrator.

3. SAME—VALIDITY OF SALE—COLLATERAL ATTACK.
Under the law of Louisiana, which requires land of a succession to be appraised by experts within one year prior to its sale under the warrant of a probate court, the failure to make such appraisal does not render the sale an absolute nullity, but is an irregularity only, which cannot be made the basis of a collateral attack upon the validity of the sale.

4. SAME—FAILURE TO RECORD DEED.
The fact that a deed to lands of a succession, executed by a sheriff on a sale made by him under a warrant from a probate court, is not filed for record until after the institution of proceedings by a mortgagee of the deceased to subject the land to his mortgage, does not affect the validity or effect of such deed as against the mortgagee, where it is left for record before he has actually seized the land; the law of Louisiana making it effective, as against third persons, from the time of filing, and not from its actual record.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

On the 1st of October, 1888, W. L. Wooten, describing himself as a resident of Caldwell parish, state of Louisiana, executed an act of mortgage upon the property herein in controversy, in favor of Henry Dickinson, of New York, to secure the payment of an indebtedness of $5,000, with interest thereon from that date at 8 per cent. per annum until paid; the indebtedness thus secured being liquidated by the execution of a bond of even date, for the sum of $5,000, due October 1, 1893, to which were attached interest coupons, payable semiannually on the 1st days of April and October. This act was acknowledged by the maker before A. B. Hundley, clerk of the district court of Caldwell parish, on October 13, 1888, and the same was duly recorded in the mortgage records of Caldwell parish on same day. W. L. Wooten having died, his widow was appointed administratrix of his estate on December 23, 1893. On July 17, 1894, the court granted an order, on application of this administratrix, filed same day, directing that a writ of sale issue as prayed for, directing the sale of all the property (consisting entirely of real estate) of the succession of W. L. Wooten, deceased, after 30 days' advertisement according to law. On September 8, 1894, the sheriff of Caldwell parish, by virtue of a commission issued to him pursuant to above order, exposed the property in controversy for sale at the court house door in Caldwell parish, and, the same failing to sell for cash, it was readvertised, to be sold on credit of 12 months, on 29th of December, 1894; at which last date it was adjudicated to I. I. Davis, complainant, for the sum of $2,000, for which he executed bond and security. On 3d of July, 1897, J. B. Watkins, M. Summerfield, and T. H. Chalkley filed their bill of complaint in the United States circuit court for the Western district of Louisiana, alleging themselves to be owners of the bond and interest coupons, heretofore recited; that all of them were due and unpaid; that Wooten had died; that his widow was administratrix of his estate, and tutrix of his minor children; prayed for the issuance of a writ of seizure and sale, and that the property be sold in accordance with the terms of the mortgage. On same day the order was

[1]Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

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granted, and on the 7th of July, 1897, notice issued to Mrs. Mattie A. Wooten, widow, in her own behalf, administratrix of the succession of W. L. Wooten, and as tutrix to Zenobia Wooten, minor, to pay the debt specified within three days, in default whereof the mortgaged property would be sold in satisfaction of the writ. On July 7, 1897, a writ of seizure and sale issued, and on August 18, 1897, was executed by seizure of the property. On September 14, 1897, the appellant filed his petition in the court below, therein asserting title to the property in controversy, through the succession sale heretofore recited, and that he had been in peaceable and undisturbed possession since the date of adjudication; that the marshal had seized it under a writ of seizure and sale issued at the instance of J. B. Watkins, and advertised the same for sale; that this would be in gross violation of his rights; that he was entitled to damages for the alleged tortious seizure; and that an injunction was necessary to arrest the sale. The petition was verified, and the judge granted the order of injunction on the 22d of September, 1897. The petitioner prayed for a citation, a writ of injunction pendente lite, a final injunction, a decree of restitution, and for judgment against the marshal and the plaintiffs in the case of Watkins et al. against Mrs. Mattie A. Wooten, in solido, for the sum of $650 damages, and all costs of suit. Thereafter the defendants in the petition appeared, and filed a demurrer, and for cause of demurrer set forth that the complainant had not by his bill made or stated a cause entitling him to relief, and that the bill was multifarious, in that some of the matters alleged were cognizant in equity and some were cognizant at law. On hearing this demurrer, the following entry was made: "As per assignment, the demurrer filed herein came on to be heard after argument by counsel for the respective parties, the same was overruled, and counsel for plaintiff elected to proceed on the equity side of the court. Case continued." Thereafter all the defendants joined in an unsworn answer admitting the issuance of the writ of seizure and sale, the seizure and advertisement for sale of the property described, but denying that Ivy I. Davis owns the property so seized and advertised, and aver the same belongs to the succession of W. L. Wooten. The answer further alleged that the pretended sale from the succession of Wooten to Ivy I. Davis, set up in the bill of complaint, is an absolute nullity, because the court under whose orders and decrees such sale was made was without jurisdiction over or of the succession of W. L. Wooten, and that its orders and decrees were absolute nullities, because said Wooten, at the time of his death, resided and had his domicile in the city of New Orleans, parish of Orleans, state of Louisiana. The case thereupon was continued from term to term, until the April term in 1900, when the defendants below filed the following as an amended answer, to wit: "Defendants, with leave of court, for further answer to bill of complaint, say and aver that plaintiff is not, and never was, owner of the lands," etc., "described in bill of complaint, and has not, and never had, any right, title, or interest therein or thereto. Defendants say and aver that the pretended sale set up by plaintiff is fraudulent, and has no legal or real existence. They aver that the recitals in pretended deed under which plaintiff claims are false; that the sheriff of Caldwell did not sell said land to plaintiff, or to any one else, and never offered same for sale under any writ on day stated in said pretended deed or at any other time. Adopting all allegations of answer, they pray that plaintiff's bill be dismissed, at his costs." Without further pleadings, the record shows that evidence was taken substantially establishing the facts alleged in appellant's petition, and thereafter a decree was rendered dissolving the preliminary injunction, denying the prayer for an injunction, and dismissing the plaintiff's bill. Solicitors for the appellants put in a motion for a new trial on the ground that the decree of the court is contrary to law and the evidence. This motion for a new trial being overruled, this appeal was taken, assigning errors as follows: "(1) That plaintiff is bona fide owner and possessor of the property described in his bill in this cause. (2) That he acquired said property by purchase at administrator's sale of the succession of W. L. Wooten, through the sheriff as auctioneer, on December 31, 1894, and since that date has been in quiet, peaceable, and undisturbed possession thereof, exercising all the acts of ownership, to the knowl-

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edge of Jabez B. Watkins et al., seizing creditors and defendants in this suit. (3) That defendant, marshal of this court and of the Western district of Louisiana, acting under and by virtue of an order of seizure and sale and writ of sale, which issued from this honorable court in the cause, entitled 'Jabez B. Watkins et al. v. Mrs. Mattie A. Wooten, Widow, Administratrix, et al.,' and No. 203 on the docket of this court, and at the instigation of the plaintiff in said cause, seized, took possession of, and advertised for sale plaintiff's property, and described in the bill of complaint in this cause. (4) That a writ of injunction is necessary to prevent the sale of plaintiff's property for the debts of another. (5) That the succession sale at which plaintiff purchased property described in his bill devested said property of all mortgages placed upon it by the deceased, and especially devested said property of the mortgage now sought to be executed against it, and transferred said mortgages to the proceeds paid by plaintiff in the hands of the administratrix. (6) That the circuit court of the United States for the Western district of Louisiana erred in denying plaintiff's title and refusing the injunction prayed for."

Geo. E. Dodd and F. G. Henderson, for appellant.
A. H. Leonard, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). As there was an actual, physical seizure and custody of the property in controversy in the suit of Watkins et al. against Wooten, in the circuit court, that court had jurisdiction to hear and determine the controversy inaugurated by the petition filed by appellant and the proceedings thereunder, irrespective of the citizenship of the parties. Morgan's L. & T. Ry. v. Texas Cent. R. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625, and cases there cited. The record shows that the proceedings on the appellant's petition have been carried on and conducted under the liberal rules of procedure as laid down in the Louisiana Code of Practice, and in total disregard of the equity rules which control equitable proceedings in the courts of the United States. Although this has been done without objection in the circuit court, and with the apparent sanction of the judge, and no errors are assigned thereon in this court, it is with hesitation we deal with the case on the merits, and as if the proceedings were in all respects regular.

The case shows that the succession of W. L. Wooten was regularly opened in the district court of Caldwell parish, and that thereon proceedings were had that resulted in a sale and transfer of the property in question to pay debts. According to the laws of Louisiana, as expounded by the supreme court of the state, it is well settled that such a sale, when perfected, has the effect of extinguishing mortgages given by the deceased upon the property, leaving the mortgage creditors to look to proceeds in the hands of the administrator. Lafon's Ex'rs v. Phillips, 2 Mart. N. S. 231; De Ende v. Moore, Id. 336; Joyce v. Poydras de la Lande, 6 La. 283; Hoey v. Cunningham, 14 La. 86; French v. Prieur, 6 Rob. 299; Leverich v. Same, 8 Rob. 97; Lewis v. Labauve, 13 La. Ann. 382; and see Succession of Thompson, 42 La. Ann. 122, 7 South. 477.

The alleged answers in this case deny the validity of the sale made under the authority of the district court of Caldwell parish in

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the succession of W. L. Wooten, on the ground that said Wooten, at the time of his death, resided and had his domicile in the city of New Orleans, parish of Orleans, state of Louisiana, and not in the parish of Caldwell, of said state. If we understand the law of Louisiana, only the probate court of the parish of the domicile of the deceased has jurisdiction to open the succession and conduct succession proceedings, and if, in fact, at the time of his death, the said Wooten was a citizen of the city of New Orleans, parish of Orleans, the district court of Caldwell parish was without jurisdiction, and its judgment and proceedings were nullities. But we fail to find in the evidence any proof whatever that the said Wooten at the time of his death was a citizen of the city of New Orleans, parish of Orleans, but find abundant evidence to the effect that at the time of granting and acknowledging the mortgage to Henry Dickinson said Wooten was a citizen of Caldwell parish. The amended answer alleges that the sale by the sheriff, under the orders of the district court of Caldwell parish, was a simulation and a sham, and had no legal and real existence; that the recitals in appellant's deed are false; that the sheriff of Caldwell parish did not sell said land to the plaintiff or any one else, and never offered the same for sale under any writ.

Assuming that this is a sufficient averment that the sale by the sheriff of Caldwell parish, under the alleged order of the district court of Caldwell parish, was a nullity, still we fail to find any evidence whatever in the record showing, or even tending to show, that the proceedings were not valid and regular. Certainly Wooten was dead, his last domicile as far as the record goes was in Caldwell parish, and apparently the district court of Caldwell parish was seized of jurisdiction, and it unquestionably issued the order of sale under which the sheriff acted. It is a well-settled rule in Louisiana that in a matter of judicial sales a purchaser need not look beyond the jurisdiction of the court and the sufficiency of the order to warrant the sale. Webb v. Keller, 39 La. Ann. 55, 67, 1 South. 423, 431, and cases there cited.

Several objections are made in the brief of the learned counsel for appellee, which we consider in order:

(1) It is contended that the sheriff's deed is invalid because the decree directing the sale of succession property should be according to law, and that according to law succession property cannot be sold, unless within 12 months preceding it has been duly appraised, and that according to the deed executed by the sheriff to the appellant, the sheriff made an appraisement of the property instead of having the property appraised in the succession proceedings. The record apparently shows that the sale took place more than a year after the appraisement made by the experts appointed by the judge. Counsel cites Webb v. Keller, supra, to the effect that it was the duty of the judge to cause the property to be estimated by experts before proceeding to the sale thereof, if it was such property as had remained unsold for more than one year after the appointment of the executrix or administrators; and cites Elliott v. Labarre, 2 La. 328, to the effect that if the forms of law be omitted a succession

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sale will be annulled. Conceding all this to be as counsel claims, we are of opinion that the irregularity suggested was a relative nullity, and whatever its value may be in a suit to annul the sale brought in the district court of Caldwell parish it is insufficient here to affect appellant's title.

(2) It is further contended that the deed does not show a sheriff's sale because it is signed by the sheriff and two witnesses, and is not signed by the purchaser, and therefore is not an authentic act, but a mere private act. The sheriff's deed, as evidence of title, seems to have been proved and presented in evidence without any question, and we find no motion to suppress the same, either in the court below or in this court.

(3) It is further complained that the sheriff's deed was not recorded at the time of the issuance and execution of the writ in the main case of Watkins et al. against Wooten, and the marshal, therefore, had the right to seize. The certificate shows that the deed was deposited for record in the proper parish on July 21, 1897, about a month prior to the actual seizure made in this case. We understand the law of Louisiana to be that a record of a conveyance of lands takes effect against third persons from the date of deposit and filing by the proper officer of the deed or other instrument, and that the time the officer actually spreads the conveyance on the records is immaterial as affecting the rights of parties. Payne v. Pavey, 29 La. Ann. 116; State v. Rojillio, 30 La. Ann. 883; Way v. Levy, 41 La. Ann. 454, 6 South. 661.

Counsel for appellees calls the attention of the court to alleged suspicious facts appearing on the face of the evidence, to wit:

"The deed, a copy of which is in evidence, recites: 'Before me, M. L. Micom, clerk 4th district court and ex officio recorder and notary public, came and appeared J. J. Meredith, sheriff,' etc. But the clerk does not sign the deed. The deed is dated December 31, 1894. It was not offered for record for more than two years. It is signed 'Jack J. Meredith, Sheriff,' and J. J. Meredith is one of the two witnesses to his own signature. The tax receipts offered in evidence show that the land was not assessed to complainant, but was assessed to W. L. Wooten during the years 1895, 1896, and 1897, and paid to this same sheriff, Jack J. Meredith, by the mortgagees, Watkins and others."

Under the law of Louisiana, it was not necessary for the clerk to sign the sheriff's deed. The statute makes the sheriff's deed authentic when signed by him. See Code Prac. La. arts. 692–698. The deed was recorded before the seizure in the suit of Watkins v. Wooten. And in this connection we may notice the fact that, as the mortgage debt on which appellees brought executory process was long past due, the appellees were not very diligent themselves. The transcript shows that the sheriff's deed is signed by Jack J. Meredith, sheriff, and witnessed by C. M. Jarrell and I. I. Meredith. The tax receipts show that the land was assessed during 1896 and 1897 to W. L. Wooten, but do not show that the same land was not assessed to appellant.

On the record and case as made before the lower court, we are clear that the appellant shows a sufficient title to the land in controversy, and that by the sale made under the decrees of the dis-

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trict court of Caldwell parish the said land has been divested of any lien arising under the mortgage which is the basis of the seizure and sale in the main suit, and we are clear that on the record and evidence as submitted the appellant was entitled to a decree in his favor.

The cause will be remanded to the circuit court, with directions to enter a decree in favor of the petitioner, granting a perpetual injunction against the marshal and the complainants in the suit of Watkins et al. against Wooten et al., forbidding and enjoining them from further proceedings to subject the property described in the plaintiff's petition to the mortgage granted by W. L. Wooten in his lifetime to Henry Dickinson, which mortgage is fully set forth in the record, and to further decree the release of the seizure of said property and the restitution of the same.

In re BISSERT.

(Circuit Court, S. D. New York. October 8, 1901.)

ADMISSION TO BAIL—JURISDICTION.

Where appeal has been taken from decision of a federal court discharging writ of habeas corpus, and pending it the prisoner has been remanded to the custody of state officers, as authorized by Supreme Court Rule 34, such federal court has no jurisdiction to entertain motion to admit to bail.[1]

Roger U. Sherman, for writ.
Harvard S. Gans, opposed.

LACOMBE, Circuit Judge. The writ of habeas corpus is dismissed, and prisoner remanded to custody from whence he came.

(October 26, 1901.)

Rule 34 of the supreme court provides:

"Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance," etc.

Appeal has been taken from the decision of this court, and in conformity with the above rule the prisoner has been remanded to the custody, not of the United States marshal, but of the state officers. Inasmuch as the appeal removed the cause from this court, and the remand removed the prisoner, the court would seem to be functus officii. Whatever tribunal may or may not now have power to entertain motion to admit to bail, it certainly is not the United States circuit court for the Southern district of New York, which no longer holds either the cause or the prisoner.

Application denied.

[1] Conflicting jurisdiction of state and federal courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.

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PACE v. PROVIDENT SAVINGS LIFE ASSUR. SOC.

(Circuit Court of Appeals, Fifth Circuit. January 14, 1902.)

No. 1,083.

LIFE INSURANCE—CONTRACT—HOW CREATED.

A receipt given by an agent of a life insurance company for the first premium on a policy cannot be held to have effected a contract of insurance contrary to a provision of the application, taken contemporaneously, that no contract should be created unless the application was accepted by the company.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi.

J. R. Byrd & Olin C. Hunt, for plaintiff in error.

Edw. Mayes and J. B. Harris, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The receipt for first premium, which is the basis of this suit, does not appear to have been given or issued by a duly-authorized agent of the Provident Life Assurance Society. If considered as issued by a duly-authorized agent, and to be a binding receipt of the company, still it must be construed in connection with the application and the statements therein, and held to effect insurance upon the life of the applicant only in case the application was thereafter accepted by the society.

The decree of the circuit court seems to be in accordance with the law and the facts of the case, and it is affirmed.

LA DOW v. NORTH AMERICAN TRUST CO. et al.

(Circuit Court, D. Oregon. December 28, 1901.)

1. GUARDIAN AND WARD—ILLEGAL SALE—NOTICE—RECORD—PRINCIPAL AND AGENT.

While plaintiff was a minor, owning the undivided one-half of certain land, his mother, who was his guardian, his brother (owning the other half), and another, conspired to raise money by mortgaging such land. The guardian petitioned to sell plaintiff's property, and a few days thereafter she, with the brother and third party, joined in a mortgage of such land. Nearly two months thereafter a pretended guardian's sale of plaintiff's interest was made to such third party, subsequently confirmed, and a guardian's deed to him made. He paid no consideration, and subsequently he, with plaintiff's mother and brother, without consideration, conveyed to another, who conveyed to defendant's son, who was her attorney in fact, and assumed a part of the mortgage, and afterwards conveyed to her. The evidence was indefinite as to what, if any, consideration was paid by defendant's son, and also conflicting as to whether he was fully informed as to the nature of the transactions and of plaintiff's rights. The mortgage was subsequently adjudged invalid by the supreme court of the state. *Held*, that defendant's son and grantor was charged with notice that the pretended purchaser at the guardian's sale had joined in the mortgage before the sale, and that there was no necessity for both the mortgage and sale to meet the minor's requirements, as shown by the petition for the sale, and that

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by his assumption of the mortgage he became a party to the illegal transaction.

2. SAME—PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT.
Defendant, being the grantee of her attorney in fact, is bound with notice of all he knew relating to the fraudulent character of the guardian's sale, and of plaintiff's right, and hence such sale and subsequent conveyance should be set aside.

On Rehearing.

1. GUARDIAN'S SALE—MORTGAGE PRIOR TO PURCHASE—INFERENCE OF FRAUD—RECORD—NOTICE.
Where a pretended purchaser at a guardian's sale, pursuant to a scheme to raise money on the property, executes a mortgage thereon before the sale,—it being understood that he will reconvey the property to the ward, but, instead, conveys to another,—the transaction is so unusual that a subsequent grantee cannot rely on the record as rebutting the inference of fraud arising from the mortgage being so executed.

2. SAME—FRAUD—ABANDONMENT OF PART OF SCHEME.
Where a pretended purchaser at a guardian's sale, pursuant to a scheme to raise money on the property, executes a mortgage thereon before the sale, agreeing to reconvey, the fact that, instead of so reconveying, he conveys to another person, does not purge the sale of its fraudulent character.

3. SAME—EVIDENCE—NOTICE.
Evidence leaves no room to doubt that a subsequent grantee claiming title through a fraudulent guardian's sale had full notice of the character of the sale, and of the existing rights of the ward in the property.

John J. Balleray and Carter & Raley, for complainant.
Raleigh Stott, for defendant Letitia Lombard.
Geo. W. Hazen, for defendant North American Trust Co.

BELLINGER, District Judge. Certain property, including that in dispute, belonged to Geo. A. La Dow in his lifetime. La Dow died about May 1, 1873, intestate, leaving a widow and two children, Frank La Dow and the plaintiff, Lewis McArthur La Dow, then about 4 months of age. Thereafter, and on September 12, 1889, the widow, Mattie La Dow, as guardian of Lewis, who was then in his seventeenth year, petitioned the county court for an order authorizing the sale of certain property, including that in dispute. The petition alleged the minority of Lewis, stating his age to be 14 years or thereabout; and it alleged facts showing the necessity for such sale, which was authorized by the county court. Thereafter, and on November 14, 1889, the property of said minor, consisting of the undivided half of lots 3 to 10, inclusive, in block 8 in the town of Pendleton, was sold to one Charles B. Isaacs for the sum of $15,000, which sale was afterwards, and on January 8, 1890, confirmed by the county court. On the 11th of the same month the widow, as guardian, executed her deed for the property sold to Isaacs. Prior to this sale, and on September 27, 1889, Mattie A. La Dow (the widow and guardian), Frank La Dow, and Isaacs executed a mortgage to the Conklin Trust Company upon said lots 3 to 10, inclusive, in said block 8, for $17,350. This mortgage was dated September 1, 1889. On March 13, 1894, the same parties (Mattie A. La Dow, Frank La Dow, and Isaacs) conveyed the mortgaged property to one James A. Howard for the consideration stated in

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the deed, of $40,000. On the 21st of January, 1895, Howard and wife conveyed an undivided half interest in lots 5, 6, 7, and 8 in said block 8, including the premises in dispute, to B. M. Lombard, for the expressed consideration of $17,500. This sale was subject to one-half of the Conklin mortgage. Thereafter B. M. Lombard conveyed the interest so acquired to Letitia Lombard, defendant herein. Howard and Letitia Lombard divided the property so held in common; the latter taking the west 27 feet of lots 7 and 8, the premises in dispute, and assuming $1,500 of the Conklin mortgage. It is conceded, or at least not disputed, that the guardian's sale was an expedient to secure a loan upon the property by means of a mortgage executed by the purchaser, who did not pay any consideration for the guardian's deed to him. Neither did Howard pay anything for the property. His interest in what was done grew out of an understanding by which he was to have some interest in the property for services in collecting rents, paying taxes, and interest on the mortgage. Both Isaacs and Howard understood that a mortgage on the property was the thing to be effected by the guardian's sale. The purchaser at the sale was to mortgage the property, and then reconvey to the parties in interest. Instead of doing this, the property was conveyed to Howard to manage; and thereafter a portion of it was conveyed to Lombard, in the expectation that Lewis McArthur La Dow's equity could be satisfied by the transfer to him of certain "back lots." At least, this is the effect of Howard's testimony. Howard testifies that he thinks he talked to Lombard before the latter's purchase about his understanding that the guardian's sale was a step towards mortgaging the property, and that Lombard said the record of the property was all right. B. M. Lombard denies explicitly any conversation with Howard such as is detailed, and he denies any knowledge of the so-called equities of young La Dow, and states that his knowledge of the title was derived from his examination of the record. He knew of the Conklin mortgage, and assumed one-half of it. He is charged, therefore, with notice that Isaacs, through whom he claimed, had joined in the mortgage before he became a purchaser at the guardian's sale. It was apparent that there was no necessity for both a mortgage and a sale. The necessity for money to meet the minor's requirements, as shown by the petition upon which the order of sale was made, was met by the loan which the mortgage secured. This fact, and the fact that Isaacs' mortgage anticipated his title, tend to show that the sale was a mere device to effect the mortgage. Lombard assumed a part of the mortgage debt. To the extent of the minor's interest, an illegal claim was, in effect, paid by him out of the minor's property. He thus voluntarily became a party to the mortgage transaction, by which a lien forbidden by law was attempted to be fastened on complainant's property. The mortgage has since been adjudged invalid by the supreme court of the state; and the defendant Lombard, in the briefs filed in her behalf, seems to assume that the obligation to pay a part of the mortgage debt, which was a consideration in the purchase relied upon, has been discharged by the adjudication, so that she is, upon the contention made in her behalf,

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benefited by the illegal mortgage at complainant's expense, since it must be presumed that the consideration in the purchase was diminished by the amount of the illegal lien assumed by the purchaser. The defendant Lombard is the mother of B. M. Lombard, and was represented by the latter as her attorney in fact, and she knew all that her attorney knew. The parties to the transaction in question may have intended nothing wrong, in point of morals. They did, however, attempt a legal wrong, in attempting to accomplish by indirection a thing which the law does not permit. Moreover, what was done does not appear to have been of advantage to the interest affected. Lombard testifies that he paid $1,000 and conveyed some 50 or 60 suburban town lots in consideration of the purchase in question. Howard hesitates to say that anything was paid. To the direct question as to whether Lombard paid any money, Howard says:

"Well, that is a hard question to answer. In one way he did. In another way he did not."

And when requested to explain, he says:

"Well, Judge, I would have to detail a trade here that would take me a half a day to explain it. * * * We made so many settlements and trades back and forth, that it would be hard to say whether he paid anything of value or not, and, if he did, how much."

Howard finally admits, however, that he thinks he got $1,000. He received 50 or 60 suburban lots, which he mortgaged for $500 through Lombard, and whether he gave them all up for the mortgage, or got a small equity out of them, he cannot state. Howard further testifies that there was $660 in the bank in his name, which had been deposited under the contract with the mortgage company; that one-half of this sum was turned over to Lombard to pay interest on the Conklin mortgage and insurance on the La Dow Block.

I am convinced that the interests of the complainant were not advanced, but were prejudiced, by the mortgage-sale transaction, and that there are no equities in favor of Lombard or his grantor in the premises, and it is against equity that Lombard should be permitted to profit at the expense of complainant by reason of the illegal mortgage which the sale was intended to effect.

The complainant is entitled to the relief prayed for, and it is decreed accordingly.

On Rehearing.

(January 29, 1902.)

J. J. Balleray and Charles Carter, for plaintiff.

George Stout and Pipes & Tifft, for defendants.

BELLINGER, District Judge. The facts in this case are stated in the opinion heretofore rendered on the final hearing. The petition for rehearing argues the legal questions involved in the case, about which there is no controversy, at some length. As to the fact that Isaacs executed the mortgage to the minor's property before the guardian's sale at which he pretended to get title, and that Lombard assumed a part of the mortgage in the purchase of the

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minor's interest, it is argued that no other inference can be drawn than that Isaacs meant to procure title, and may have had an understanding or agreement with the guardian that he would bid for the property at the guardian's sale when it should occur, and that, if such inference should be held sufficient to put Lombard on inquiry, the inquiry, if followed, would only lead to the record. It is claimed that the record was examined by Lombard, and rebutted whatever inference of fraud there may have been arising from the mortgage, and that this was as far as Lombard was required to go, and that there was no other source of information to which he could go; that the existence of a device to mortgage the property through the means of a sale was rebutted by the fact that Isaacs did not deed the property back after the mortgage, as he had agreed to do; that the conveyance by Isaacs to a third person was an abandonment of the device in question; and that the possession of Howard, Isaacs' grantee, points away from the fraud to bona fides in the transaction. The petition then discusses the inferences drawn by the court from the facts stated, and argues from the testimony that Lombard bought the property in question in good faith and for a valuable consideration. It may be that the record facts in the case are not sufficient to charge Lombard with notice of a scheme to circumvent the law and incumber the minor's property; but if, as seems to be conceded, these facts might warrant an inference that Isaacs meant to procure title, and perhaps that he had an agreement with the guardian that he would bid the property in at the guardian's sale, then the unusual circumstances so inferred were suggestive, at least, of the truth in the premises. It is needless to say that there can be no such assurances of title at a future guardian's sale as will authorize a mortgage in advance of the sale. It is quite true that a grantor's covenant of warranty will operate to convey an after-acquired title, but it is not true that the practice obtains of mortgaging or selling land that the grantor does not claim to own. Such a transaction would be unusual, and, if it has occurred in a case that admitted of some binding agreement for a title in advance, I doubt if it has ever been heard of where the title was to come through a judicial sale. Concede, then, that there was enough to suggest to Lombard that Isaacs mortgaged the plaintiff's property under an agreement with the guardian that the property was to be sold at guardian's sale, and that he (Isaacs) should become the purchaser; does this lead to nothing, or, as is argued in the petition, does it lead away from the truth? If it does not conclusively prove, at least does it not warrant the inference of, concerted action between Isaacs and the guardian to effect a mortgage by the means of a sale? The argument that if there was such a device the failure of Isaacs to deed the property back, as he had agreed to do, and his conveyance to another, was an abandonment of the device, assumes that what would otherwise be a fraudulent expedient is made proper and lawful by the bad faith of one of the parties to the transaction; that Isaacs, having gone into a scheme to effect an illegal mortgage by a guardian's sale upon an agreement to reconvey, could purge the sale of its fraudulent character by keeping the property, instead of keeping his word to restore it. If it is not

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conceded, it is conclusively proven, that the sale in question was a mere device to effect a mortgage; that Isaacs paid nothing for the property, and was to reconvey it, the mortgage scheme being consummated. Isaacs testifies that he purchased the property in question at the guardian's sale at the request of complainant's uncle and mother, the latter being his guardian; that the guardian's sale was a mere form; that he did not purchase the property, but went through the form of a purchase, "just for the purpose of putting that mortgage on it"; that it was understood beforehand that he was not to pay anything, and that he did not pay anything,—"never paid a cent"; that he was to turn the property back to the complainant after the mortgage was made, and he does not remember just how it was fixed up. Isaacs, as a matter of fact, joined Mrs. La Dow in a conveyance to Howard, from whom B. M. Lombard acquired it. Howard does not appear to have paid anything for the property. His relation to it seems to have been that of a mere agent or trustee, to manage the property, and pay for it out of the proceeds of a sale when he should make one. His testimony is important as to B. M. Lombard's knowledge of all facts affecting the title he was acquiring, and of the character of payments made by him for the property. Howard says that, if he remembers correctly, the whole matter of title was talked over with B. M. Lombard, and especially the matter of Lewis La Dow's having some equity in the property, or possible equity; that he thinks the character of the equity was discussed; that he (the witness) knew that the object of the guardian's sale was to mortgage the property, and he thinks he talked to Lombard about that, and his recollection is that Lombard said the record of the property was all right; that he (the witness) had received some back lots, and he talked with Lombard about fixing the matter with complainant by giving him those back lots; that witness and Lombard discussed the matter, and concluded that when complainant became of age he (complainant) would be willing to quitclaim the property if he received those back lots. Howard seems to be as well disposed toward one side as the other. His statements with reference to conversations with Lombard are cautious, but they are explicit enough to make it clear that B. M. Lombard knew all there was to know about the title he was dealing with, and I have no doubt of the truthfulness of the witness. B. M. Lombard is by profession a lawyer, and he is a real estate dealer. He was impressed with the binding character of the record. He relied upon that. But his eyes were open. He saw and heard and knew the facts out of which the record grew. He could not ignore the information he received from Howard in their many conversations on the subject. If B. M. Lombard was relying on the probate record, he was also hoping to extinguish complainant's right or "equity," and to get his deed. What did he want this deed for? What was Lewis' equity, which had been so fully talked over between Howard and B. M. Lombard? Moreover, consider what Howard says as to what B. M. Lombard paid for this property. The transaction is so involved in the ramifications of a trade that the witness cannot tell whether, as a net result, he got anything or not. He ad-

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mits that Lombard paid him $1,000, and that he got something out of 64 outside town lots traded to him by Lombard, and handled and disposed of by the latter. The story of these suburban lots, six miles from Portland and two miles from the Willamette river, and of Lombard's connection with them after the sale, shows the complaisance of Howard, and makes it easy to understand his inability to tell whether he finally, at the end of a trade with Lombard that it would take him a half a day to explain, got anything or not. B. M. Lombard denies the statements of Howard as to conversations respecting Lewis La Dow's rights and equities. Mr. Wade, cashier of the First National Bank at Pendleton, testifies to conversations had with B. M. Lombard and Howard together, in which they said "that a part of the consideration and trade, and the understanding throughout, was that, when this had been settled up, that Lewis La Dow was to get the back lots, but they felt very confident that they were getting the property cheap at that." This witness further testifies that he would not be "real positive," but that he is "morally certain," that Lombard told him "that he was fully acquainted with all the conditions that existed." This testimony is strongly corroborative of Howard's testimony, and it leaves no room to doubt that Lombard knew all about the rights of Lewis La Dow in the premises, and that he relied on his ability to get the latter's deed by the transfer of the back lots; that he had traded to Howard a lot of worthless so-called town lots, and could afford to take chances as to complainant's interests. He felt, as Wade testifies, "very confident that they were getting the property cheap at that." John D. Wilcox corroborates Lombard, but there are portions of his testimony which show that his memory is indistinct in important particulars. He sold out or traded out his interest to Lombard, but so long a time had intervened, and the matter was so involved in "forty trades" that the witness testifies he had had with the latter, that he does not remember whether he got any cash out of it or not.

The petition for rehearing criticises the statement contained in the opinion heretofore rendered that the assumption by Lombard of the illegal mortgage was at complainant's expense. That statement was made upon the theory that Howard intended to account to the complainant for the property held by him, and for which he (Howard) appears not to have paid anything at the time the Lombard deal was entered into. Upon this theory, Lombard's agreement to pay an illegal demand against complainant as a part of the consideration for the property taken—an agreement which he subsequently escaped through an adjudication that the debt was illegal—was at the expense of complainant's interest. If those concerned in the transaction did not intend to restore the fee of this property to the owner, then it must be admitted that, so far as he was concerned, it made no difference whether Lombard paid anything for it or not. And yet the fact remains that this property was conveyed, not sold, in order to effect a mortgage upon it, which the law did not permit; and the party taking the title, with the understanding that he should reconvey it after the mortgage was exe-

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cuted, conveyed it to a third person without consideration outside of the mortgage, and manifestly to protect the mortgage. There was no other consideration for these conveyances than the mortgage. So that what Lombard assumed of the mortgage for which complainant was not liable was at the expense of the property and of complainant's interests. There are no disguises that can conceal the fact that when a man takes property upon an agreement to pay, and thereafter avoids payment, he gets to that extent something for nothing, and when he does this it is usually at the expense of the owner of the property so acquired.

The petition for a rehearing is denied.

BROWN v. WORSTER.

(Circuit Court, E. D. Pennsylvania. February 7, 1902.)

1. TIME OF TAKING TESTIMONY—ENFORCEMENT OF RULE.
Rule 69, limiting the time wherein testimony may be taken to three months after the case is issued, will be enforced unless by a written stipulation the parties agree to a longer period, or, if no such agreement can be reached, unless the court has extended the time on a proper application.

2. CROSS-EXAMINATION—OBJECTIONS.
Where, in the taking of testimony for use at a trial, irrelevant or otherwise improper cross-examination is indulged in, the questions should ordinarily be answered, and the error dealt with as a question of costs.

In Equity.

Henry E. Everding, for complainant.
George J. Harding, for respondent.

J. B. McPHERSON, District Judge. Applications to extend the time for taking testimony in patent cases are so often made that it seems desirable both to Judge DALLAS and myself to express our views briefly on the general subject. Rule 69, limiting the time wherein testimony may be taken to three months after the case is at issue, is habitually disregarded,—frequently, no doubt, by express or tacit agreement between the opposing counsel,—and this irregular practice often results in difficulties from which the court is asked to extricate one or both of the offenders. We try to make an allowance for the pressure that a large practice entails upon a busy lawyer, and have, therefore, been liberal in our treatment of these applications. But, when such motions are opposed, it is very difficult indeed for the court to decide what ought to be done, without taking up a great deal of time in going over the whole case in order to reach the proper point of view. We therefore ask the bar, especially in patent cases, to comply strictly with rule 69, unless it is clear to both sides that three months is too short a time. If this period is too short, we suggest that counsel by written stipulation—which we will recognize and adopt—agree to a longer period. If no such agreement can be reached, the court will then act upon a proper application for extension. When time has been apportioned under rule 67, we shall ex-

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pect diligence, and further time will not be granted unless diligence appears.

The present application would be refused if it were not for the looseness of practice that has heretofore prevailed. The complainant has certainly not been diligent, and has not explained his delay; but I do not wish to be strict without notice, and he is therefore allowed 10 days more (including February 17th) to complete his prima facie case.

The motion to expunge or compel defendant to print the cross-examination as part of his own testimony is refused. The witness must answer cross-question 41. If irrelevant or otherwise improper cross-examination is indulged in, it can ordinarily be dealt with satisfactorily as a question of costs. In doubtful cases this, I think, is the proper course. Where the offense is clear, the court has ample power to stop it summarily.

SLAUGHTER et al. v. LA COMPAGNIE FRANCAISE DES CABLES TELEGRAPHIQUES.

(Circuit Court, S. D. New York. January 4, 1902.)

1. CONTRACTS—BREACH—NOMINAL DAMAGES—SPECIFIC PERFORMANCE—FORMER JUDGMENT—BAR.

Where, in an action for specific performance of a contract to lease telegraph lines, the bill alleges that an action at law was brought on the contract, which resulted in a judgment for plaintiffs against defendant sustaining the contract and for nominal damages, such judgment is not necessarily an absolute bar to a decree for specific performance, though a judgment for substantial damages might be.

2. SAME—SPECIFIC PERFORMANCE—OBJECT OF CONTRACT—MUTUAL BENEFIT.

A contract recited that defendant owned an Atlantic cable and certain land telegraph lines, and desired to obtain a larger percentage of the telegraph traffic between the United States and Europe, and that plaintiffs intended to establish a new telegraphic system throughout the United States, and desired to obtain control of defendant's land lines. It then provided for a lease of such land lines to plaintiffs on certain work being done within a specified time, and an interchange of business and office facilities, there being no other consideration for the lease. *Held* that, in the absence of a showing that plaintiffs have established any lines or offices in the United States, and are in a position to receive or confer any benefits from the interchange of traffic contemplated by the lease, specific performance should not be decreed.

In Equity.

C. Walter Artz, for plaintiffs.
Edward K. Jones, for defendant.

WHEELER, District Judge. This bill is brought for specific performance of a contract dated July 14, 1896, between the plaintiff Slaughter and others to be thereafter associated with him, called "parties of the second part," and the defendant, called the "party of the first part," for a lease of its land lines between New York, New Haven, Hartford, Providence, Taunton, and the landing place of its cable for 99 years, which recites:

"Whereas, the Compagnie Francaise des Cables Telegraphiques, hereinafter designated as 'party of the first part,' desires to obtain a larger percentage

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of the telegraph traffic between the United States and Europe; whereas, certain persons hereafter designated as 'parties of the second part' intend to establish a new telegraphic system throughout the United States; whereas, the said parties of the second part are desirous of obtaining control of the land lines and franchises, rights, etc., as now in possession of the Compagnie Francaise des Cables Telegraphiques, party of the first part; whereas, it will be to the mutual advantage of the parties hereto to so agree that the cables and franchises and European offices of the party of the first part may be used in connection with the land lines, franchises, and American offices of the parties of the second part: Therefore it is agreed between the parties hereto, as follows."

—And provides for the execution of the lease upon the fulfillment of either of these conditions:

"That the said parties of the second part shall within forty-five (45) days from the date of the execution of this agreement begin work on the repairs necessary to place the telegraphic lines which are the subject of this agreement in condition to be used during the coming fall and winter months, and vigorously prosecute the said work to its completion, said work to be performed under the direction of the party of the first part, and not to cost more than ten thousand dollars. Upon the termination of the said work to the satisfaction of the party of the first part, the condition required shall be considered fulfilled, and the lease herein mentioned shall be executed and delivered. At the option of the parties of the second part they may pay the sum of ten thousand ($10,000) dollars to the party of the first part, which sum shall be expended by the said party of the first part in making the said repairs. On payment of the above mentioned sum of ten thousand dollars ($10,000) the conditions required shall be fulfilled, and the lease herein mentioned shall be executed and delivered."

And the contract further provided:

"Fifth. That this agreement shall be null and void unless within forty-five (45) days from the date of its execution the parties of the second part commence the work of repairs as herein provided, and within forty-five (45) days from its execution pay to the party of the first part any sum expended or agreed to be expended not to exceed the sum of five thousand ($5,000) dollars in the repairs herein contemplated."

The lease was to provide:

"That when the parties of the second part shall be duly established with lines and offices throughout the United States they will give exclusively to the party of the first part the messages coming to its offices from Europe or elsewhere, which can reach their destination over the cables of the party of the first part; and the party of the first part will reciprocally give to the parties of the second part all traffic coming by its cables for points reached by the lines of the parties of the second part."

No rent was, or was to be, provided for, and the advantages to accrue to the parties respectively were such as might arise from this interchange of traffic. The bill sets out the option, and alleges:

"(4) That subsequent to said 14th day of July, 1896, the said William H. Slaughter associated with himself individuals, your orators herein, and on information and belief that on or about the 28th day of August, 1896, duly tendered the sum of ten thousand dollars ($10,000) to the defendant in conformity with the provisions of said contract, and in the exercise of the option above referred to."

—without alleging that the plaintiffs had commenced the work of reconstruction, or that the defendant had done so for them under the contract, or that this tender was made within the 45 days, or that the plaintiffs have in any manner become established with lines

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and offices throughout the United States, or any part thereof, from which any advantages by the interchange of traffic contemplated could accrue to the defendant. The bill alleges that an action at law was brought in this court upon the contract, which resulted in a judgment on a verdict for the plaintiffs against the defendant sustaining the contract, and for nominal damages. This may conclusively show that the contract was not avoided by the failure to begin work or to exercise the option and pay or tender the $10,000 within the 45 days; but, if so, it also shows that the plaintiffs suffered no appreciable actual damages from the failure of performance that could be compensated for in money. The defendant relies upon this as an absolute bar to a decree for specific performance. The recovery of substantial damages for a breach of the contract might operate as such a bar to enforcing it as a whole, but the recovery of nominal damages might not. However that may be, that judgment covers all damages at law accrued to that time. Specific performance is not a matter of strict right, but of sound discretion; the contract should be one that can reasonably be carried out, and the party seeking that it be carried out capable of carrying it out. Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955. Without any lines and offices in the United States to receive or confer any benefits from the interchange of traffic contemplated by the lease, the plaintiffs do not appear to be so situated as to be capable of carrying out the lease, or to have any ground, in equity, for asking that the making of the lease be compelled.

Demurrer sustained.

COLUMBIAN EQUIPMENT CO. v. MERCANTILE TRUST & DEPOSIT CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,094.

1. EQUITY—REFERENCE FOR ACCOUNTING.
   A complainant is not entitled to a reference for an accounting, where the allegations of the bill are denied in the answer, until there is at least sufficient evidence to show the right to an accounting. An order for an accounting will not be made to enable him to make out his case before the master.

2. CONTRACTS—RIGHT TO RESCISSION—CONTRACT WITH TRUSTEE.
   Complainant corporation purchased a street railroad from defendant, which held it as trustee for certain bondholders. Some time after complainant had made its first payment, and had gone into possession of the property, its board of directors passed a resolution assenting to the distribution by defendant of the payment made, and complainant subsequently made another payment. *Held* that, in the absence of evidence that defendant still had in its possession any of the money, which it received solely as trustee, it was not subject to a suit by complainant to rescind the contract and recover the money paid thereon.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

This is a suit in equity by the appellant, a corporation under the laws of West Virginia, against the appellee, a corporation under the laws of Maryland. In the year of 1888 the East Birmingham Land Company executed a

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mortgage on its property to the appellee, as trustee, to secure $50,000 of bonds. In 1891 the same land company, after changing its name under an act of the legislature, executed a second mortgage, covering its railway property, to secure an indebtedness of $37,500, subject, however, to the first mortgage. Default was made in the payment of the second mortgage, and the trustee therein named sold the property in July, 1891. Webb and Tompkins became the purchasers, and under an act of the legislature of Alabama they organized a corporation known as the "Birmingham & Gate City Street Railway Company." The latter company then held the property subject to the first mortgage. The Birmingham & Gate City Street Railway Company made a contract with the appellee whereby the former company, in consideration of the appellee's refraining from making a sale of the property for default under the first mortgage, agreed to convey its railway property to the trust company on the 1st day of August, 1894. On the 29th of October, 1894, the appellant and appellee made an agreement by which the appellant purchased the said property from the appellee for the sum of $51,000. This agreement was made by the appellee with the consent and for the benefit of the bondholders under the first mortgage. Later, on February 11, 1895, the appellant and appellee made a more formal agreement of purchase and sale, and the appellant thereupon went into possession of the property. The sale, as stated in the first agreement, was on the following terms: Cash payable November 15, 1894, $3,000; cash payable February 15, 1895, $3,000; and cash payable within 18 months from November 15, 1894, $45,000,—in all, $51,000; the deferred payments to bear interest at the rate of 6 per cent. from November 15, 1894. The entire purchase money was not in excess of a sum sufficient to pay off the bonds with interest secured by the first mortgage. The appellant paid $6,000 of the purchase money. When the last payment of the purchase money became due, amounting to $45,000, the appellant failed to pay it. It claimed to have discovered defects in appellee's title, and that it had been deceived, etc. The appellee filed its original bill to foreclose the first mortgage, and caused the property to be placed in the hands of a receiver. The appellant, the Columbian Equipment Company, was made a party defendant to the bill. A final decree was rendered foreclosing the mortgage, and the property was sold under that decree. In the meantime the cross bill under consideration had been filed, and the decree on the original bill foreclosing the mortgage was without prejudice to the rights asserted in the cross bill. The claims asserted in the cross bill were left for future consideration. The cross bill sought a rescission of the agreement between the parties whereby it purchased the property, because the contract was void as beyond the corporate powers of the contracting parties and upon allegations of fraud. The appellee, as defendant to the cross bill, filed an answer thereto admitting the contract of sale, but denying the other averments of the bill. The case was tried on its merits, and on May 28, 1901, a final decree was rendered dismissing the cross bill. Thereupon the Columbian Equipment Company appealed to this court, and assigns nine errors, all based on the action of the court in dismissing the cross bill, and asserting that, the agreements between the appellee and appellant having been ultra vires, the cross complainant was entitled to relief.

H. D. Hotchkiss (John F. Martin, on the brief), for appellant.

A. H. Taylor (Albert Latady and J. Peirce Bruns, on the brief), for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The cross complainant and appellant asserts two claims against the appellee: (1) A claim for $6,000 purchase money, which it paid on the contract of purchase; and (2) $3,500, which it alleges it expended in improvements and betterments on the property. We first consider the latter claim.

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It is alleged in the cross bill that "while in possession of said railway property" the cross complainant "expended in improvements and betterments thereon the sum of $3,500." The answer of the appellee denies this averment. No evidence is offered on the subject. It prayed that a lien may be declared on the property mentioned in the cross bill for the amount so expended, and for a reference to a master to ascertain the amount, and for a personal decree against the appellee. The bill does not show how the $3,500 was spent; that is, what improvements were made, or what investment of it was made. Conceding that it is sufficiently alleged that it was used in "improvements or betterments" without stating the facts, there should have been some evidence offered to sustain the averment. A reference will not be made to state an account without some evidence to show the necessity for the accounting. An order for an accounting is not made to enable the complainant to make out his case before the master. There must be, at least, sufficient evidence to show the right to demand the accounting. Railroad Co. v. Williams, 94 Va. 422, 26 S. E. 841. There not being sufficient evidence as to this claim to require the court to make a reference, there was certainly not enough to authorize a decree for this sum in favor of the cross complainants.

The other claim in the cross bill is for the sum of $6,000 paid on the purchase money. Three thousand dollars, it is alleged, was paid "at or about the date of said contract, and the further sum of $3,000 principal, with interest accrued, upon the 15th day of February, 1895." A written agreement is in evidence that the cross complainant "earned $5,604 through the operation of the property while in its possession." It is not stated in the agreement whether these earnings were gross or net. Allowing a credit on the $6,000 for these earnings would leave a balance of $396.

The appellee received this purchase money in trust for distribution. It had no claim to the money except as trustee. The board of directors of the appellant, at an adjourned meeting on February 9, 1895, "resolved that the Mercantile Trust & Deposit Company are hereby authorized to make such disposition of $3,000 heretofore paid by this company as a part purchase price upon said property, and held in trust by them, as they may see fit in accordance with said agreement." It is not shown that the appellee has not made a legal disposition of the money. It is not shown that it retained any part of the $6,000 of purchase money. The appellee, we think, was authorized by the conduct of the appellant to distribute the funds. On the pleadings and evidence we could not presume that it was holding the money at the time this litigation began. These considerations would dispose of the case, we think, even if it be conceded that the contract was ultra vires,—a question we do not decide.

After a careful consideration of the oral and printed arguments in behalf of the appellant, we are of opinion that the circuit court did not err in dismissing the cross bill. The decree is affirmed.

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SPOOR v. BOARD OF SUP'RS OF RIVERSIDE COUNTY et al.

(Circuit Court, S. D. California. January 6, 1902.)

COSTS—TAXATION—TIME FOR FILING MEMORANDUM.

Under the rule of the circuit court for the Ninth circuit which requires a party in whose favor a judgment or decree is rendered, and who claims costs, to file and serve a memorandum of his costs and disbursements within five days after rendition of the verdict, or "after notice of the decision of the court," and which further provides that "notice of a decision may be by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party," the five days do not begin to run in an equity case until notice has been received in one of the three ways specified. It is not sufficient that the solicitor had actual knowledge of the decision, or that his clerk or representative was present at its announcement.

In Equity.

Wm. J. Hunsaker, for complainant.
R. H. F. Variel and Otis & Gregg, for defendants.

ROSS, Circuit Judge. This is an appeal from the refusal of the clerk to disallow and strike from the files the defendants' memorandum of costs. The suit was one in equity, the decision of which was announced by the court in a written opinion delivered and filed on the 26th day of August, 1901,—being a day of the July term, 1901, of the court,—an entry of which decision was on that day entered by the clerk in the minutes. The facts in respect to the matter are agreed to by the respective parties, and are as follows: On August 22, 1901, the clerk mailed a letter addressed to Mr. R. H. F. Variel, one of the solicitors for the defendants, stating that the court would on August 26, 1901, at 10:30 o'clock a. m., render its decision. At the time of the mailing of the letter and of the rendition of the court's decision, Mr. Variel was absent from the city where the court is held; but his clerk, Mr. Mellette, who was in charge of his office and business, opened the letter, attended court at the time therein mentioned, as the representative of Mr. Variel, for the purpose of hearing, and did hear, the decision of the court. Mr. Mellette thereupon wrote Mr. Variel, informing him of the rendition of the decision, which letter was received during Mr. Variel's absence. The latter returned to the city about September 15, 1901. The final decree in the suit was filed and entered September 28, 1901, and the memorandum of costs in question was served and filed October 2, 1901.

The contention on the part of the complainant is that the defendants waived and lost their right to costs because of their failure to serve and file the memorandum within the time required by rule 17 of this court, which is as follows:

"The party in whose favor a judgment at law or decree in equity is rendered, and who claims his costs, shall, within five days after the rendition of the verdict, or after notice of the decision of the court, referee, or commissioner—or, if the entry of judgment or decree on the verdict or decision is delayed by order of the court, then before such entry is made—deliver to the clerk of the court, and serve on the attorney or solicitor of

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the adverse party, a copy thereof, together with a notice of application to have the same taxed, a memorandum of his costs and necessary disbursements in the action or proceeding. * * * Notice of a decision may be by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party."

It will be noticed that the time of the party in whose favor a decree is rendered begins to run, not from the date of the entry of the decree, but from "notice of the decision of the court." It is not denied that the decision in a suit in equity, within the meaning of the rule, consists of the written opinion of the court and the entry in the minutes; and, did the rule of the court not specify the manner in which the notice of the decision may be given, it would be very clear that actual notice thereof by the solicitor for the party in whose favor the decree was rendered would be, as held by the supreme court of California in Mullally v. Society, 69 Cal. 559, 11 Pac. 215, and other cases cited by complainant's counsel, sufficient. But rule 17 of this court, unlike the provisions of the statute of California referred to in the California cases cited, does provide how the notice may be given, to wit, "by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party." Prescribing, ex industria, as the rule does, how the notice may be given, it is not reasonable to conclude that it was thereby intended that any other method shall be sufficient. Otherwise, there would be no occasion for any specific provision in respect to notice at all. Without it, the requirements of the rule would have been substantially similar to the California statute upon the subject, under which actual notice, however derived, would be sufficient to start the time running. As the rule stands, I think that one of the three methods prescribed is essential for that purpose. As it is conceded that no written notice of the decision was given, this view disposes of the matter, unless it be, as is contended on behalf of the complainant, that Mellette's presence was that of the solicitor in whose employment he was. The rule does not say that the notice may be by the presence of the solicitor or his clerk or other representative, but by the presence of the solicitor, whose presence at the time of the announcement of the decision the rule treats as the equivalent of a written notice, but does not, I think, under a fair reading of its language, attribute that effect to the presence of any one else.

The order appealed from is affirmed.

UNITED STATES SAVINGS & LOAN CO. v. HARRIS et al.

(Circuit Court, E. D. Kentucky. January 27, 1902.)

1. BUILDING AND LOAN ASSOCIATION—LOAN IN ONE STATE TO A CORPORATION OF ANOTHER—PLACE OF PAYMENT—CONTRACT—LAW WHICH GOVERNS.
Where a building and loan association incorporated in Minnesota makes a loan to a member residing in Kentucky, secured by a mortgage on his real estate in the latter state, all payments of interest and principal

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to be made at the home office of the association in the former state, the contract is governed by the laws of Minnesota.

2. SAME—USURY—EVASION OF LAW.
Where a contract of loan made between a building and loan association of one state and a resident of another state, and secured by mortgage on his real estate therein, is valid under the laws of the former state, but usurious under the laws of the latter state, the fact that the place of payment is fixed at the home office of the association should not be construed as an evasion of the usury laws of the state where the property is situated.

3. SAME—FEDERAL COURTS—LAWS OF STATE—DECISIONS OF STATE COURT.
Under Rev. St. U. S. § 721, requiring the federal courts to be bound by and enforce the laws of the state in which the court is sitting, such a court is not bound, against its own judgment, to follow the decisions of the highest court of such state, in determining the question as to what law governs a contract of loan between a building and loan association of one state and a member residing in the state in which the court is sitting, secured by mortgage on land in the latter state; the adjudications of the state court on the subject not being based on any local statute, or constituting a rule of property situated within the state, which the federal court is bound to follow.[1]

4. SAME—CONTRACT MADE PRIOR TO DECISION OF STATE COURT.
Where a building and loan association makes a loan and takes a mortgage on land in another state, the contract being valid in the state of the domicile of the corporation, and after the loan is made the supreme court of the state in which the land is situated decides, in a suit between other parties, that such contracts cannot be enforced in such state because usurious, a federal court in that state, in an action to foreclose such mortgage, is not required to follow such decision when it believes the decision to be wrong.

Beckner & Jonett, for complainant.
Geo. B. Kinkead and Morton & Darnall, for defendants.

COCHRAN, District Judge. Plaintiff is a Minnesota corporation, authorized to transact the business of a mutual building and loan association according to the usual plan of operating such institutions. July 30, 1892, defendants, residents of Kentucky, subscribed for 60 shares of stock, of par value of $100 each, to be paid for in monthly installments of 60 cents per share. August 30, 1892, they borrowed $3,000, and gave their note therefor, bearing 6 per cent. interest, payable monthly, secured by mortgage on certain real estate, and by collateral assignment of 30 shares of said stock. The other 30 they assigned to it absolutely, as premium for the loan, and thereupon those shares ceased to exist, save as a measure of the monthly installments of premium. To the extent of the 30 shares assigned as collateral security, they were entitled to participate, proportionately with the other stockholders, in the net earnings of the company. Their portion thereof was not payable to them in cash, but was to be applied in maturing the stock, and upon its maturity they had a right to have their loan canceled and mortgage released. All other borrowers were upon the same footing exactly, and the only difference, as to nonborrowers, was that upon maturity of their stock, they were entitled to payment of same in cash. After lapse of three

[1] State laws as rules of decision in federal courts, see notes to Griffin v. Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 558.

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years from date of loan, defendants had the option to pay it and acquire the status of a nonborrower, and, if they failed to meet installments of dues, premiums, or interest for three months continuously, plaintiff had the option to close their account on a stipulated basis, and sue for balance due. Defendants paid the installments of dues, premium, and interest as they became due, with more or less regularity, and some fines for tardiness, until June, 1896, when they ceased paying entirely. Plaintiff admits that up to that time defendants paid in all $1,797. Defendants contend that they paid $1,899. December 3, 1896, plaintiff exercised its option to close the account, and on December 8, 1896, ascertained the amount due it to be $3,158.90, for which, with interest from that date, this suit was brought. If the transaction had been a loan of money, and nothing more, and the payments made had been applied on the loan in accordance with the principle in partial payments, it would have been reduced to an amount under $2,000, instead of having $158.90 added to it. This bad showing is attributed by plaintiff to losses caused by shrinkage in value of real estate taken in satisfaction of loans, by the refusal of the courts of certain states, including Kentucky, to enforce its contracts as made, and by legal expenses in foreclosure suits. The defense is that the real nature of the transaction between plaintiff and defendants was a loan of money, pure and simple, and all else in its form, other than that, was an artifice to cover usury, and that therefore the amount due from defendants to plaintiff should be ascertained on that basis. This defense presents a question in the choice of laws. It does so because the transaction involved herein contains elements belonging to two separate jurisdictions, to wit, the states of Kentucky and Minnesota, and the laws of those jurisdictions as to transactions of a similar character, entirely local, are different. The real estate mortgaged is situated in Lexington, Ky. Possibly defendants' contract was made there. The supreme court of Tennessee, however, has held that an exactly similar contract of another with plaintiff, made under somewhat the same circumstances, was made in Minnesota. Loan Co. v. Miller (Tenn. Ch. App.) 47 S. W. 17. And certain of the federal circuit courts have held that similar contracts of others with other associations, made under somewhat the same circumstances, were made in the states where the offices of those associations were located. Association v. Bedford (C. C.) 88 Fed. 7, 12; McIlwaine v. Iseley (C. C.) 96 Fed. 62, 68; Investment Co. v. Alexander (C. C.) 96 Fed. 870, 872, 873. But it is not essential to dispose of this question in this case. On the other hand, defendants' contract was to be performed in Minnesota by the payment of the installments of dues, premium, and interest at its office in St. Paul, or at that of its trustee in Minneapolis. The difference in the laws of these two jurisdictions is this: By the law of Minnesota, as to such a transaction entirely local, its real nature and form square, and the contract, as made, is valid in all its parts. In the case of Association v. Lampson, 60 Minn. 424, 62 N. W. 545, Start, C. J., said:

"The respondent, then, upon this appeal, is to be regarded as a mutual building and loan association, doing a local business, and as such it is not

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subject to the usury laws of this state by reason of excess of premiums contracted to be paid by its members to it on a loan to them over the rate of interest permitted by law. * * * But to entitle mutual building and loan associations to the benefit of this exemption from the usury laws, they must conduct their business in good faith, and loan their funds only to bona fide members. They cannot loan their funds to strangers upon usurious terms, practically exclude them from participating in the advantages and profits of the mutual system in which outlay and return are intimately blended, and then claim the benefit of the statute as a cover for the transaction. Otherwise they would become simply associations of legalized usurers, availing themselves of the privileges and exemptions of the statute intended only for strictly mutual building and loan associations."

This is in accordance with the law of a large majority of the jurisdictions of this country. By the law of Kentucky, as to such a transaction entirely local, it is nothing more than a loan of money at a usurious rate of interest, and the contract as made is not enforceable. Authorities which may be cited as so holding are as follows, to wit: Herbert v. Association, 11 Bush, 296; Gordon v. Association, 12 Bush, 110, 23 Am. Rep. 713; Association v. Johnson, 88 Ky. 191, 10 S. W. 787, 3 L. R. A. 289; Simpson v. Association, 101 Ky. 496, 41 S. W. 570, 42 S. W. 834. In the Herbert Case the loan was to a member of the association, but upon its being made he ceased to be such, and his sole relation thereto thereafter was that of a debtor. In the Gordon Case the loan was to a stranger. In the Johnson and Simpson Cases the loans were to members who continued to be such after becoming borrowers, and borrowers and nonborrowers shared alike in the earnings and losses of the institution. The decisions in the two former cases, though not relevant, had much to do with shaping the decisions in the two latter. In the Johnson Case, Pryor, J., said:

"A loan to members at the legal rate of interest, with reasonable dues for the maintenance of the organization, could not be held usurious; but such power as is conferred on the corporation in this case, or upon its members, in the loan of money evidenced by the transaction in question, devests the appellant of its benevolent character, and converts it into an organization under the forms of law for the purpose of filling its treasury by imposing oppressive burdens on its members, who have been solicited to become the objects of its benevolence."

And in the Simpson Case, Hazelrigg, J., said:

"This court has had under consideration the relation of the member who had obtained money on his stock in these associations bore to the association, and we have invariably held that relation to be a borrower of money, merely."

As before stated, this distribution of the elements of the transaction involved herein between the two states named, and this difference between their laws as to transactions of a similar character, entirely local, necessitates a choice by this court between those laws, as to which shall control it in disposing of the defense made herein. Before making such choice, however, it has to be considered whether the court is free to act in accordance with its own judgment, and, if so, which law should be chosen. The latter consideration will receive attention first. If this were a case of an ordinary obligation to pay money and interest thereon, made in Kentucky, but payable in Minnesota, and without any mortgage to secure it, the interest

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agreed to be paid would be upheld, if valid under the law of Minnesota. In the case of Andrews v. Pond, 13 Pet. 65, 78, 10 L. Ed. 61, Mr. Chief Justice Taney said:

"The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance, and, if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for higher interest without incurring the penalties of usury."

In the case of Miller v. Tiffany, 1 Wall. 298, 17 L. Ed. 540, Mr. Justice Swayne quotes this language with approval, and adds:

"The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case, also, for the higher rate."

And in the case of Junction R. Co. v. Bank of Ashland, 12 Wall. 226, 20 L. Ed. 385, Mr. Justice Bradley said:

"With regard to the question what law is to decide whether a contract is or is not usurious, the general rule is the law of the place where the money is made payable, although it is also held that the parties may stipulate in accordance with the law of the place where the contract is made."

To the same effect are the cases of Scotland Co. v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261; Coghlan v. Railroad Co., 142 U. S. 111, 12 Sup. Ct. 150, 35 L. Ed. 951.

The fact that it was secured by mortgage on real estate in Kentucky would not make any difference. In the case of De Wolf v. Johnson, 10 Wheat. 367, 6 L. Ed. 343, suit was brought in Kentucky to enforce a mortgage on real estate therein, given to secure a note executed, and perhaps payable, in that state. It was set up as a defense that the note was a renewal of another note, containing usury. That note had been made and was payable in Rhode Island, but when given it was stipulated that it should be secured by conveyances of land in Kentucky, which seem never to have been made. The question was as to which state's law should govern in determining the effect of usury in that note. Mr. Justice Johnson said:

"With regard to the locality of the contract of 1815, we have no doubt that it must be governed by the law of Rhode Island. There is nothing that can raise a question but the circumstance of its making a part of the contract that it should be secured by conveyances of Kentucky land. But the point is established that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrowed, unless another place of payment be expressly designated by the contract. No tender would have been effectual to discharge the mortgage, unless made in Rhode Island. On a bill to redeem, a court of equity would not have listened to the idea of calling the mortgagee to Kentucky in order to receive a tender."

The case of Miller v. Tiffany, supra, was a suit in the circuit court of the United States for the district of Indiana to enforce a

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mortgage on real estate in that state given to secure a note signed there, but delivered, upon receipt of consideration, in New York, and payable in Ohio. The interest stipulated for was usurious, according to the law of New York, but not according to the law of Ohio. It did not appear how it was as to the law of Indiana. It was held that the validity of the stipulation was to be determined by the law of Ohio, where the note was made payable.

Mr. Minor, in his work on Conflict of Laws (page 31), thus states the law:

"So, also, with respect to mortgages of land, though the mortgage itself must be such as will constitute a transfer of title under the lex situs, the question as to whether the debt secured thereby (if contracted in another state) is a valid consideration to support the mortgage (for instance, whether it is usurious) is to be determined by the law which governs the validity of the debt."

This would seem to be correct on principle. If a court will enforce an unsecured contract to pay interest because valid according to a foreign law, and thus render the obligor's real estate located within its jurisdiction liable to be subjected by execution or otherwise to the payment of such contract, there would seem to be no reason why it should not subject same to the payment thereof in pursuance of a mortgage, if the mortgage has been properly executed. The only significance that can be attached to a mortgage on real estate, in disposing of a question as to usury in the obligation to secure which it has been given, is as an aid in determining the place of performance when the obligation is silent on that point. Minor, Confl. Laws, p. 390; 2 Jones, Mortg. § 660. A limit, however, must be put upon what has been said as to upholding a contract to pay interest if authorized by the law of the place where the contract is to be performed. It will not be upheld if the fixing of the place of performance is a device to evade the usury laws of the place where made. But it is not such merely because by fixing that place the law of the place where made is in fact evaded. In the case of Van Vleet v. Sledge (C. C.) 45 Fed. 743, Judge Jackson said:

"McCollum states the matter too strongly when he says it was intended to evade the law of Tennessee. It was certainly intended to obtain the Arkansas, rather than the Tennessee, rate of interest. That intention was no violation or evasion of the law of Tennessee."

In order for the fixing of the place of performance in another jurisdiction than where the contract is made to be such a device, it is essential that the fixing of that place be a pretense and not bona fide. This is well brought out in Minor, Confl. Laws (page 379). He says:

"Paradoxical as it may seem, there is often more difficulty in determining the locus solutionis of a contract which expressly designates a place of performance, than where none is named. The reason is that the parties sometimes attempt to cover their real intentions touching the place of performance by falsely naming a place which they do not really intend to be the true locus solutionis. This is done in order to evade the law of the real place of performance, when it would condemn the contract. In such cases, where the locus solutionis is of importance, it is the duty of the court to disregard the false witness of the parties' contract, and to ascer-

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tain the place of performance really intended. For though the parties have the right to choose bona fide the place where their contract is to be performed, they have not the right, in order to evade the law of the place they have really chosen, to pretend that they have selected a different place. Thus it has been held, by courts which take the view that the validity of usurious contracts is dependent upon the lex solutionis, that a debt falsely pretended to be made or payable in a particular state, so that usurious interest may be exacted under its law, will not be enforced. But the mere fact that the motive for selecting a particular place as the locus celebrationis or locus solutionis of a contract is to evade the law of another state is immaterial, if the choice is bona fide. The important point is that the parties have the right to select the locus. This being conceded, the reasons which induce them to make a particular choice are not open to inquiry."

The principles thus laid down as to ordinary obligations for the payment of money and interest thereon have been applied by the federal courts in a number of cases quite recently to transactions similar to that involved herein, and it has been uniformly held, with possibly one exception, that the nature and validity of the contract of the borrowing member is to be determined by the law of the state under which the association was organized, and at whose office in that state that contract was to be performed. The cases in the inferior federal courts so holding are as follows, to wit: Association v. Logan, 14 C. C. A. 133, 66 Fed. 827; Association v. Bedford (C. C.) 88 Fed. 7; Andruss v. Association, 36 C. C. A. 336, 94 Fed. 575; Investment Co. v. Alexander (C. C.) 96 Fed. 870; Association v. Rector, 38 C. C. A. 686, 98 Fed. 171; Hieronymus v. Association (C. C.) 101 Fed. 12; MacMurray v. Gosney (C. C.) 106 Fed. 11; Hieronymus v. Association, 46 C. C. A. 684, 107 Fed. 1005; Manship v. Association (C. C.) 110 Fed. 845; McIlwaine v. Ellington (C. C. A.) 111 Fed. 578. The case of Association v. Bedford was carried to the supreme court of the United States, and affirmed by it, in the case of Bedford v. Association, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834. In a number of these cases, as above indicated, it was held that the contracts sued on were made, as well as to be performed, at the office of the association.

In the following cases the question as to the fixing of the place of performance in the foreign state being a device to evade the usury laws of the state where the real estate mortgaged was situated, and the suit to enforce the mortgage had been brought, was expressly referred to, and it was held that it was not, to wit: Association v. Logan, 14 C. C. A. 133, 66 Fed. 830; Hieronymus v. Association (C. C.) 101 Fed. 14. The fact is that in such transactions not only is the fixing of the place of performance at the office of the association in accordance with the real intention of the parties, but it is reasonable that that place should be so fixed. Thereby uniformity and equality amongst the borrowing members scattered through many states are secured, and the convenience of the association itself subserved. In none of these cases was the mortgage feature of the transaction considered as having any bearing upon the question as to which law was to govern. Indeed, it is rarely, if ever, referred to in that connection.

The sole possible exception to these cases is that of McIlwaine v. Iseley (C. C.) 96 Fed. 62. It arose in North Carolina, and was a

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suit to enforce a mortgage on real estate in that state, given by a resident thereof, whose contract was made and to be performed, as the court held, at the office of the association, in Tennessee. The supreme court of North Carolina had theretofore held that such a transaction should be governed by its law as to similar transactions entirely local, and not by the law of Tennessee in relation thereto. Judge Simonton in that case held likewise. It is questionable whether he so held because the law of North Carolina was the proper law, or because he felt bound by the decisions of the state court that it was. Inasmuch as in the case of Investment Co. v. Alexander (C. C.) 96 Fed. 870, which arose in South Carolina, where there was no such obstruction,—the supreme court of that state having theretofore held in a similar case that the foreign law was the proper law,—he followed the decisions of that court, it would seem that the ground of his decision in the other case was that he felt bound by the North Carolina decisions.

We conclude, therefore, that if this court is free to make choice between the law of Kentucky and that of Minnesota in regard to similar transactions entirely local, as to which shall govern the one involved herein, the latter is the proper law. In reaching this conclusion, we have left out of consideration the fact, not heretofore stated, that it was expressly stipulated in the note and mortgage herein that they were "made with reference to and under the laws of Minnesota," the exact effect and significance of which we do not feel it necessary to determine. How, then, is it as to this court's freedom to make choice? The necessity for determining this question in this case arises out of the fact that the court of appeals of Kentucky, in the following cases, to wit: Association v. Harris, 98 Ky. 41, 32 S. W. 261; Loan Co. v. Scott, 98 Ky. 695, 34 S. W. 235,—has heretofore decided that the law of Kentucky as to similar transactions entirely local is the proper law to govern a transaction like the one involved herein. The plaintiff herein was the association in the latter of those two cases, and the transaction there involved was the same as here. In the Harris Case, Grace, J., said:

"This loan, however, was made not directly and in a straightforward, business manner, but with much circumlocution." And again: "And yet, in the face of these figures, which are incontrovertible, appellant insists that its contract is all legitimate and fair; that there is no fraud, no deception, and, stranger still, no usury; and this latter proposition he upholds by an elaborate brief, and by the citation of many authorities."

He characterizes the place of operation as a "cunningly devised scheme," and states that the usurious interest in it is "covertly concealed by the literal terms of the contract." On the question of the choice of laws he says:

"And by the adoption of many fictions he [appellant] says that, in any event, this transaction does not violate the usury laws of Kentucky. Among these fictions, he says this contract was made in Tennessee, although it was in fact made in Lexington, Ky.; and, so far as this record discloses, appellee was never in Knoxville, Tenn., in his life. The subscription for the stock (being the corner stone of this scheme) was made in Kentucky; the application for the loan written and signed here; the note dated, written, and signed here, and the mortgage made to secure the payment for this stock; and thus the payment of the loan made was written, dated, and executed,

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acknowledged and recorded, in Fayette county, Ky. Yet appellant, by counsel, says that by intendment of law this contract was made at Knoxville, Tenn., and is a Tennessee contract, and that under and by the laws of Tennessee, as adjudged by the supreme court of that state, this transaction is not usurious. And, further, appellant contends that, by comity between the states, this contract, being valid and free from usury in Tennessee, must be enforced in Kentucky. * * * On this question of comity, and on the assertion that this contract is all valid, and not usurious, by the laws of Tennessee, we desire again to submit the views of this court in reference to these transactions, as was set forth and announced in the case of Association v. Johnson, 88 Ky. 191, 10 S. W. 787, 3 L. R. A. 289. * * * In that case the court held that transactions of that character were in violation of the fundamental law of the land."

On the same subject, Hazelrigg, J., in the Scott Case, said:

"A foreign building and loan association engaged in doing business in Kentucky will be permitted to charge no higher rate of interest than is chargeable under the laws of this state, and while, by the laws of comity, the charter of such a corporation will be recognized here as the law of its existence, it is the charter alone which is recognized, and not the general legislation of the country of its domicile with reference thereto, or the constructions of its charter provisions by the foreign courts. Moreover, when such a corporation employs the usual agencies to solicit and transact business in this state, and contracts for the payment of premiums and interest in excess of the rate authorized here, the transaction will be denounced as an attempted evasion of our laws, whatever may be the nominal rate specified or artifice adopted; and this though it be specifically provided that the contract is made with reference to the laws of the foreign state. Such a provision only makes the intent to evade more manifest. The principles underlying these conclusions are fundamental, and require no citation of authority."

Is this court, then, bound to set aside its own judgment in the matter, and the decisions of the federal courts hereinbefore referred to, and to follow these decisions of the state court? The embarrassment due to this situation is augmented by the consideration that, if the transaction involved herein were entirely local, the court would feel bound to follow the decisions of the state court in relation to such transactions. The jurisdiction of this court is limited to the state of Kentucky, and it may be stated as a general rule that it is bound by and must enforce the laws of that jurisdiction whenever cases calling for their enforcement are properly before it. It is so provided by section 721, Rev. St. U. S. But the decisions of the highest court of a state are not the laws of that jurisdiction. As said by Mr. Justice Story in the case of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865:

"In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often reexamined, reversed, and qualified by the courts themselves whenever they are found to be either defective, ill founded, or otherwise incorrect."

And further, as said by Mr. Justice Bradley in the case of Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359:

"The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts."

It would seem to be a corollary to these two propositions that in no case are the federal courts bound, in strictness, to follow the

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decisions of the highest court of the state. But as said further by Mr. Justice Bradley in the case of Burgess v. Seligman:

"The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference."

To avoid these results, and from "comity and good sense," the federal courts show their respect for, and deference to, the settled decisions of the highest court of the state, so far as to follow them blindly, as it were, in two well-recognized classes of cases. One class is where the matter decided relates to the interpretation or validity of the written or statutory laws of the state, if the federal constitution is not involved. The other class is where the matter decided relates to the acquisition, or not, of rights to, interests in, or liens upon property located within the state, even though the acquisition, or not, depends solely upon the unwritten law of the state. Often the cases which arise belong to both classes; the acquisition, or not, of such rights, interests, or liens depending upon the interpretation or validity of some statute. In cases outside of these two classes, where the matter to be decided is one of commercial law, or general jurisprudence, as it is generally put, the federal courts refuse to be bound by the decisions of the highest state court, and exercise their own independent judgment. Does this case, then, come within either one of those two classes, or does it lie on the outside? It certainly does not come within the first class. There is no statute in Kentucky providing that such contracts as the one involved herein are against that state's public policy and nonenforceable within it, and those decisions of the court of appeals as to choice of laws to govern the transactions involved therein were not based upon any statute. Nor does this case belong to the other class. Those decisions cannot be said to have established a "rule of property," within the meaning of that phrase as used by the federal courts. It is true that they hold that the foreign associations were not entitled to a lien by virtue of their mortgages on the real estate in Kentucky covered by them for more than was due on the basis that the transactions were loans of money, pure and simple. This, however, was not because of any invalidity in the mortgages themselves. It was because of the nature and invalidity of the personal contracts secured by the mortgages, as determined by them under the law of Kentucky, as to similar transactions entirely local, which they made choice of. If those decisions had related to personal contracts simply,—i. e., to contracts unsecured by mortgage,—they would not be considered as establishing a rule of property. The mere fact that they related to such contracts secured by mortgage on real estate in Kentucky can make no difference. Certainly not as to the personal contract herein. And if not as to it, why as to the mortgage to secure it? The case of Edwards v. Davenport (C. C.) 20 Fed. 756, is in point. By the settled decisions of the supreme court of Iowa, the deed or mortgage of a lunatic is valid if the grantee or mortgagee, as the case may be, is ignorant of his lunacy when he accepts it. In that case suit was brought to enforce the bond and mortgage

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of a lunatic. It was the court's own judgment (and it had been so ruled by the supreme court of the United States) that the bond and mortgage were invalid, though the mortgagee was ignorant of the lunacy of the mortgagor when he accepted them. The question was whether, notwithstanding this, this court was bound to follow the decision of the state court. It was held that it was not. McCrary, J., said:

"It is only necessary in the present case to determine the validity of the bonds executed by George A. Davenport. If these are held invalid as to him, the mortgage, which is a mere incident, falls with them. Can it be said that a rule respecting the validity, force, and effect of a contract entered into by a person of unsound mind is a rule of property? It is a rule which may, indirectly, in a certain class of cases, affect the title to property, but the same may be said of any ruling of the state courts respecting contracts. If the sum claimed as due upon a contract is sought to be fastened as a lien upon real estate, either by mortgage or attachment, a decision of the question of its validity will undoubtedly affect the title to such property. But it has never been claimed that for this reason the decisions of the state courts upon the validity of any class of contracts can be regarded as a rule of property. If the complainant had sued at law upon the bonds, it would not have been claimed that the state decisions in question were binding on this court. It is difficult to see upon what principle we can apply one rule to the bonds when suit is brought upon them at law, and another when suit is brought upon them in equity. The decisions of the highest court of a state may be said to constitute a rule of property when they relate to and settle some principle of local law directly applicable to titles. A rule of property is one thing; a rule respecting the validity of a class of contracts which may or may not affect titles to property is another and a different thing."

It must be held, therefore, that this case lies outside of both classes of cases where the federal courts follow the decisions of the state courts. The question involved is one of general jurisprudence. It has been intimated above that, if the transactions involved herein were entirely local to Kentucky, the court would feel bound to follow the decisions of the court of appeals in relation to such transactions. This is because such a case would become within the first class named. Those decisions were based upon a construction and determination of the validity of the legislation of Kentucky in pursuance of which the transactions involved therein were had. The conclusion we have reached finds support in the decisions by the federal courts in the building association cases cited above. In several, if not in most, of them, the decision of the federal court did not run counter to the decision of the state court, but was in accordance with them. This was so in the case of Bedford v. Association, decided by the supreme court, carried there from the circuit court, Western district, of Tennessee, through the circuit court of appeals for the Sixth circuit. The supreme court of that state had theretofore decided that in a transaction like the one in hand the foreign law should govern. These cases, therefore, are not in point in the matter now under consideration. The case of McIlwaine v. Iseley, decided by the circuit court of North Carolina, above indicated, is perhaps in point here, and so is adverse to the position taken herein. The cases, however, of Manship v. Association and McIlwaine v. Ellington are both in point, and in accord with that position. The Manship Case was de-

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cided by the circuit court, Southern district, of Mississippi. It distinctly refused to follow a prior decision of the supreme court of Mississippi to the effect that in a transaction such as here the domestic law should govern. The Ellington Case was decided by the circuit court of appeals for the Fourth circuit on appeal from a decision of circuit court, Western district, of North Carolina, reported in 96 Fed. 1007, to the same effect as that in the Iseley Case. That court of appeals refused to be bound by the decisions of the supreme court of North Carolina, and reversed the decision of the lower court. This must be taken as overthrowing the Iseley Case, also, if, indeed, that was not done by direct appeal.

But in addition to this there is another reason why this court is not bound to, and should not, follow the decisions of the state court. The relation between the plaintiff and defendants, out of which this suit has grown, was entered into in August, 1892. The Harris Case (the first of the two cases from the Kentucky court of appeals referred to above) was decided by that court more than three years afterwards,—October 1, 1895. This feature brings this case within a recognized exception to the rule that the federal court should follow the settled decisions of the highest court of a state when the case comes within either of the two classes stated above. That exception is thus stated in oft-quoted language of Mr. Justice Bradley in the case of Burgess v. Seligman, supra, to wit:

"When contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

This exception has found frequent recognition in recent years by the federal courts. The following are some of the cases: Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296; Bartholomew v. City of Austin, 29 C. C. A. 568, 85 Fed. 359; Jones v. Hotel Co., 30 C. C. A. 108, 86 Fed. 375; Speer v. Board, 32 C. C. A. 101, 88 Fed. 749; Clapp v. Otoe Co., 45 C. C. A. 579, 104 Fed. 473; Pine Co. v. Hall, 44 C. C. A. 363, 105 Fed. 84.

It is true that, before the making of the contract sought to be enforced herein, the court of appeals of Kentucky had taken its position as to transactions entirely local. This it did for the first time in a relevant case in the Johnson Case, decided in February, 1889. But it did not follow from this that the rule thus laid down would be applied to a transaction containing such foreign elements as this one does. Indeed, the settled rule in this state as to ordinary contracts for the payment of money made here and payable elsewhere had a tendency, at least, to indicate that it would not be so applied. In the case of Goddin v. Shipley, 7 B. Mon. 575, Judge Marshall said:

"The general principle that a contract referring by its own terms to a particular place where it is to be performed is to receive its construction and legal character and effect from the laws of the place thus referred to is in itself so obviously reasonable, and on the score of authority so well established, as to preclude all discussion of its correctness."

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This rule has received recognition recently in the case of Glass Co. v. Taylor, 99 Ky. 24, 34 S. W. 711. Judge Pryor said:

"It is a question of intention, and all the facts must be considered in order to determine what law the parties looked to as controlling their rights under the contract,—whether the law of the place where the contract was entered into, or the law of the place where it was to be performed; nor is the rule here recognized in conflict with the cases heretofore decided by this court in Goddin v. Shipley, 7 B. Mon. 575; Hyatt v. Bank, 8 Bush, 193; Young v. Harris, 14 B. Mon. 556, 61 Am. Dec. 170. Ordinarily the place of performance fixes the nature and interpretation to be given the contract."

And in the case of Brown v. Todd's Adm'r, 29 S. W. 621, the court upheld a judgment enforcing a mortgage on real estate in Kentucky to secure a note given and payable in Indiana, which stipulated for 8 per cent. interest and attorney's fee, though, according to the settled law of this state, that stipulation was usurious and illegal. Judge Guffy said:

"The law of the place where the contract was made and where it was to be performed must govern in this case, and the proof in the cause establishes the fact that such a contract, as to interest and attorney's fee, was enforceable under the laws of the state of Indiana."

It follows from these considerations that this court is not bound to follow the state decisions, and is at liberty to make choice of that law which it deems is the proper law of this case. That law, as we have already shown, is the law of Minnesota, and the transaction between plaintiff and defendant must therefore be upheld as made. This conflict between the state and federal court in this jurisdiction is unfortunate. We can only say, as was said by Mr. Justice Swayne in the case of Butz v. Muscatine, 8 Wall. 575, 19 L. Ed. 490, where a similar condition existed:

"There are several adjudications of the highest court of the state more or less adverse to the views we have expressed. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusion which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part by blindly following the footsteps of others, and substituting their judgment for our own. Were we to accept such a solution, we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the constitution which called this court into existence."

The books of the defendants show the payments made by them on account of interest and stock installments to have been $1,836. It is admitted that $63 were paid on account of fines. This makes a total of $1,899.00, the amount claimed by defendants. This must therefore be adjudged to be the correct amount. Counsel for plaintiff will restate accounts on this basis, and draw decree for balance due as thus ascertained, with 6 per cent. interest thereon from December 8, 1896, until paid.

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JOHNSTON v. CITY OF PHILADELPHIA.

(Circuit Court, E. D. Pennsylvania. January 22, 1902.)

No. 5.

1. MUNICIPAL CONTRACTS—EXECUTION.
A contract with a city for work on a school building is void, and the contractor doing work thereunder is a volunteer, it not having been countersigned by the controller, and filed and registered, as required by Act June 1, 1885 (P. L. 51) art. 14, and not having designated any appropriation on which it was founded, as required by article 7, § 1, subd. 7.

2. SAME.
Failure of a contract with a city for completing work on a building to be countersigned by the controller and to designate an appropriation on which it is founded, as required by Act June 1, 1885, art. 14, and Id. art. 7, § 1, subd. 7, is not cured or excused by the fact that the contractor's bid for the entire work had been accepted by the city, and in a prior, duly-executed contract with him for part of the work it was recited that he contracted and agreed, when requested so to do, to enter into a contract to finish the building, subject to a further appropriation of a certain sum, being the balance required to pay for the remaining work.

Motion for Judgment on Reserved Point N. O. V.

Frederick A. Sobernheimer and John G. Johnson, for plaintiff.

J. W. Catharine, Asst. City Sol., Ernest Lowengrund, Asst. City Sol., and John L. Kinsey, City Sol., for defendant.

J. B. McPHERSON, District Judge. The facts upon which the reserved question arises are not in dispute, and appear mainly in the written evidence. They are briefly these: In July, 1896, the board of education of the city of Philadelphia asked for proposals to finish the new building for the Boys' High School, upon which some work had already been done under a separate contract. Upon July 7 the plaintiff put in a bid, offering to finish the building in accordance with the plans and specifications for certain specified sums. On September 8 the committee on property of the board reported in favor of awarding the contract to the plaintiff for the sum of $324,405.50, and upon the same day the board adopted the report of the committee. At that time, no money had been appropriated by councils for the purpose of finishing the building, but in spite of that fact Johnston went on and did certain work upon the building, amounting to $100,000. On July 14, 1897, councils appropriated $100,000 for the purpose of paying for this work; and on September 8 of that year a contract was entered into between the plaintiff and the city, in which he agreed to

"Furnish and deliver all the materials and perform all the labor requisite in erecting and building the granite portion of the tower, and in installing and placing in position certain iron work, air ducts, area walls, metal ceilings, and mill work, including painting and glazing, and in doing such concreting, plastering, tiling, painting, and carpenter work, including the flooring of the fifth floor, as may be directed by the architect and supervisor of the board of public education, under the authority of the committee on property of said board, being appurtenant and necessary to the completion of the main building of the new high school for boys. * * * Said work to be performed in strict and exact accordance with the detailed drawings

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and plans on file in the office of said board and the specifications hereto attached, which said plans and specifications are hereby made a part of this agreement as fully to all intents and purposes as though herein set out at length, and as authorized by ordinance of councils of said city approved July 14, 1897."

This is the ordinance already referred to that appropriated $100,000 toward the completion of the building; and the fact that the contract was limited to this part of the work further appears from a later clause of the agreement in these words:

"It is further distinctly understood and agreed that the total amount to be paid for the materials and supplies to be furnished and work done under this contract shall in no event exceed the sum of $100,000."

This money was duly paid to the plaintiff, and some time thereafter, again without contract or appropriation, he did further work upon the building, amounting to $144,500. This work was done during the years 1897 and 1898, and upon December 28 of the latter year councils appropriated, to pay for this second installment, and for one or two other small items, the sum of $150,000. Thereupon a second contract was entered into on January 13, 1899, containing the same provisions as are found in the first contract, with one or two unimportant differences. The amount to be paid under the second agreement was expressly limited to the sum of $144,500, and this sum was in due course paid to the plaintiff. He again went forward with the work, once more without contract or appropriation, and (with some exceptions) did what was necessary to carry out his bid. A third contract was then drawn up, dated June 30, 1899, in which the plaintiff agreed

"To furnish all the materials and perform all the labor necessary for the erection and completion of the addition to the tower, rebuilding the transit room, and making alterations, including gratings, bars, and such other work as may be required for the completion of the building of the new high school for boys."

These, apparently, were the matters comprised in the final installment of the operation. The amount specified in the contract to be paid was the remainder of his bid, namely, $90,762.50. This sum is the subject of the present suit. The work called for by the plaintiff's bid has been finished, except certain items, for which an allowance has been made by the verdict, and the building has been taken possession of and is now being used by the city.

The defense is that no legally binding contract was ever executed for the third installment of the work, and therefore that under the statutes of Pennsylvania, the ordinances of the city, and the decisions of the courts, the plaintiff was a mere volunteer, and cannot recover. Further facts bearing upon this question are as follows: The paper dated June 30, 1899, which was signed by the plaintiff, was not signed by the mayor on behalf of the city, but purports to be approved by the chairman of the committee on finance on July 6, 1899, who was acting in reliance upon a resolution of select and common councils passed on June 15, 1899, that authorized the chairman of that committee to approve contracts and sureties during the summer vacation. The paper was not countersigned by the con-

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troller, nor filed and registered by number and date and contents in the mayor's office, and an attested copy was not furnished to the controller or to the department charged with the work. The act of June 1, 1885 (P. L. 51), relating to the city of Philadelphia, provides in article 14, § 1, as follows:

"All contracts relating to city affairs shall be in writing, signed and executed in the name of the city by the officer authorized to make the same after due notice, and, in cases not otherwise directed by law or ordinance, such contracts shall be made and entered into by the mayor. No contract shall be entered into or executed directly by the city councils or their committees, but some officer shall be designated by ordinance to enter into and execute the same. All contracts shall be countersigned by the controller and filed and registered by number, date and contents in the mayor's office, and attested copies furnished to the controller and to the department charged with the work."

In article 7, § 1, subd. 7 (page 46), the following provision will be found:

"Every contract involving an appropriation of money shall designate the item of appropriation on which it is founded, and shall be numbered by the controller in the order of its date and charged as numbered against such item, and so certified by him before it shall take effect as a contract, and shall not be payable out of any other fund, and if he shall certify any contract in excess of the appropriation properly applicable thereto, the city shall not be liable for such excess, but the controller and his sureties shall be liable in damages for an amount not exceeding such excess, which may be recovered in an action on the case for negligence by the contracting party aggrieved."

The requirements thus specified were also not complied with in the paper now being considered. It was a proposed contract involving an appropriation of money, but it did not designate the item of appropriation upon which it was founded; neither was it numbered, or charged, or certified by the controller.

It seems clear to me that because of the foregoing defects the paper in controversy never took effect as a contract (to use the words of the act). It would be a waste of time to discuss this proposition, because the precise question has already been several times decided both by the supreme court and by the superior court of the state. The act of 1889 relating to cities of the third class contains a provision (article 9, § 5) concerning the duty of the controller to certify contracts that differs only verbally from article 7 of the act of 1885. For present purposes the meaning is identical. In City of Erie v. A Piece of Land on Eighteenth St., 176 Pa. 478, 35 Atl. 136, the supreme court declared in direct and positive terms that:

"This requirement [of the act of 1889] is a condition precedent to the legal efficacy of the contract, and without it there is no efficacious force in the attempted contract as to any one. As this requirement is entirely absent from the controller's certificate, the conclusion follows that there never was a lawful contract for the paving in question, and hence there can be no recovery. * * * It results that the paving company has no contract upon which it can recover, and it is therefore to be regarded as a mere volunteer, having no lawful claim against this defendant."

This decision was followed in City of Harrisburg v. Shepler, 7 Pa. Super. Ct. 491, affirmed by the supreme court in 190 Pa. 374, 42 Atl. 893, and also in Same v. Mish, 14 Pa. Super. Ct. 496. Moreover, article 14 of the act of 1885 relating to Philadelphia was itself before

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the supreme court in Hepburn v. City of Philadelphia, 149 Pa. 335, 24 Atl. 279, and it was there declared that:

"These clear and explicit requirements of the city's organic law are not merely directory. On principle as well as authority they are mandatory. To hold otherwise would defeat the very object that the legislature had in view in thus specifically describing the manner in which all contracts relating to city affairs shall be executed, and expose the public funds to raids of every conceivable form. * * * We have no doubt that the requirements of the organic act above quoted are mandatory, and must be strictly pursued. * * * When plaintiff was injured, and her cause of action arose, the relation of independent contractor between the city and Kane had not been created. There was no independent contractor in the case. The papers referred to—the advertisement, the bid, and the letter of acceptance—set forth the terms upon which the city was willing to enter into a contract with him; but neither singly nor altogether do they constitute a valid contract, nor in fact any contract. They are merely negotiations preparatory thereto. The contemplated contract was not executed or evidenced in the only way in which it could become effective to make Kane an independent contractor until after the accident."

This language applies with equal force to the foregoing requirements of article 7.

It is, I think, conceded, but, at all events, it cannot be successfully denied, that, if these decisions apply, the paper of June 30, 1899, never took effect as a contract, and therefore the city was never bound thereby. To avoid the force of these authorities, the plaintiff relies upon the following clause, contained in the first and second contracts, both of which were legally executed and certified:

"The said party of the second part further contracts and agrees that he will, when requested so to do, enter into a contract with the said party of the first part to finish and complete the entire work necessary to fully complete and finish the said building in accordance with the said plans and specifications, for the total of $324,405.50, subject to a further appropriation by said councils of the sum of [in the first contract, $224,405.50, and in the second contract, $90,762.50], that being the balance required to pay for the said work remaining unfinished."

The argument is that, because these two lawfully executed and certified contracts contained this provision, the plaintiff was relieved from the necessity of entering into another formal contract, and that no further signing by the proper officer of the city or certification by the controller was required. To this argument I cannot agree. The very language of the provision relied upon by the plaintiff seems to me to be fatal. He agrees to "enter into a contract" to finish the entire work, subject to a further appropriation by councils, and these words contemplate action in the future. The plaintiff's bid had been accepted, but, as was said in Hepburn v. City of Philadelphia, this was not the contract. The bid and acceptance merely set forth the terms upon which the city was willing to enter into a contract, but they did not constitute a valid contract, nor in fact any contract. Neither can the first and second contracts be so construed as to constitute a contract for the whole work. They are expressly limited to parts only; and, moreover, they could not lawfully cover more of the work than such portions as had already been provided for by appropriations made by councils. It must be admitted that there is an apparent hardship in the conclusion that the plaintiff has put his

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labor and materials into a building which the city is using but declines to pay for. Nevertheless, the positive command of the statute must be enforced. The plaintiff took all the risks that were visible in the transaction. He was willing to do the work without a contract and without an appropriation, trusting to the disposition of councils to pay for it afterwards, and to the approval of the proper municipal authorities; and, now that the risk has fallen out against him, while it may be regretted that he has lost a large sum of money, it can only be said that he has lost it by his own folly.

Judgment will be entered for the defendant upon the reserved point, notwithstanding the verdict.

HILL et al. v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, D. Washington, N. D. January 23, 1902.)

APPEAL—REVERSAL ON SINGLE POINT—RETRIAL—LAW OF CASE.

On the trial of an action in a United States circuit court, after a judgment of the same court in favor of the plaintiffs on the pleadings has been affirmed by the circuit court of appeals, and then reversed by the supreme court, on the ground that the answer raises a material issue, said issue is the only issue to be tried, and the decision of the circuit court of appeals as to all other questions must be considered as the law of the case.

Action upon a life insurance policy issued to George Dana Hill, father of the plaintiffs. Tried before the court and a jury, resulting in a verdict in favor of the plaintiffs. Heard on a motion for judgment in favor of the defendant non obstante veredicto. Motion denied.

Stanton Warburton, Preston, Carr & Gilman, and Eben Smith, for plaintiffs.

Struve, Allen, Hughes & McMicken and R. C. Strudwick, for defendant.

HANFORD, District Judge. Upon the facts alleged and admitted by the pleadings, a judgment in favor of the plaintiffs was rendered by this court, which was affirmed by the circuit court of appeals. Thereupon the case was removed to the supreme court of the United States by a writ of certiorari, and by that court the judgment was reversed, and the case was certified back to this court, with a mandate for further proceedings in accordance with the opinion delivered by Mr. Justice BREWER. For a complete statement of the case, reference is made to the decisions of the supreme court, reported in 178 U. S. 347–350, 20 Sup. Ct. 914, 44 L. Ed. 1097, and of the circuit court of appeals for the Ninth circuit, reported in 38 C. C. A. 159, 97 Fed. 263–270, 49 L. R. A. 127. The ground upon which the decisions of the two lower courts were reversed is stated in the opinion of the supreme court as follows:

"Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy, and

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all rights and obligations on the part of the parties thereto. But it is said that the insured was not the beneficiary,—his wife, and, in case of her death, their children, being named as such,—and that it was not in his power, by nonpayment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, 'failed, neglected, and refused' to pay the premium. So we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused,' and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge, or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it."

After being reinstated in this court, the case was brought to a trial, and was submitted to a jury for decision of one issue only, which the supreme court of the United States held to be a material issue raised by the defendant's answer. The parties were permitted to introduce evidence relating to other facts which were not seriously disputed, for the purpose of developing the case fully and fairly, and to make a record which would enable the attorneys to argue the legal questions to their own satisfaction. The evidence bearing upon the material issue was all in favor of the plaintiffs, and the jury rendered a verdict accordingly. The court afterwards declined to hear arguments on a motion for a new trial, for the reason that a new trial would be a useless proceeding, for, if the plaintiffs are not entitled to a judgment upon the verdict, they can never prevail, and the law applicable to the conceded facts exonerates the defendant from any liability whatever under the policy sued upon. The defendant then interposed the motion now under consideration, and upon that motion counsel on both sides have argued the case, earnestly and elaborately, as if the decision of the supreme court had completely expunged the previous determinations of this court and of the circuit court of appeals, and returned the case here, to be again considered with respect to the primary question whether the policy lapsed, and was rightfully canceled by the defendant for nonpayment of the annual premiums which accrued in the lifetime of George Dana Hill.

In behalf of the plaintiffs it is alleged that by a stipulation in the contract the parties have explicitly and conclusively determined that the contract was made at the defendant's home office, in the state of New York, and as, by its terms, the contract is to be performed in New York, all questions as to the validity of every one of its provisions, and as to the rights and liabilities of the parties under the contract, must be determined in accordance with the laws of the state of New York; that in form the policy is not for a single term of one year, with a right of renewal extending the insurance

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from year to year, but is a continuing policy, subject to forfeiture and cancellation for nonpayment of annual premiums to become due as specified; therefore the company had no power to cancel this policy or claim a forfeiture without complying with the statute of New York which prescribes that a specified notice must be given in a manner specified, and, for failure on the part of the company to give the statutory notice, the premiums did not become due, and there was no default. Against this contention the defendant's attorneys have argued, with ingenuity and force, that the contract did not have vitality until the policy was delivered, and the first annual premium paid, in the state of Washington; that the policy contains an express declaration that the annual premiums are to become due on a specified date in each year, of which notice is given and accepted by the policy itself, and the right to any other notice expressly waived, and that, in case of failure to make the payments to accrue as specified, the policy should lapse, and the right of the insured under it should be absolutely terminated; that this stipulation is not contrary to any law in force in the state of Washington; that the laws peculiar to the state of New York cannot apply to this contract so as to affect its validity, or limit the rights or obligations of the parties under it, by force of the legislative power of the state of New York; that the statutes of New York may be considered as controlling the contract only so far as the parties by their own agreement have adopted the same, and the particular statute which the plaintiffs have invoked cannot be deemed to have been adopted by the parties contrary to their solemn agreement, although as to matters concerning which the contract is otherwise silent the laws of the state of New York are made controlling. On the trial it was shown by uncontradicted evidence that a local collecting agent of the defendant company presented to George Dana Hill the company's official receipt for the second annual premium when it became due, and requested payment, and also held the receipt for a time, and made several demands for payment, and afterwards time for payment was extended, by special direction of the Pacific Coast manager of the company, so as to give ample opportunity to keep the policy alive by payment of the premium; but, notwithstanding the efforts to collect the premium, it never was paid. And upon the argument it was insisted that the company dealt only with George Dana Hill; that in all the transactions relating to the policy he represented the beneficiaries; that the company had the right to regard him as being fully authorized to act for the beneficiaries in the matter, and whether the failure to pay the premium was due to his inability to obtain the amount of money required, or any other cause, the mere fact of nonpayment, under the circumstances, constitutes neglect and refusal on the part of the plaintiffs to pay the premium, as alleged by the defendant in the plea referred to in that part of the opinion of the supreme court above quoted.

After a great deal of deliberation, I feel constrained to hold that as the main questions above outlined were fully considered by this court and by the circuit court of appeals, and decided in favor of the plaintiffs, and as the decisions of these questions are left undis-

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turbed by the supreme court, they must now be regarded as the law of this case. A cluster of cases involving the same or kindred questions were brought before the supreme court by this defendant, and argued by eminent lawyers in connection with this case; and it is fair to assume that all the different phases of the questions were pressed upon the attention of the court. See Mutual Life Ins. Co. Cases, 178 U. S. 327–353, 20 Sup. Ct. 906–915, 44 L. Ed. 1088–1099; Insurance Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181. It appears that both questions did receive attention, and there was a fair opportunity to decide them finally, so as to terminate the litigation, if the decision sustained the defendant in either of its contentions; but the supreme court refrained from giving any instructions to the court to which the case was remanded, unless an inference unfavorable to the defendant may be drawn from the fact that this case was distinguished from the Cohen Case. If the lower courts erred in holding that this policy could not be canceled for nonpayment of premiums, without compliance on the part of the defendant with the New York statute, the special plea which contained the allegation that these plaintiffs failed, neglected, and refused to pay the second premium is complete, and sufficient to constitute a valid defense, without that allegation, and the particular matter which the supreme court adjudged to be a valid defense is superfluous, or else the preceding allegations as to the place where the contract was actually made, and as to nonpayment by the father of the plaintiffs, tendered only an immaterial issue; for if the statute of New York prescribing that a particular notice must be given, and that any agreement contained in the policy waiving that prescribed notice shall be void, is not applicable, and if the stipulations contained in the policy and the laws in force in the state of Washington are controlling, then the right of the company to cancel the policy became absolute when the time had passed for the payment of the second annual premium, and the refusal of these children to pay that premium after the policy was already dead is very much like skinning a dead body, but could have no effect on the legal rights of the parties. The opinion of the supreme court, and the references therein made to its decisions in the other cases, show that it was adjudged by that court that an agreement by competent parties to abandon a policy of insurance would constitute a complete bar to any action upon the policy, and it was shown that the answer contained allegations amounting to a plea of express abandonment by agreement between the defendant and George Dana Hill; but instead of reversing the judgment for error in not giving effect to the plea of abandonment by George Dana Hill, as it should have done, if he was authorized to terminate the rights of the plaintiffs, the court intentionally refrained from expressing any opinion on the question as to the binding effect on the rights of the plaintiffs of his acts and omissions alleged in the answer. The opinion points out that the defendant by its answer raised an issue as to the intentional conduct of the plaintiffs themselves in refusing to pay the premium, distinct from the alleged agreement made by their father to abandon the policy,

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and it is obvious that the decision of the supreme court is hinged upon this issue as to the individual conduct of the plaintiffs themselves. That is made a material issue, and I think that it is the only issue which, under the mandate from the supreme court, was reopened for adjudication in this court.

The motion must be denied.

DEXTER v. KELLAS.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 40.

1. WRIT OF ERROR—REVIEW—DISCRETION.
The refusal to postpone a trial is within the discretion of the court, and will not be reviewed on error unless the discretion has been abused.

2. SAME.
A refusal to reinstate a cause after dismissal is in the discretion of the court, and not reviewable on writ of error.

In Error to the Circuit Court of the United States for the Northern District of New York.

William A. Sutherland, for plaintiff in error.

Charles W. Mathewson, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant taken by default because of the failure of the plaintiff to appear at the time the cause was moved for trial. The assignments of error challenge the action of the court below in refusing the application of the plaintiff to postpone the cause, and denying a motion made by him subsequently to the dismissal of the complaint to open his default.

A writ of error will not reach rulings involving an exercise of discretion unless the discretion has been abused. The refusal to postpone a trial is within the rule. Means v. Bank, 146 U. S. 620, 13 Sup. Ct. 186, 36 L. Ed. 1107; Isaacs v. U. S., 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Goldsby v. U. S., 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343. So, also, is the refusal to reinstate a cause. Welch v. Mandeville, 7 Cranch, 152, 3 L. Ed. 299. Upon the facts in the record, so far from there having been an abuse of sound discretion by the court below, its rulings were amply justified.

The judgment is affirmed, with costs.

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JACK et al. v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,091.

1. EVIDENCE—DECLARATIONS OF PERSON DECEASED—RES GESTÆ.
The modern tendency is to extend, rather than to narrow, the rule as to the admission of declarations as part of the res gestæ, especially in view of the fact that the parties are now generally permitted to testify in their own behalf, and to consider the grounds which formerly excluded such declarations as affecting their weight only.

2. SAME.
In an action on a life insurance policy by one Jack, as assignee, it was shown that the insured was a young man, recently married, and poor, who had been employed as a laborer by plaintiff for a number of years; that within a few months prior to his death his life had been insured in all for $21,000, all the policies having been assigned to plaintiff, who paid the premiums thereon; that he died from poison, and one Dr. Lipscomb had been convicted of his murder, for which offense also plaintiff had been tried and acquitted; that on the day preceding his death he was in town, and in and around plaintiff's store, as was also Dr. Lipscomb, who had conversations with plaintiff; that about 4 in the afternoon the doctor gave deceased a box, containing a single capsule, and told him to take it before going to bed, which he did; that within a few minutes thereafter he began to have convulsions, which followed each other at short intervals, and in the third of which he died; that between the second and third convulsions, with the consciousness of impending death, he made to his wife the following statement: "I am going to die. * * * Dr. Lipscomb killed me with a capsule he gave me to-night, and Guy Jack had my life insured, and hired Dr. Lipscomb to kill me." *Held*, that such statement as a whole, and each part of it, was admissible in evidence on the part of defendant, under the circumstances shown and as against the objections made, as a part of the res gestæ.

3. SAME — GENERAL SCHEME TO DEFRAUD — PROOF OF OTHER GENERAL ACTS.
Defendant in such action, in support of a defense that plaintiff had fraudulently procured the insurance and had murdered the insured, and for the purpose of connecting plaintiff with the acts of Lipscomb, was entitled to prove any fact which tended to show that they were acting in concert; and evidence that they had been engaged together in obtaining fraudulent insurance on the lives of others was not inadmissible because it tended to show the commission of other crimes by plaintiff.

4. SAME—PROOF OF CONSPIRACY—DECLARATIONS OR ACTS OF CONSPIRATOR.
In support of an allegation of a conspiracy between plaintiff and another to defraud a life insurance company by procuring the issuance of the policy sued on on the life of the insured and then murdering him, statements, declarations, or acts of the co-conspirator are not inadmissible because made or occurring after the death of the insured, on the ground that the object of the conspiracy had been accomplished, since it was not in fact accomplished, under such allegations, until the collection of the insurance.

5. TRIAL—INSTRUCTIONS—SUFFICIENCY OF EXCEPTIONS.
A general exception to the charge of the court, covering many matters and issues, is insufficient to raise any question thereon which can be considered in an appellate court.

6. APPEAL—REVIEW—INSUFFICIENCY OF RECORD.
An appellate court cannot consider statements of fact in the assignments of error not shown by the bill of exceptions.

7. EVIDENCE — MEASURE OF PROOF — ALLEGATION OF CRIME IN CIVIL ACTION.
In an action on a life insurance policy, a defense that the plaintiff aided and abetted or procured another to murder the insured need not

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be proved beyond a reasonable doubt; but it is sufficient if the jury, by all the evidence, are satisfied and convinced that the plea is true.

8. APPEAL—REVIEW—INSTRUCTIONS.
The failure of the trial court to give instructions requested cannot be assigned for error or considered by the appellate court unless it appears from the bill of exceptions that such instructions were requested and refused, and exceptions to such refusal were duly taken.

9. LIFE INSURANCE—ACTION ON POLICY—PARTIES.
The widow of an insured has no interest in a policy made payable to his legal representatives, and which had also been assigned by him to another, which will enable her to maintain an action thereon, where it appears that the deceased owed debts at the time of his death, and that his estate has not been settled.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

W. E. Baskin and T. W. Brame (C. C. Miller, on the brief), for plaintiffs in error.

R. F. Cochran, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

SHELBY, Circuit Judge. This is an action on a life insurance policy. It was brought in the circuit court of Noxubee county, Miss., and duly removed to the court below. Plaintiff Guy Jack sued as the assignee of the policy, and Lillie A. Stewart, the other plaintiff, sued as the widow and sole surviving heir of Charles T. Stewart, the insured. The policy was for $10,000, and had been issued by the defendant in error on the life of Charles T. Stewart. It was made payable to the executors or administrators of the insured. It had been assigned to Guy Jack with the consent of the defendant. After the case had been removed to the United States court, the defendant filed a plea denying the allegations of the declarations,—a plea of a general issue. Defendant, under the Mississippi practice, gave notice of special defenses that would be made. One of these defenses was that Guy Jack, designing to cheat and defraud, induced Charles T. Stewart to apply to the Mutual Benefit Life Insurance Company for a policy of insurance on his life for the sum of $10,000; and that he also induced Charles T. Stewart to make an application to the defendant, the Mutual Reserve Fund Life Association, for another policy of insurance on his life for $10,000; and that, when both of these policies had been issued, he persuaded Charles T. Stewart to assign them to him; and that, after the assignments were made, Guy Jack employed Dr. W. H. Lipscomb to kill Charles T. Stewart, and that Lipscomb did murder Stewart. Notice of other defenses was given, which it is not necessary to mention. Plaintiffs offered in evidence the policy of insurance on which the suit was brought and the assignment thereof to Guy Jack, and proved that Charles T. Stewart was dead. It was admitted in open court by the plaintiffs that Charles T. Stewart was poisoned, and that Lipscomb had been convicted of his murder. The evidence offered by the defendant tended to show that Lipscomb forged three applications for insurance on the life of Mrs.

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Alice V. Hart, a widow in delicate health. These policies amounted to $12,500. One of them was made payable directly to Jack, and the others assigned to him. Lipscomb witnessed the assignment of both policies. These policies were issued without the knowledge of Mrs. Hart. When she learned of their existence, she had them canceled. Jack also held a large amount of insurance on the lives of other persons. In obtaining this insurance, Lipscomb was the medical examiner. Charles T. Stewart's life was insured in all for $21,000. The entire amount was held by Jack, as assignee, at the time of Stewart's death. Twenty thousand dollars of it had been in force for less than eight months. The policy sued on was assigned to Jack to secure the payment of a note for $10,000, payable one day after date, and of even date with the assignment. Stewart had signed his name to this note in the presence of three witnesses. Jack paid the premiums on these policies. He paid part in money and part in lumber. At this time Jack was insolvent. There were many unpaid judgments on record against him, and his property was mortgaged. There was some evidence tending to show that Jack and Lipscomb held themselves out as being unfriendly, when in fact they were friendly. While Jack was in jail, held to answer an indictment for the murder of Stewart, he wrote the following letter:

"Sept. 8, 1899. De Kalb, Miss., 3/3/97.

"Mr. Chas. W. Camp, Mutual Reserve Fund Life Ass'n, New York, N. Y.—Dear Sir: From a pleasant conversation had with you in your office last November I learned you first saw the light in our state, and that you are a Mason. Yr. assn. certainly feel kindly towards me for my letters to yr. pres. That no doubt caused you not to issue more insurance on life of W. B. Davis a short time before his death. What is needed is more light, that the innocent may be vindicated, and all the guilty punished,—an electric light thrown in the homes of people at Scooba, and skeletons brought from the closets. I have labored hard for years to obtain the facts that I now possess. I'm worth more to the state of Mississippi and insurance companies than a dozen lawyers or detectives. I don't want your attorney or mine to know anything about my knowledge of affairs. It might cause my death, and then justice would be cheated of her reward. All I demand is that the insurance companies back me, and the state of Mississippi protect me. A word from insurance companies will let me out on bail. On yr. command I'll visit your city, and we will have conference, and arrange matters satisfactory. Let me hear from you at your earliest some way, and oblige

"Yours very resp., Guy Jack."

There was other evidence offered by the defendant, which will be referred to in discussing the various objections and exceptions. The plaintiffs offered evidence explanatory of these various circumstances. There was a verdict and judgment for the defendant, and the plaintiffs sued out a writ of error.

Objections to the Declarations of Charles T. Stewart.

Charles T. Stewart, the insured, was a young man, and had been married about a year before his death. He was poor, and had never owned his own home; the total value of his property being about $210. He had been almost continuously in the service of Guy Jack for about 15 years as a log hauler and helper in Jack's sawmills.

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At the time of Stewart's death, Jack held $21,000 of insurance on his life, including the policy involved in this suit. Charles T. Stewart spent the whole of the 21st of January, 1897, in the town of Scooba, Miss. About 4 o'clock in the afternoon, on that day, Dr. W. H. Lipscomb wrote for him a prescription, and carried it to the drug store of Dr. J. G. Mooney to be filled. Dr. Mooney was absent, and Lipscomb left the prescription at the drug store. Later both Lipscomb and Mooney returned to the drug store, and Lipscomb called Mooney's attention to the prescription. The prescription called for ten grains of bromide quinine, ten grains of antikamnia, and three-sixtieths of a grain of strychnine, to be made into three capsules. Dr. Mooney filled the prescription, making the three capsules as prescribed. Dr. Lipscomb suggested at the time that Mooney should use the crystal or powdered strychnine instead of the tablets. Mooney placed the three capsules in a small red paper box, and wrote thereon, as directed in the prescription, "Take one at night." He gave the box to Lipscomb, who paid for the prescription. Lipscomb left the drug store with the box containing the three capsules, and soon met Charles T. Stewart and his father, J. M. Stewart, at the northeast corner of Guy Jack's store. Lipscomb took Charles T. Stewart aside, and said to him, "Bathe your feet and legs to your knees to-night, and take that capsule." He handed Stewart the red paper box. The box was opened, and it contained only one capsule. Charles T. Stewart then went home, getting there "about dark." He seemed cheerful and happy. He put up his horse, and fed him, and ate supper. He bathed his feet, and took the capsule, as directed by Lipscomb. In 10 or 15 minutes after taking the medicine he became very ill, and was seized with convulsions. Between the second and third convulsion he made declarations, which were proved by the evidence of his wife, and which were the subject of exceptions to be now considered. In the third convulsion he died. Only a few minutes intervened between the convulsions. He had taken only one capsule. The red box was examined immediately after his death, and it contained no other capsules. An autopsy of the body of Stewart showed that the cause of his death was poison by strychnine. One and one-half grains of strychnine were found in his stomach. Lipscomb and Jack were jointly indicted for the murder of Stewart, and, after a severance, Lipscomb was tried and convicted. On appeal to the supreme court of Mississippi the conviction was reversed. 75 Miss. 559, 23 South. 210, 230. He was again convicted, and on appeal the conviction was affirmed. 76 Miss. 225, 25 South. 158. Guy Jack was tried and acquitted. The circumstantial evidence in the record tends to connect Guy Jack with Lipscomb in causing the death of Stewart. The following excerpt from the evidence of Lillie A. Stewart, his widow, will show the declarations of Charles T. Stewart and the questions raised about them:

"Mr. Miller (attorney for the plaintiffs): We desire to submit this matter to the court out of the presence of the jury. (Jury sent out of court.) Q. Now, if Charley made any statement to you at that time, tell the court what he said. A. Well, he told me he was going to die; that he had been dead; and that the good Lord had sent him back to tell me that Dr. Lipscomb had

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killed him with a capsule he had given him that night; and that Guy Jack had his life insured, and that he had hired Dr. Lipscomb to kill him. (Plaintiff objects to the statement of the witness: (1) 'That he was going to die,' and separately to that part (2) 'that he had been dead,' and (3) 'that the good Lord had sent him back to tell me that Dr. Lipscomb had killed him with a capsule he had given him that night'; (4) 'that Guy Jack had his life insured, etc.'; and (5) plaintiff objects to the entire statement, as a whole, making each of said objections separately and severally, upon the ground that said statement, and the separate parts objected to, are each irrelevant, immaterial, and incompetent.) The Court: I am going to sustain the objection to this part: 'That he had been dead, and the good Lord had sent him back to tell me;' and will not permit it to go before the jury. The other, taken in connection with all of the facts in the case, * * * I will overrule the objection to, and the jury will consider it, subject to the instructions of the court. (Plaintiff excepted separately. The jury were returned into the court.) Mr. Miller: Our objection is not confined to the language that you strike out, but we object to the whole statement. * * * The Court: Yes, you object to each part specifically, and then as a whole. Mr. Miller: We withdraw our objection to that part of the statement 'that the good Lord had sent him back,' and let her make the statement in full, but our objection will stand to all the balance, except that part 'that the good Lord had sent him back.' The Court: I don't think it is proper for that part to go before the jury, however. Mr. Bozeman (attorney for the defendant): We would prefer that just that part go to the jury that is competent. * * * Q. Mrs. Stewart, if Charley Stewart made any statement to you at the time referred to when your examination was interrupted, tell the court and jury what Charley Stewart said to you. A. Tell it like I did before? Q. Just tell the jury— The Court: Tell what he said. A. Well, he said: 'I am going to die, and I have been dead;' that 'Dr. Lipscomb killed me with a capsule he gave me to-night; and Guy Jack had my life insured, and hired Dr. Lipscomb to kill me.' Q. Now, how long did he live, Mrs. Stewart, after he said that? A. I don't know, sir, exactly. It was not very long. Q. Well, about how long did he live, Mrs. Stewart? A. I couldn't tell exactly. Q. A few moments, or an hour or two, or what? A. Well, I don't know. It was not very long, because I know I left the bed, and went and sat down on some wood that was put in there to make a fire with, and Mr. Duran stepped over to the bed, and told me he was dead, and I don't think it had been very long. Q. I believe you stated that he made that statement to you after the second convulsion? A. Yes, sir; he died in the third convulsion."

Before making this statement, Stewart had called on a negro man present to pray for him, and it clearly appeared otherwise that he was conscious of impending death. This being a civil case, however, these declarations are not offered as dying declarations. Dying declarations, as such, are admitted only in the case of a trial for the homicide of the declarant, and then on the ground that they were made in extremis. 1 Greenl. Ev. § 156. And Wharton says: "We may conclude, therefore, that such declarations are limited to criminal prosecutions when the subject-matter of the investigation is the declarant's death." Whart. Cr. Ev. (9th Ed.) § 288. But declarations made in extremis are often legal evidence in civil cases, for where they constitute part of the res gestæ, or come within the exceptions of declarations against interest, or the like, they are admissible, as in other cases, irrespective of the fact that the declarant was under apprehension of death. 1 Greenl. Ev. § 156. It is, of course, a general rule that the declarations of no man are admitted in evidence without the sanction of an oath and opportunity for cross-examination. But exceptions to the hearsay rule

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are as well established as the rule itself. There is much difficulty and much conflicting authority in the application of the exceptions. The declarations in this case are accompanied by the circumstances that usually accompany such declarations when admitted. The declarant is dead, and cannot be produced as a witness. The declarations were made without opportunity or cause for wariness or falsehood, and, besides, they were made under the sense of impending death; and, while not admissible, as we have said, as dying declarations, the fact that the declarant knew he was dying is looked on in the law in graver cases than this as dispensing with the necessity of an oath. The declarations of the individual made at the moment of a particular occurrence, where the circumstances are such that we may assume that his mind is controlled by the event, are received in evidence as a part of the res gestæ because they are supposed to be involuntarily forced out of him by the particular event, and thus have an element of truthfulness which they might not otherwise have. They must be undesigned declarations incident to a particular litigated act, and illustrative of such act. If one, immediately upon being shot, cries out, "I am shot! I am killed!" and names his assailant, these declarations would, without question, be admitted as a part of the res gestæ. In Com. v. Hackett, 2 Allen, 136, the victim was heard to cry out: "I am stabbed!" The witness at once went to him, and within 20 seconds after that heard him say: "I am stabbed. I am gone. Dan. Hackett has stabbed me." This evidence was held competent as a part of the res gestæ. While it is said that the declarations must be contemporaneous with the main fact, no rule can be formulated by which to determine how near, in point of time, they must be. No two cases are exactly alike, and the determination of this question is always inseparable from the circumstances of the case at bar. The transaction in question may be such that the res gestæ would extend over a day, or a week, or "a month." Rawson v. Haigh, 2 Bing. 99; Insurance Co. v. Mosley, 8 Wall. 397, 407, 19 L. Ed. 437; People v. Vernon, 95 Am. Dec. 58, note, and cases there cited. In this case the fatal capsule was handed to the victim in the afternoon, but not taken till bedtime. If Lipscomb, instead of giving him the capsule and prescription on the streets in the afternoon, had called at his house, and given it to him, and left a minute before it was swallowed, the declarations would have been brought nearer in point of time to the moment that Lipscomb had handed Stewart the medicine; but we cannot see that the rule as to the admissibility of Stewart's declarations would have been different. If one threw a bomb, which immediately exploded, and killed another, the declaration of the dying man as to who threw it would be a part of the res gestæ. If the assailant, instead of throwing the bomb, had placed it concealed, and fixed to explode in an hour or in 10 hours, when it exploded, the involuntary exclamation of the fatally wounded man, naming the person who had placed the bomb near him, would be, we think, a part of the res gestæ. So we do not think that these objections gain any weight from the length of time which elapsed between Lipscomb's act of handing the capsule to Stewart and his declarations.

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The declarations were made while Stewart was suffering from the effect of Lipscomb's act. The objection to the whole declaration, we think, was properly overruled.

That part of Stewart's declaration, "That he had been dead, and the good Lord had sent him back to tell me," was excluded by the court, and no question as to its admissibility is before us. Separate objections to other portions of the declarations were overruled, and exceptions reserved. The statement "that he was going to die, which is separately objected to, made 10 or 15 minutes before he died, was admissible as showing his physical condition. Such declarations are always received. Besides, it could not injure the plaintiffs. The statement "that Dr. Lipscomb had killed him with the capsule he had given him that night" is, we think, clearly admissible.

The next objection, as it appears in both the printed and original transcripts, is addressed to the statement "that Guy Jack had his life insured, etc." That Jack had insurance on Stewart's life is not a disputed question. This suit is to collect such insurance, and Jack admitted as a witness that he had $21,000 of insurance on Stewart's life when he died. Again, the part of the declaration reciting "that Guy Jack had his life insured" is unobjectionable. The court was justified in overruling the objection, even construing it to embrace the words "and that he hired Lipscomb to kill him," because the objection included evidence to which no objection could be well taken; for, if an objection covers any admissible evidence, it is properly overruled. U. S. v. McMasters, 4 Wall. 680, 18 L. Ed. 311. The only material part of the sentence to which it is claimed that this objection is addressed is "that he [Jack] had hired Dr. Lipscomb to kill him." If we are to treat this part of this sentence as covered by the objection, and as separately objected to, as it has been treated by counsel, though it is not set out in the objection, it presents a question difficult of solution. The words we have just quoted are not embraced in the objection, unless they are included by the addition, "etc.," to the objection. The objection is made that the declaration is "irrelevant, immaterial and incompetent." It may be doubted if these objections are sufficiently specific to require us to review the ruling on them. We learn from the argument for the plaintiffs in error that the objections to this statement, "That Jack had his life insured; that he had hired Lipscomb to kill him,"—are that it narrates a past transaction; that the declarant could have had no knowledge of the fact stated; that it is mere opinion; in short, that it is hearsay,—does not come properly within the exception as to the res gestæ. In Insurance Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437, the action was on an accident policy. The insured accidentally fell downstairs, receiving injuries from which he died. The circumstances of the accident were proved only by the declarations of the insured made to his wife and son. He was sleeping upstairs, and went down. When he came back, he told his wife he had fallen down the back stairs, and received injuries. He made similar declarations to his son. The supreme court held these declarations admissible as a part of the res gestæ. "To bring such declarations within the principle," said the court, "generally, they must be contemporaneous with

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the main fact to which they relate. But this rule is by no means of universal application." The court then quoted approvingly Baron Pork in Rawson v. Haigh, 2 Bing. 99, as saying:

"It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go to the length of saying that a declaration made a month after the fact would, of itself, be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form a part of the whole res gestæ."

After quoting other cases, the court said:

"Here the principal fact is the bodily injury. The res gestæ are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. * * * Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below. In the ordinary concerns of life no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason. The want of this concurrence in the law is often deeply to be regretted. The weight of this reflection, in reference to the case under consideration, is increased by the fact that what was said could not be received as 'dying declarations,' although the person who made them was dead, and hence could not be called as a witness."

State v. Thompson, 132 Mo. 301, 34 S. W. 31, was a trial for murder, by poison contained in a luncheon claimed to have been handed deceased by the defendant. It was held that the statements of deceased, while eating the luncheon, as to how and from whom he received it, were admissible as a part of the res gestæ.

It cannot be said that Stewart certainly had no knowledge of the fact stated. He, Jack, and Lipscomb were at the rear end of Jack's store, talking, the afternoon that Lipscomb gave Stewart the capsule. Lipscomb was in Jack's store that afternoon. What knowledge Stewart had as to what occurred we cannot know. It is enough that he makes the statement as a fact. The jury were, of course, not bound to believe the statement. If the circumstances indicated a want of knowledge in the declarant on the subject of the declarations, that would be considered as lessening or destroying the weight of the declarations. That would be for the jury. 1 Greenl. Ev. 160; People v. Taylor, 59 Cal. 640, 645. In Insurance Co. v. Mosley, supra, the court said, referring to the doctrine of res gestæ: "The tendency of recent adjudications is to extend, rather than to narrow, the doctrine." And Lord Chief Justice Cockburn said: "People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight." Reg. v. Churchwardens, etc., of Parish of Birmingham, 1 Best & S. 763; State v. Thompson, 132 Mo. 321, 34 S. W. 31. The fact that the defendant now is allowed to testify has greatly tended to liberalize the rule as to declarations claimed to be part of the res gestæ.

The case has been argued as if a specific objection had been made separately to that part of the declaration that Jack had hired Lips-

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comb to kill the declarant, and we have examined the case as if such objection had been made, and we are of opinion that, in view of all the circumstances, this case should not be reversed, because this declaration was admitted.

Other Objections to Evidence.

To make Lipscomb's acts evidence against Jack, it was necessary to show that they had conspired to defraud the defendant. It is not often that direct proof of such a conspiracy can be made. Usually it must be proved by a variety of circumstances. One circumstance, standing alone, may seem trivial; but, if it is relevant, it is evidence, and many circumstances may be convincing proof. It was admissible to prove Jack's relations to Lipscomb,—that they appeared to be unfriendly, but were in fact on good terms, and that they were connected in securing other fraudulent insurance. Jack's declarations that Lipscomb was a "very handy man for him to use in getting out bad insurance risks," and in fact any circumstance, were admissible that tended to show they were acting in concert. Objections to such evidence were all properly overruled. It is, of course, true that evidence of another and distinct crime committed by a defendant, in no way connected with the one for which he is on trial, is inadmissible. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which the defendant is on trial, it must not be excluded because it also shows that the defendant has committed another offense. Wood v. U. S., 16 Pet. 342, 10 L. Ed. 987; Wallace v. State, 41 Fla. 547, 26 South. 713; Barnett v. Insurance Co., 115 Mich. 247, 73 N. W. 372.

One of the issues submitted to the jury was whether Jack secured the insurance on the life of Stewart in good faith to secure a debt Stewart owed him, or did he procure it for improper purposes, and with criminal motives. On such issue it was admissible, considering the evidence of Lipscomb's connection with Stewart's death, for the defendant to show that Jack and Lipscomb were engaged in the business of procuring fraudulent insurance, and that the insurance on Stewart's life was a part of such scheme. State v. Brady (Iowa) 69 N. W. 290, 36 L. R. A. 693; Beberstein v. Territory (Okl.) 58 Pac. 641; People v. Summers, 115 Mich. 537, 73 N. W. 818; Carroll v. Com., 84 Pa. 107; Whart. Cr. Ev. (9th Ed.) 31; 3 Greenl. Ev. 15.

After Stewart's death, Jack made proof to secure the insurance money on his life by sending a statement to Lipscomb, to be signed by him. Lipscomb was at that time in jail, charged with Stewart's murder. The record also shows that incidents occurring between Jack and Lipscomb, and statements and declarations made by Lipscomb after Stewart's death, were received in evidence. It is urged here that there was error in receiving this evidence, because, if a conspiracy had been established to kill Charles T. Stewart, the same had been accomplished, and that no declarations or conduct of Lipscomb could be admissible in evidence against Guy Jack after the accomplishment of the conspiracy. The fallacy of this position is that the conspiracy did not have for its aim and end the killing of

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Stewart. The purpose of the conspiracy was to get the insurance on his life. If this could have been accomplished without Stewart's death, he probably would not have been poisoned. His death was an incident, but not the end, of the conspiracy. If, after his death, part of the insurance money had been collected, and divided between Jack and Lipscomb, can any one doubt that such evidence would have been admissible as tending to show the conspiracy and its purpose? The court did not err, we think, in admitting proof of the conduct of Lipscomb, after the death of Stewart. Holt v. State (Tex. Cr. App.) 46 S. W. 829; State v. Byers (Mont.) 41 Pac. 708.

Charge of the Court.

The entire charge of the court is in the bill of exceptions. The bill of exceptions shows that plaintiffs reserved an exception to the whole charge. Such exception to the entire charge, consisting, as in this case, of several closely printed pages, cannot avail to secure a reversal.

This exception is also reserved: "We also except to the language read by your honor from the book." The bill of exceptions does not show what language was read from the book. The assignment of error following this exception purports to set out what was read by the trial judge as a part of his charge. But we cannot consider statements of fact in the assignment of errors not based on the bill of exceptions. Unless the bill of exceptions certified by the judge showed what was read as a part of his charge, and the exception thereto, the question is not before this court for review.

The court was requested by the plaintiff to charge the jury that they "must be satisfied beyond a reasonable doubt arising from the evidence that Guy Jack was implicated in the murder." The court said, "I do not think that is the law, and I decline to give the instruction." This is a civil case. The defendant, by plea, averred that Guy Jack, the plaintiff, aided and abetted Lipscomb or procured him to murder Stewart, the insured. The burden was on the defendant to prove its plea, but it was not required to prove it beyond a reasonable doubt. If the jury was, by all the evidence, satisfied and convinced that the plea was true, that was sufficient.

Written Instructions Requested.

It appears from the printed transcript that during the progress of the trial the judge presiding requested the attorneys for the parties to present to the court written instructions, so that the court might be advised as to their respective theories of the case. The attorneys for the plaintiffs handed to the court before the argument began 30 separate written charges, numbered from 1 to 30, inclusive. Some of these charges were marked, "Given for the convenience of the court in charging the jury." "The remaining instructions," the transcript states, were not passed upon by the court, nor were any exceptions taken by the plaintiff on account of the failure of the court to give the instruction to the jury, or to mark them "Given" or "Refused." It is assigned as error that the court did not give these 30 charges. These charges do not even appear in the bill of

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exceptions. The bill of exceptions does not show that any exceptions were reserved to the refusal of the court to give them. On the contrary, the statement which follows the copy of the charges in the transcript shows affirmatively no exceptions were taken to the failure of the court to give the charges. Unless it appears in the bill of exceptions that a charge was requested, and refused by the court, and an exception duly reserved, no question is presented in regard to such charge for decision by this court. These charges are embodied a second time in the transcript, being set out in a motion for a new trial, the refusal to give them being assigned as one of many grounds for a new trial. The refusal of the court to grant a new trial is assigned as error. We have often held that the granting or refusing a new trial is in the discretion of the trial court, and that its decision cannot be reviewed by this court. Such is the unvarying rule of the federal courts.

Mrs. Stewart's Alleged Interest.

Lillie A. Stewart, widow of the insured, was joined as plaintiff in the suit. In rulings on the admission of evidence and in the charge to the jury the trial court held that on the undisputed evidence she had no interest in the action. The policy in suit was made payable, not to his wife, but to the executors or administrators of the insured. Charles T. Stewart, the insured, assigned the policy, with the consent of the insurance company, to Guy Jack. No other assignment of it had been made. The declaration filed by both of the plaintiffs states these facts. For the purpose of showing an interest in Mrs. Stewart, it is alleged in the declaration that she "furnished proofs claiming the proceeds of said policy as the widow and only heir at law of said Charles T. Stewart," and that Guy Jack had furnished proofs claiming the proceeds of the policy under the assignment from the insured. Then follows the statement that "plaintiffs have adjusted their respective claims to the proceeds of said policy of insurance, and agreed on a basis of settlement of the same." There is evidence in the record that Charles T. Stewart owed debts at his death. If the assignment is to be regarded, Jack alone, as assignee, owns the policy; if the assignment be ignored, the policy being payable to the executors or administrators of the insured, they alone could sue on it. In Insurance Co. v. Jack, 76 Miss. 788, 25 South. 871, an action was brought by Jack and Mrs. Stewart on a life insurance policy assigned to Jack, which was payable to the executors or administrators of the insured. The court held—properly, we think—that Mrs. Stewart was a stranger to the contract; that, if she had made an agreement with Jack as to a division of the proceeds, that was a contract with which the insurance company had no concern. We concur in this view. The record in this case shows affirmatively that Mrs. Stewart had no right of action on the policy. In this case, by her pleading, she is affirming that the policy was assigned to Jack.

The judgment of the circuit court is affirmed.

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TOWN OF ALDEN v. EASTON.

(Circuit Court of Appeals, Eighth Circuit. December 9, 1901.)

No. 1,573.

1. TOWNS—BONDS TO AID RAILROAD—AMOUNT—LIMIT—STATUTES—CONSTRUCTION.

Gen. St. Minn. 1866, c. 10, § 107, provided that no town should have power to contract debts in any one year in a larger sum than the amount of taxes assessed for such year, unless authorized by a majority of its voters. Chapter 11, § 78, as amended, limited the annual tax levy for town purposes to a sum not exceeding 10 mills on the dollar, and provided that nothing in such section should be construed to prevent the supervisors of any town from "levying any tax which by any special law they are authorized to levy." Section 79 prohibited the contracting of any debt by a town which would render necessary the levy of a higher rate of tax than that prescribed by section 78, "unless specially and expressly authorized by law." An act of the legislature (Sp. Laws Minn. 1868, p. 47), in section 1, expressly authorized each town in certain counties to issue bonds, as thereinafter provided, to aid in the construction of any railroad running into such counties. Section 2 prescribed the minimum face value of the bonds, manner of execution, and rate of interest. Section 3 provided that any such town might, by vote of the majority of the legal voters of such town, fix the amount and size of bonds to be issued and the rate of interest. Section 4 provided a complete scheme for levying a tax on the property of the town in an amount "not less than the principal and interest upon such bonds," for the apportionment of the tax, collection thereof, and payment of the bonds. *Held* that, as the act of 1868 undertook to provide a complete scheme to accomplish the desired purpose, in the absence of a plain and clear intent it should not be presumed that it meant that the authority given the town to fix the amount and size of the bonds should be read with, and limited by, Gen. St. 1866, c. 11, §§ 78, 79, to 10 mills on the dollar of the taxable property.

2. SAME.

The act of 1868 is obviously the exercise of the power reserved by the legislature in Gen. St. Minn. 1866, c. 11, §§ 78, 79, to permit by special law, in exceptional cases, the creation of debts by towns in excess of the limit prescribed by the general law.

3. SAME—AUTHORITY TO FIX AMOUNT—LEGAL VOTERS.

By the act of 1868, the whole matter of whether bonds should be issued, and the amount thereof, was relegated to the judgment of the legal voters of the town, who by self-imposed taxation were required to make provision for the payment, and the bonds issued pursuant to such authority are valid.

In Error to the Circuit Court of the United States for the District of Minnesota.

The town of Alden, the plaintiff in error, one of the congressional townships of Freeborn county, in the state of Minnesota, on March 28, 1870, having been duly authorized by a majority of its qualified voters, issued its 15 certain bonds, of the denomination of $1,000 each, in aid of the construction of the Southern Minnesota Railroad, projected across the township. These bonds were payable, according to their tenor, on or before 30 years after date, and bore interest, represented by attached coupons, at the rate of 7 per cent. per annum. The railroad was constructed as projected, and the bonds received by the company were negotiated and passed from hand to hand in the market from the date of their issue until 1894, when 10 of them were purchased by Easton, the defendant in error, under such circumstances as constituted him, within the meaning of the law, an innocent purchaser thereof for value. The coupons representing the interest on the

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bonds were regularly paid from 1870 to 1898 without any question or objection on the part of the town as to their validity. On July 24, 1899, the town, by its treasurer, wrote a letter to Easton notifying him that it had determined to contest the validity of the bonds. After the principal had matured, Easton instituted this suit in the circuit court of the United States for the district of Minnesota against the town to recover the face value of the bonds, together with interest accrued thereon from and after 1898. The town in its answer denied liability, on the ground that it exceeded the limit of indebtedness permitted by the statutes of Minnesota in issuing the bonds, and that they were therefore void. It also filed a counterclaim to recover from Easton the amount of interest paid him by the town after he had become the owner of the bonds. The case went to trial, and resulted in a judgment for Easton for the full amount of the principal of the bonds and unpaid interest thereon. The town brings the case here by writ of error to reverse that judgment.

Charles Butts (A. G. Wedge and Moses E. Clapp, with him on the brief), for plaintiff in error.

S. D. Catherwood (R. E. Shepherd, with him on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The General Statutes of Minnesota of 1866, in force in 1870, when these bonds were issued, provide as follows:

Chapter 10, § 107:

"No town has power to contract debts or make expenditures for any one year in a larger sum than the amount of taxes assessed for such year, without having been authorized by a majority of the voters of such township. * * *"

Chapter 11, § 78:

"There shall be levied, annually on each dollar of taxable property in this state (other than such as by law is otherwise taxed) as valued and entered on the grand list of taxable property for the several purposes in this chapter enumerated, taxes at the rates hereinafter specified, namely: * * * For township purposes on the taxable property in the township, as entered and valued on the grand list, such sum as the clerk shall certify to the county auditor, has been voted by such town not exceeding five mills on the dollar. * * *"

By subsequent amendment, the limit of the levy of 5 mills on the dollar was enlarged to 10 mills on the dollar. By act of the legislature of Minnesota approved March 6, 1868 (Sp. Laws Minn. 1868, p. 47), power was conferred upon the towns in several counties of the state, including Freeborn county, to issue bonds in aid of the construction of any railroad running into, or proposed to be built through, either or all of such counties. Section 3 of that act is as follows:

"Any town in either of the aforesaid counties may at any annual or regularly called special meeting, by vote of the majority of the legal voters of such town present and voting, fix the amount and size of bonds to be issued by such town, the rate of interest and the date of payment of all and any thereof. * * *"

Section 4 of that act provides a scheme for levying a tax upon the real and personal property of the town, and for the collection

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thereof, and for the appropriation of the same, when collected, to the payment of the principal and interest of the bonds issued by the town. An act of the legislature of Minnesota approved February 27, 1869, amends the act of March 6, 1868, in certain particulars unnecessary now to be referred to.

It is contended by plaintiff in error that the provisions of Gen. St. 1866, c. 11, § 78, are applicable to and control the present case, and that the limit of indebtedness there fixed, namely, such as shall not exceed 10 mills on the dollar of taxable property of the town, exhausted the power of the town. It is admitted that $15,000, the aggregate of the bonds issued, exceed that limit. It is contended, on the other hand, by the defendant in error, that the provisions of the General Statutes already quoted are not applicable to the creation of the bonded indebtedness in question, but that the Special Acts of 1868 and 1869 conferred ample authority upon any town to incur an indebtedness in aid of the construction of railroads through the county, in any amount which might be agreed upon by a majority of the qualified voters of the town. The trial court adopted the latter view, and ruled accordingly. The correctness of this ruling only is brought to our attention by the assignment of errors.

The general statutes relating to township organization (section 107, c. 10, Gen. St. 1866) place no limit upon the power of towns to create debts, the only condition thereto being an authorization by a majority of the voters of the town; but chapter 11, § 78, relating to the levy of taxes, fixes a limit of taxation for township purposes not exceeding 10 mills on the dollar of the taxable property of the township, but contains a very significant proviso, as follows:

"And provided further that nothing in this section shall be construed to prevent the county commissioners, township supervisors, or corporate authorities of any city, town or village from levying any tax which by any special law they are authorized to levy."

Section 79 of the same chapter contains a prohibition against contracting any debt or incurring any pecuniary liability by a town which will render necessary the levy of a higher rate of tax than the maximum rate prescribed by section 78, namely, 10 mills on the dollar of the taxable property of the town, but this last-mentioned prohibition contains a very significant exception. It reads as follows:

"It shall be unlawful for the corporate authorities of any * * * township, * * * unless specially and expressly authorized by law, to contract any debt * * * for the payment of either principal or interest of which * * * it will be necessary to levy * * * a higher rate of tax than the maximum rate prescribed by this chapter."

From the foregoing provisions of the general laws relating to township organization and taxes, it is, we think, very obvious that the legislature of Minnesota first adopted a general rule prohibiting the creation of any debt by a town in excess of 10 mills on the dollar of the valuation of its taxable property, and at the same time made provision for exceptional cases when it could, by the passage of a special law, permit a town to create an indebtedness in excess of

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that limit, provided only it secured the consent of a majority of the voters of the town thereto. In other words, the legislature seems to have thought that its own legislative wisdom and discretion and the will of the majority of the voters of the town, taken together, would afford adequate safeguards against improvidence when any special occasion should arise suggesting the advisability of contracting indebtedness in excess of the limit fixed by the general law.

We are now brought to the inquiry whether the legislature enacted any special law authorizing the plaintiff in error to contract the indebtedness in question. Attention has already been called to the act approved March 6, 1868. Section 1 of that act expressly authorizes each town in the counties of Filmore, Mower, Freeborn, Faribault, Martin, and Jackson "to issue bonds *as hereinafter provided*, to aid in the construction of any railroad running into or proposed to be built through either or all of the counties aforesaid." No limit is there placed upon the amount of bonds to be issued except such as is comprehended in the words underscored, "as hereinafter provided." Section 2 prescribes the minimum face value of the bonds, the rate of interest they shall bear, and how they shall be executed. Section 3 is as follows: "Any town in either of the aforesaid counties may at any annual or regularly called special meeting by vote of the majority of the legal voters of such town, present and voting, fix the amount and size of bonds to be issued by such town, the rate of interest," etc. Section 4 provides a complete scheme for levying a tax upon the real and personal property of the town in an amount "not less than the principal and interest upon such bonds," and to "apportion the same upon such years as may be deemed expedient," and also for the collection and payment of such tax to the town treasurer, to be by him applied "in payment of the principal and interest of the bonds issued by the town." It thus appears that this act is complete in itself, and requires no resort to the general law for its enforcement. It authorizes the issuing of bonds, and provides a full scheme of taxation to secure funds for their payment.

But it is contended by the plaintiff in error that the words found in section 3, authorizing the majority of the legal voters to "fix the amount and size of bonds," must be read in connection with the general law, and be supplemented by the words found in that law, namely, "not exceeding ten mills on the dollar on the taxable property of the township." We are unable to agree with this contention of counsel, for the following reasons: First, the legislature, as already observed, undertook to provide a complete scheme to accomplish the desired purpose, and we should not presume, in the absence of a plain and clear intent to the contrary, that it meant what it did not say; second, the act in question is obviously the exercise of a power reserved to the legislature by the general law (sections 78, 79, c. 11, Gen. St. 1866) to permit, by special law, in exceptional cases, the creation of debts by towns in excess of the limit prescribed by the general law; third, the act of 1868, by clear and unmistakable language, authorizes each town in Freeborn county, among others, to issue bonds "as hereinafter provided,"

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and then provides for an election, conferring upon the majority of the legal voters of the town power to "fix the amount of bonds * * * to be issued." In other words, the legislature, being satisfied that the best interests of the towns justified them in extending aid to railroad construction in their counties, left it to the judgment of the majority of the legal voters to determine whether the towns should grant any aid, and, if so, to fix the amount of such aid. The whole matter relative to the amount of bonds to be issued was relegated to the judgment of the legal voters of the town, who, by self-imposed taxation, were required to make provision for the payment of the same.

The foregoing conclusions are in harmony with the views expressed by the supreme court of Minnesota in the case of State v. Town of Clark, 23 Minn. 422. The town of Clark was one of the towns in Faribault county which issued bonds in aid of a railroad, under the provisions of the act of March 6, 1868. In 1872 the constitution of Minnesota was amended so as to create an effectual inhibition against contracting any indebtedness by towns in excess of 10 per cent. of the value of their taxable property. It was contended by the town that the constitutional amendment abrogated the act of 1868, so that no authority to issue bonds thereunder existed after the adoption of the constitutional amendment. The court in its opinion takes occasion to say:

"By Sp. Laws 1868, c. 24, as amended by Sp. Laws 1869, c. 44, and Sp. Laws 1870, c. 49, any town in the county of Faribault was authorized to issue bonds to aid in the construction of any railroad running into such county. No limit was placed upon the amount of bonds which might be issued by any town upon the determination of its voters. * * * Prior to the taking effect of this [constitutional] amendment, the power of the legislature to authorize the issuing of bonds or the incurring of indebtedness [in aid of railroads] by any of the municipal corporations mentioned was unlimited as respected the amount of bonds and indebtedness. * * * At the time when the amendment was made [in 1872], the laws under which the town of Clark was authorized to issue the bonds in question had been enacted and were in full force. They placed no limit upon the amount of bonds issuable, save such as might be fixed by the voters."

While it may be said that the real question now under consideration was not necessarily involved in that case, and therefore that the opinion expressed by the supreme court is not such an interpretation of local law as, under recognized principles, should control our judgment, it is nevertheless true that the supreme court in that case had the general subject before it, and expressed views in harmony with reason, and which commend themselves to our judgment.

In the case of State v. Routh, 61 Minn. 205, 206, 63 N. W. 621, 622, the supreme court had under consideration the rule governing the construction of statutes of Minnesota, and announced its conclusion as follows:

"When a general intention is expressed, and also a particular one which is inconsistent with the general one, the particular intention will be considered an exception to the general one; that is, where a special law which applies to a limited district, as a city, conflicts with a previous general law, the latter yields to the former."

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In the case of Board of Com'rs of Seward Co., Kan., v. Ætna Life Ins. Co., 32 C. C. A. 585, 590, 90 Fed. 222, 227, the rule was laid down by this court thus:

"Privileges granted by special act are not affected by inconsistent general legislation on the same subject, but the special act and the general laws must stand together, the one as the law of the particular case, and the other as the general law of the land."

To the same effect also are the following authorities: Townsend v. Little, 109 U. S. 504, 512, 3 Sup. Ct. 357, 27 L. Ed. 1012; Gowen v. Harley, 6 C. C. A. 190, 56 Fed. 973; Felt v. Felt, 19 Wis. 193, 196; Ex parte Smith, 40 Cal. 419; Crane v. Reeder, 22 Mich. 322; Suth. St. Const. §§ 158, 159.

For the reasons hereinbefore stated, and on the authorities cited, we entertain no doubt that the trial court correctly ruled that the special act of 1868 conferred ample authority upon the town of Alden to incur the indebtedness represented by the bonds in question.

Our attention was called in the argument to several acts of the legislature of Minnesota passed in 1871, 1875, 1881, and 1883, recognizing the validity of the bonds in question, and also to the fact that the town of Alden had levied taxes to pay the interest on the bonds from year to year, beginning with 1871 and ending with 1897, and had actually paid the same without objection, and without any claim that the bonds were invalid; and it was argued with much force and persuasiveness that the acts of the legislature in question constitute a legislative recognition of the validity of the bonds, and that the acts of the town in levying taxes and paying the interest on the bonds for a period of nearly 30 years evince a construction of the statutes by the parties in interest in harmony with the contention of the defendant in error, and that these acts of the state and of the parties should be given force in the determination of the question now involved.

It is certainly true that, in cases of doubt concerning the true interpretation to be placed upon legislative enactments, resort may be had to contemporaneous, and even subsequent, legislation, to ascertain the true intent and meaning of that in question; and it has been held by this court in the cases of County of Washington v. Williams and Blair v. County of Washington (decided at its last May term; C. C. A.) 111 Fed. 801, that, even in cases involving the power of a municipality to aid in the construction of a railroad, a liberal interpretation should be placed upon the act claimed to confer the power when first brought in question after the lapse of many years of continuous recognition of the validity of the bonds issued thereunder. But, in the view we have taken of the legislation involved in this case, we find no occasion to resort to these extraneous aids. The act of March 6, 1868, for the reasons hereinbefore stated, conferred adequate power upon the town of Alden to issue the series of bonds in question.

Some other questions were discussed by counsel at the argument and in their briefs, but, as they are not based upon any assignment of error, they require no consideration at our hands.

The judgment of the circuit court is affirmed.

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CANNEY v. WALKEINE.

(Circuit Court of Appeals, First Circuit. June 14, 1901.)

No 379.

MASTER AND SERVANT—INJURY THROUGH NEGLIGENCE OF SUPERINTENDENT—MASSACHUSETTS STATUTE.

The provision of the Massachusetts employers' liability act which gives a right of action against an employer for a personal injury caused to an employé "by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence," is remedial in character, and not to be so artificially and narrowly construed that the fact, alone, that one given authority of superintendence works with his hands the greater part of the time, necessarily excludes him from being one whose "principal business is that of superintendence," nor do the decisions of the supreme judicial court of the state thereon require such a construction; and where a superintendent, although so working himself, is also during the same time that he is working actively exercising the duty of superintendence, that may be found, in a proper case, to be such "principal business."

In Error to the Circuit Court of the United States for the District of Massachusetts.

Walter T. Badger (Solomon Lincoln, on the brief), for plaintiff in error.

William A. Pew, Jr., for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. In this case there were a verdict and a judgment for the plaintiff below, and the defendant below sued out this writ of error. It will be convenient to use the word "plaintiff" as indicating the plaintiff below, and "defendant" as indicating the defendant below.

The action rests on the provision in the employer's liability act of Massachusetts which gives a right of action for a personal injury caused to an employé, "by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." The defendant's proposition is as follows: One who labors the "most of the time with his hands" is not a superintendent, within the meaning of the statute. He puts it to the effect that the statutory word "principal" means principal in point of time, and that the idea that it means principal in point of importance has been expressly negatived. He maintains that this is an arbitrary rule applied by the supreme judicial court of Massachusetts to the construction of this statute, with reference to the circumstances which he claims the jury would have been justified in finding to have existed in the case before us, and he asked an instruction to the jury accordingly. This was not given.

The plaintiff was engaged in drilling in the defendant's granite quarry. While so employed he was struck from behind by a rope,

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and was thrown down and injured. The rope was in use to hold down the blocks of a derrick in the same quarry, and it was being tightened by the alleged orders of one Anderson when it struck the plaintiff. There was evidence tending to show that Anderson was negligent, and that his negligence caused the injury.

Anderson was employed by the defendant with the gang in which the plaintiff was working. The defendant testified that he had a man under him who acted for him when he was away,—one Edward Dyer; that he was sometimes there himself, and "then Dyer was there"; that he had four gangs of men (that is, one for each derrick); that there was one man to take charge of each of these gangs; that Anderson had charge of one of them, consisting of from six to seven men; that Anderson would go into the quarry in the morning, and put on the chalk line, and tell the men to cut that line; that he would see that the stone was all right; that, if he (the defendant) had an order for any particular dimension of stone, he would write it off on a card and give it to Anderson; that Anderson would get it out and hoist it up; that, when Anderson was not otherwise engaged, he would take his hammer and go to work with the rest of the gang, —"just the same as the rest of them"; and that he (the defendant) paid the quarryman from 14 to 17 cents an hour, and Anderson about 25 or 30 cents. Anderson testified that the superintendent told him what kind of stone he wanted, and that he did the rest; that he would make up his mind where he would get out stones, and took them wherever he pleased from the ledge on which he was directed to work; that he laid out the lines; that, after the stones were split and blown out, they were hoisted up on the bank, and were there put on a railroad train or wagons; that he had charge of the stones from the time they were started in the pit until they left the quarry; that the man in charge of the derrick was under him, and also the engineer, the tool boy, and the signalman; and that he told them what he wanted done, and they did it. This evidence leaves it entirely plain that, although the plaintiff worked with Anderson and Anderson worked with the plaintiff, they were not wholly employed in the same class of labor, and that Anderson had under his charge men not engaged in drilling, and therefore men not engaged in precisely the same labor in which the plaintiff was engaged, although in the common work and in the same gang. It is not questioned that Anderson was the "boss" of the gang, in the way in which that expression is commonly used, nor that the jury might properly have found that he was engaged, at least to some extent, in superintendence, within the meaning of the statute.

The plaintiff, referring to Anderson, testified, among other things, as follows:

"Q. What was he doing when you were at work? A. Bossed the men.
"Q. Was he doing that all the time? A. All the time.
"Q. Was he present during every hour of the day, looking after the men and watching them? A. Yes."

It was testimony of this character to which the court referred when it said to the jury: "There is some evidence in this case that the man [Anderson], while at work, was also engaged in the line of

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superintendence; that, even if working with his hands, he was engaged in keeping an outlook upon the work, and giving directions to the men."

At the outset the court said to the jury:

"There is no arbitrary rule by which you can determine, or, rather, which I can state to you as a rule which should govern your determination of this question. I cannot say to you, and the statute does not mean, that because a man is engaged a fourth of the time in giving orders or directions or planning the work, or because he is engaged a half of the time in manual labor, the question should turn one way or the other, or three-fourths of the time or nine-tenths of the time, as has been stated in one of the decisions of the supreme court of Massachusetts. So it is an open and fair question for you to determine, upon your experience and understanding as to the way things are done, and upon the evidence, whether it was either the sole or principal duty of the man Anderson to superintend and direct."

Thereupon the defendant made the following request:

"I would want your honor to charge that, if the jury find that Anderson did labor most of the time with his hands, he was not a superintendent, within the meaning of the statute."

The court replied to this, "I should have to deny that, in that abstract form," but it reinstructed the jury as follows:

"There seems to be some misunderstanding, gentlemen, as to just what I said with respect to the consideration to be given to the situation if Anderson worked with his hands a fourth of the time, a half of the time, or three-fourths of the time, or nine-tenths of the time. I did not intend to say to you that such expressions on the part of the witnesses would control, or, if you should find he did actually work a large portion of the time that the question of superintendence would necessarily turn upon that fact alone, for the reason that there is some evidence in this case that the man, while at work, was also engaged in the line of superintendence; that, even if working with his hands, he was engaged in keeping an outlook upon the work and giving directions to the men. Of course, if a man was engaged nine-tenths of the time, or perhaps three-fourths of the time, or more than half the time, in actual manual labor, giving up entirely during that period all idea of superintendence or direction, throwing off his responsibility and becoming altogether a common laborer, and having no reference to the direction of the work or outlook upon what was going on, then it probably would follow that he was not a superintendent, or not a superintendent whose chief duty was superintendence. But if at the same time that he was laboring he was giving directions, and adhering to his right to direct and superintend, and was actually keeping an outlook and directing, then it would become a question for you to determine, notwithstanding the fact of manual labor for a greater or less portion of the time; it would be a question for you to settle upon all the evidence, taking into consideration all the evidence, the amount of labor, the importance of superintendence, the extent of direction,—all together,—for you to determine whether his chief duty was that of superintendence."

If the instructions had rested where the court first left them, the charge would, perhaps, have been deficient. It cannot, however, be doubted that what the court added after the defendant made the request which we have cited materially modified what it had before said. In making this modification, the court so fully expressed itself to the jury that there is no question that whatever detrimental impressions the first instructions may have made were removed. Therefore the case fairly turns on the question whether or not the final instructions were correct, and sufficiently full, in view of the request made by the defendant.

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We will consider in their chronological order the various decisions of the supreme judicial court of Massachusetts, cited to us by either party.

In Malcolm v. Fuller, 152 Mass. 160, 25 N. E. 83, the nisi prius court, in charging the jury, used these expressions with reference to the person claimed to have been intrusted with superintendence:

"If generally or principally he is at work manually with his hands, then he is not a man whose sole or principal duty is that of superintendence." "That is, if Stewart was set to work with a gang of men, and expected to do his share, either of holding or pounding the drill, and was generally engaged in that employment, or in manual employments about the quarry, then he is not a man whose sole or principal duty is that of superintendence."

These instructions, however, were not passed on by the court in bench, for the case turned on the proposition that the act which caused the injury was not an act of superintendence. The same is true as to Cashman v. Chase, 156 Mass. 342, 31 N. E. 4, in which the court found that it was evident that in operating the engine the person who was alleged to be in superintendence "was doing the work of a laborer, acting upon the directions of others, and not directing them." Also, in Shepard v. Railroad, 158 Mass. 174, 33 N. E. 508, the court failed to state why it held that the section foreman in that case was not charged with superintendence, within the meaning of the statute, and the question of the meaning of the word "principal" in the statute was not specifically raised. Prendible v. Manufacturing Co., 160 Mass. 131, 35 N. E. 675, also fails as an authority for either party before us.

In O'Brien v. Rideout, 161 Mass. 170, 36 N. E. 792, the substance of all the evidence was reported in the bill of exceptions. The court below ordered a verdict for the defendant, and the plaintiff excepted. The court in bench overruled this exception. The foreman stood in similar relations to his co-employés as Anderson in the case at bar, because, while the plaintiff was at work with a circular saw, sawing butternut wood, the foreman, while employed with the same gang, was giving orders, attending to grinding tools, piling lumber, and keeping busy generally. The court said that the evidence would not justify a finding that the foreman came within the statute, and added what was said by one of the witnesses, to the effect that the foreman was "at work pretty much all the time in getting out lumber, or piling it up, or arranging it, or in operating saws." While it is quite possible that this case would have justified us in sustaining a verdict for the defendant, if it had been ordered by the court below, and all the evidence were before us, it fails to state specifically anything by which it can be understood whether or not it intended to lay down an arbitrary rule by which the statute is to be construed, or whether it only referred to the testimony which it quoted as a leading fact, which, under the circumstances, brought it to the conclusion which it reached.

Dowd v. Railroad Co., 162 Mass. 185, 38 N. E. 440, so far as the specific point which we have before us is concerned, is subject to the same observation as Prendible v. Manufacturing Co.

A case which is thought to give much support to the defendant's

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position is O'Neil v. O'Leary, 164 Mass. 387, 41 N. E. 662. This came up on exceptions to a refusal at nisi prius to give the following instruction requested by the defendant, appearing at page 389, 164 Mass., and page 662, 41 N. E.:

"There is no evidence that McDonald was employed as a superintendent, whose sole or principal duty was that of superintendence, so that the defendant can be held liable for the negligence of McDonald."

The court in bench, considering only the evidence for the plaintiffs, held that this instruction should have been given. It abstracts that evidence at page 390, 164 Mass., and page 663, 41 N. E., and then proceeds as follows:

"In a sense, it is undoubtedly true that superintendence is more important than manual labor; and so, if superintendence is intrusted to a man who also works with his hands, it may be said that his principal duty is that of superintendence. But if the statute had intended that every person exercising superintendence should not be considered a fellow servant with a person injured, there would have been no need of the words 'whose sole or principal duty is that of superintendence.' These words must have a reasonable interpretation given to them; and a majority of the court is of opinion that it cannot be said of a person who works at manual labor, to the extent shown in this case, that his principal duty is that of superintendence."

It is to be observed that the plaintiff's case contained no proof like that referred to in the charge in the case at bar, to the effect that while the alleged superintendent was at work he "was also engaged in the line of superintendence," and that, "even if working with his hands, he was engaged in keeping an outlook upon the work, and giving directions to the men." In other words, the charge before us went on the ground that, even if the labor performed by Anderson was continuous, the jury might find, on the evidence, that it was of such a character as did not prevent him from also at the same time giving superintendence to the work, and, further, that he did give such superintendence continuously, or substantially so. Of course, we cannot say judicially that this proposition involves any inconsistency. Therefore the precise circumstances under which the case at bar was left to the jury were not brought to the attention of the court in O'Neil v. O'Leary.

Geloneck v. Pump Co., 165 Mass. 202, 216, 43 N. E. 85, is too indefinite to be of use. Crowley v. Cutting, 165 Mass. 436, 43 N. E. 197, by implication, reaffirms the conclusion in O'Neil v. O'Leary; but it had no occasion to pass precisely on the particular question before us. Reynolds v. Barnard, 168 Mass. 226, 46 N. E. 703, is not of importance, except that it again recognizes the conclusion in O'Neil v. O'Leary. The case turned on the fact that the proofs were conflicting, and that therefore the issue was properly submitted to the jury. It again failed to propound the precise question which the evidence and the charge in the case at bar raise.

In Gardner v. Telegraph Co., 170 Mass. 156, 48 N. E. 937, there was a verdict for the defendant; and the sole question was on the admissibility of certain evidence offered by the plaintiff and excluded. The court held that it was admissible on the question of superintendence; using this expression, which we will refer to again: "This" (that is, the evidence excluded) "would have justified the jury

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in finding that he" (that is, the alleged superintendent) "was something more than a mere laborer in charge of a gang." Riou v. Granite Co., 171 Mass. 162, 50 N. E. 525, turned on the fact that the act out of which the injury arose was not an act of superintendence. The court, by referring to Reynolds v. Barnard, 168 Mass. 226, 46 N. E. 703, reaffirmed whatever there is in O'Neil v. O'Leary, 164 Mass. 387, 41 N. E. 662. Eaves v. Manufacturing Co., 176 Mass. 369, 373, 57 N. E. 669, is wholly indefinite, so far as concerns the question which we have to determine.

The result of these decisions undoubtedly establishes as a general rule what is restated in Reynolds v. Barnard, 168 Mass., at page 228, 46 N. E. 704,—that, when an employé works with his hands the greater portion of the time, he cannot superintend, within the purview of the statute; but they do not compel us to the conclusion that this rule is absolute, and to be applied without qualification under exceptional circumstances. When, as said in what we have already quoted from Gardner v. Telegraph Co., the alleged superintendent is only "a mere laborer in charge of the gang," this general rule might well be applied, if not as a rule of law, at least as a rule of presumption of fact so forcible that the court would not allow a jury to disregard it. To go further, however, than to state it ordinarily as illustrative for the guidance of juries, would give an artificial construction to a statute which seems simple, plain on its face, and reasonable in its purpose; and it would also hold that the court could assume to know that a man cannot work constantly with his hands, and yet exercise superintendence in such manner that that is his principal duty. Such an assumption would be so forced as to exclude the possibility, which the common mind knows to exist,—that not only may an employé be engaged at all times in labor with his hands, and yet exercise superintendence under such circumstances that that is his principal duty, but that, also, he may be so engaged under such peculiar circumstances that quite continuous laboring with his hands is a necessary part of the duty of superintendence. Since none of the decisions which have come to our observation were rendered under circumstances which brought to the attention of the court the exceptional facts in support of which the plaintiff produced evidence in the case at bar, and since, therefore, we are not concluded thereby with reference to such exceptional facts, and since, moreover, the defendant's proposition would compel us to give an artificial and narrow construction to a remedial statute, contrary to the just and reasonable rules ordinarily applicable, and since, also, the alleged superintendent in this case was, as we have shown, "something more than a mere laborer in charge of a gang," we are unable to determine that the instructions given the jury were not suitable and sufficient.

The judgment of the circuit court is affirmed, with interest, and the defendant in error recovers the costs of appeal.

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DE FORD et al. v. MARYLAND STEEL CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 416.

1. BREACH OF CONTRACT—DAMAGES—EXPENSE INCURRED—LOST PROFITS.
Damages based on the estimated expenses incurred and losses of profits sustained by reason of defendant's failure to complete and deliver certain vessels within a specified time are not recoverable in an action for breach of a contract to complete and deliver the vessels within the specified time, though the purpose for which the vessels were intended was understood by the parties, such damages being entirely conjectural.

2. SAME—REMOTENESS OF DAMAGES.
Damages based on the loss of vessels in a hurricane are too speculative to be recoverable in an action for breach of a contract to construct and deliver the vessels within a specified time at a designated place, their destruction occurring at another place.

3. SAME—MEASURE OF DAMAGES.
In the absence of special circumstances, a party failing to complete and deliver vessels within a specified time is liable only to the amount of the interest on the payments made prior to their delivery for the time of the delay.

In Error to the Circuit Court of the United States for the District of Maryland.

Charles Morris Howard, for plaintiffs in error.

Alexander Preston (J. Alexander Preston and Robert Ludlow Preston, on the brief), for defendant in error.

Heard by GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

GOFF, Circuit Judge. The defendant below, also the defendant in error, contracted with the plaintiffs below, who are also the plaintiffs in error, under a written contract dated September 6, 1899, to build for them, in accordance with certain specifications, one steel screw tug, and to complete and deliver the same to said plaintiffs on or before the 1st day of January, 1900, unless prevented by providential occurrence, fire, strikes of workmen, or other obstacles beyond their power to control, for the sum of $15,750. The defendant also contracted with plaintiffs, by written contract dated December 6, 1899, to construct for them, in accordance with certain described plans, two barges, and to endeavor to complete and deliver said barges to the plaintiffs on or before the 1st day of February, 1900, unless prevented by providential occurrences, fires, strikes of workmen, or obstacles beyond their power to control, for the sum of $11,500. The vessels so contracted for were to be delivered at Sparrow's Point, in the state of Maryland. For various reasons, not necessary to be here set forth in full, the tug and barges were not actually delivered to the plaintiffs until July 21, 1900. The last installment of pay for said vessels was made by the plaintiffs to the defendant on the day the same were so delivered, and the plaintiffs on that day duly served on the defendant a protest in writing, reserving to themselves all rights and claims that they might be entitled to

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because of said delay. The plaintiffs were engaged in the business of manufacturing and selling sugars, having places of business in Boston and Porto Rico, and the vessels so contracted for and delivered were intended to be used during the sugar season of 1900. The tug and barges left for Porto Rico under the tow of a larger tug on the day they were delivered to the plaintiffs, and, after having experienced tempestuous weather off of and south of Cape Hatteras, both of the barges were lost; one of them on July 26th, and the other on the following day. The tug was compelled to return to Norfolk, but afterwards went to Porto Rico under her own steam. On the 5th day of January, 1901, the plaintiffs instituted an action at law in the circuit court of the United States for the district of Maryland, claiming damages from the defendant because of its failure to complete and deliver said vessels according to the terms of the contract mentioned. It is alleged in the declaration that the failure to complete and deliver said vessels was not caused by providential occurrences, fires, strikes of workmen, or other obstacles beyond the defendant's power to control, but was owing to the negligence of the defendant; and it was further alleged that said vessels were intended by the plaintiffs for use in connection with their sugar business in Porto Rico, and that they were known to be so intended by both parties to said contract, and that by the failure of the defendant to deliver the vessels within the time stipulated, the plaintiffs were subjected to great expense for freight and for lighterage, and that they were deprived of the profits of valuable contracts in connection with such vessels, which profits they would otherwise have made, and that by reason of the delay and of the failure of the defendant to complete and deliver said vessels in accordance with the terms of the contract, the plaintiffs were subjected to great additional expense; and the plaintiffs also alleged that the 21st day of July in every year is the beginning of the hurricane season in the locality for which said vessels were intended, and that by reason of the delay in sailing, caused by the defendant's negligence, the vessels encountered a violent hurricane on the voyage to Porto Rico, by which all of said vessels were severely injured, and the two barges totally lost, to the great damage of the plaintiffs. The case was matured and came on to be heard on the 16th day of April, 1901, when, by agreement of the parties, the matters in issue were tried by the court without a jury. On the 6th day of May, 1901, the rulings and findings of the court, on the matters so submitted to it, were duly made and filed, and on the 27th day of May, 1901, judgment was entered for the plaintiffs for the sum found by the court in their favor. From such judgment the said plaintiffs sued out the writ of error we are now to dispose of. The court below found that the tug should have been completed for delivery on February 1, 1900, and the barges on April 1, 1900; that there was an inexcusable delay in the delivery of the tug of 5 months and 20 days, and in the delivery of the barges of 2 months. Exceptions to the rulings and findings of the court in a number of particulars were duly taken by the plaintiffs, and they, by their assignments of error, insist that the damages allowed by the court were entirely inadequate.

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With the conclusion reached by the court below that there was an inexcusable delay in the delivery by the defendant of the vessels contracted for by the plaintiffs, we are in entire accord. Therefore the ascertainment of the proper measure of damages applicable to the circumstances found to exist in the present case will dispose of most of the assignments of error, as there were no exceptions by either plaintiffs or defendant below to the action of the court on the prayers submitted. The court below rejected the plaintiffs' claim for damages based upon the fact that the vessels were intended to be used by the plaintiffs in connection with their sugar business in Porto Rico, and that the failure to deliver the vessels within the time stipulated in the contract subjected the plaintiffs to great expense for freight and lighterage, and deprived them of profits that they would otherwise have made; and also rejected the claim for damages alleged to have been caused by the delay in sailing, and the damages, if any, of the hurricane season, charged to have been caused thereby. It will be observed that the contracts required the delivery of the vessels at Sparrow's Point, and not in Porto Rico, and yet much of the evidence offered by the plaintiffs tended to prove the unusual risk and the great cost of taking a tug as small as the one so built and delivered, and barges as shallow as those contracted for, on a voyage of over 1,200 miles from the Chesapeake Bay to Porto Rico. The evidence offered on the subject of rental value had reference to the use of the vessels at Porto Rico, where it was conceded they were intended for use; but their arrival at Porto Rico, and their profitable utilization at that point, were so uncertain, and so entirely conjectural as to necessarily exclude all claims for loss founded upon their use in that country. The contracts made no reference to the arrival of the vessels at Porto Rico, but, on the contrary, distinctly provided for the delivery of the same before any effort was made to remove them to Porto Rico. It does not appear from the evidence that a tug could have been rented in Porto Rican waters during the sugar season of 1900 at any price, and it appears that there were very few barges to be had there under any circumstances, and it is quite evident that such conditions existed as a result of the great cost and the extreme risk attending the efforts to take such vessels from the United States to that section.

In cases of this character, speculative damages are, as a rule, excluded. The indemnity of the vendee is the actual loss sustained by reason of the vendor failing to comply with his contract; and, where there is an absence of fraud, the vendee has never been allowed damages remotely consequential, and resting in mere speculation. In such cases parties should not be held liable for losses which they could not reasonably have anticipated, and which they did not contemplate when the contract was entered into. It is hardly possible that the damages now claimed by the plaintiffs in error could have been in the contemplation of either of the parties to the contracts under which the vessels before mentioned were constructed. Naturally, the vendor in this case presumed that, in the event of a breach on its part, the damages awarded would be proportionate to such recovery

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as would be allowed it in case of a breach by the vendee in failing to pay the purchase money when the vessels were delivered at Sparrow's Point, and it is well established that such recovery would be limited to the contract price of the vessels, with legal interest thereon. Damages of the character now insisted upon by the plaintiffs in error are so uncertain, and have reference to so many unforeseen and changing contingencies, that no reasonable basis for properly ascertaining their amount can be established. It would be a mere calculation of chances by juries and by courts, producing results not conducive to the due administration of justice, and deterring prudent men from making contracts like those now under consideration, to the great detriment of business and commercial affairs. It does not appear from the contracts, nor from the correspondence preceding them, nor from the conduct of the parties during the time the vessels were being built, that the defendant below was expected to see to their safe arrival at Porto Rico, or that there would be any special loss to the plaintiffs if delay should occur in the time of delivery. No penalty for delay is found in the contracts, and certainly the plaintiffs did not act as if they regarded time as material, or considered prompt delivery of the completed vessels as essential. On the contrary, they directed various changes to be made in the manner of the construction of the tug,—alterations which they must have realized would cause considerable delay,—and after the completion of the barges they did not take possession of them until six weeks had elapsed. We refer to these facts, fully disclosed by the evidence, for the purpose of showing the absence of such special circumstances as would make other damages than those we have indicated, proper to be assessed because of the breach by the defendant relating to the delay in delivering the vessels. The court below allowed the plaintiffs the sum representing the interest at 6 per cent. per annum, on the payments made by them prior to the delivery of the vessels, for the full time resulting from the delays, and we find no error in that judgment.

The following cases bear upon the questions raised by the assignments of error, and, in our opinion, direct the conclusion we have reached concerning them: Howard v. Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Taylor v. Maguire, 12 Mo. 313; Hadley v. Baxendale, 9 Exch. 341; Primrose v. Telegraph Co., 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883; The Ceres, 19 C. C. A. 243, 72 Fed. 936, 943; Drug Co. v. Byrd, 34 C. C. A. 351, 92 Fed. 290; Railroad Co. v. Bucki, 16 C. C. A. 42, 68 Fed. 864; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; Oil Co. v. Schlens, 59 Md. 31, 43 Am. Rep. 537; Blanchard v. Ely, 21 Wend. 342, 34 Am. Dec. 250; Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293.

There is no error in the judgment complained of, and the same is affirmed.

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SOUTHERN RY. CO. v. CRAIG.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 404.

1. MASTER AND SERVANT—RAILROAD TRAINS—MODE OF OPERATION—AVOIDING COLLISIONS BETWEEN TRAINS—ORDINARY CARE.
Plaintiff's intestate, a railroad conductor on an extra train, had orders to precede a delayed regular train into defendant's yards. No instructions were given to look out for any other train on entering the yards. Intestate was killed in a collision with a switching engine in the yards. No notice of the approach of the extra train had been given to those on the switch engine. The company's rules, known to intestate, gave the right of way to switch engines in the yards, and required that extra trains must approach and run through yard limits under full control. The evidence as to whether intestate's train was under full control was conflicting. The night of the accident was shown to have been dark and foggy. *Held* that, notwithstanding the rules of the company, it was the duty of the crew of the switching engine to exercise ordinary care in avoiding collisions with incoming trains.

2. SAME—ORDINARY CARE—INSTRUCTIONS.
An instruction that the crew of the switching engine should take proper precautions against collisions with incoming trains, the character of such precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals, was correct.

3. SAME—OBSERVANCE OF RULES—QUESTION FOR JURY.
The question as to whether intestate observed the rule of having his train under full control on entering the yards was for the jury.

4. SAME—EXCESSIVE DAMAGES—APPEAL.
Where, in an action for the death of plaintiff's intestate, the instructions are proper, and the record shows no attempt to magnify the injury or pain, nor any appeal to the passion, prejudice, or sympathy of the jury, nor indication that the jurors were so influenced, the appellate court will not disturb a verdict on the ground of excessive damages.

In Error to the Circuit Court of the United States for the District of South Carolina, at Columbia.

Thomas P. Cothran, for plaintiff in error.
J. E. McDonald, for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and BOYD, District Judges.

BOYD, District Judge. This action was commenced in the court of common pleas for Fairfax county, in the state of South Carolina, to recover damages for the death of Laurence S. Harrison, the intestate of Craig, the defendant in error, alleged to have been caused by the negligence of the plaintiff in error on the 15th of November, 1899. Upon petition of the plaintiff in error, the Southern Railway Company, the case was removed to the circuit court of the United States for the district of South Carolina for trial. A trial was had before Simonton, circuit judge, and a jury, at Columbia, S. C., on the 13th and 14th days of December, 1900, and a verdict for $12,500 returned by the jury in favor of the administrator, and judgment was thereupon rendered by the court for said sum as

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damages against the plaintiff in error. The case comes here for review upon a writ of error sued out by the railroad company.

Harrison, the intestate of the administrator, Craig, was in the employment of the Southern Railway Company as a conductor, and on 15th of November, 1899, was in charge of a ballast or gravel train on the railroad of the company. Intestate's train was numbered and called "Extra 555," that being the number of the locomotive attached to it and operated by J. W. Fetzer, engineer. During the afternoon of the 15th of November, 1899, Extra No. 555 was engaged in work along the line of the Southern Railway near a place called "Pomaria," about 30 miles from Columbia. At 8:22 p. m. on the said day an order was issued by the railway company's superintendent, and received by intestate and his engineer, directing them to run Extra 555 from Pomaria to Columbia. At Allston, a station on the route from Pomaria to Columbia, an order was received by intestate and his engineer, at 9:02 p. m., to the effect that their train would run ahead of train No. 62, the latter being a regular passenger train, due at Columbia at noon that day, but which was more than 10 hours late. On the way from Allston to Columbia, at Bookman's, at the request of the engineer, who had been recently employed by the railway company, and who was new upon the yard and block system, the intestate left his caboose, and went upon the locomotive to pilot the engine through the yard at Columbia. Extra 555, consisting of 17 cars, loaded with ballast, drawn by the locomotive in charge of Fetzer, reached Columbia at 10:55 p. m. The night was very dark and foggy, and as Extra 555 was moving into Columbia on the main track, and having entered the limits of the yard, the switch engine which was being operated on the yard, whilst running backward, pulling a number of cars from a side track onto the main line, collided with intestate's train, and he was killed in the collision. There was conflict of testimony as to the rate of speed at which the two trains were running when the collision took place. Fetzer, the engineer on Extra 555, testified that his train was running at about 4 miles an hour; that he had it under full control; and that, from the way the engines came together, it was his opinion that the speed of the switch engine at the time was 12 or 15 miles an hour. The fireman on Extra 555 testified that he was on the train, and that it was running 10 miles an hour; and Hart, the flagman on the same train, testified that it was running 15 miles an hour. Foulke, the engineer, and Stevens, the fireman, on the switch engine, both testified that its speed was only 4 or 5 miles an hour. Extra 555, as it approached the place of collision, was coming up a heavy grade, and as it entered the yard at Columbia it made no stop to ascertain if the track was clear, and no torpedoes were set or flagmen stationed to notify the extra not to proceed. As the extra was running on the main line after it entered the yard limits, the engineer, Fetzer, saw the light of the switch engine coming backward, running onto the line, about 50 yards in front, and he then put on the emergency air brakes, blew his whistle, and reversed his engine, but this was too late to prevent the collision. The operator of the switch engine was

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not notified by the superintendent that Extra 555 was coming. There was a rule of the company which gave the switch engine the right of way within the yard limits in Columbia over all trains except regular trains, and it was shown upon the trial that intestate had notice of this rule. There was also a rule of the company that extra trains must approach and run through yard limits under full control. Intestate also had notice of this rule.

At the close of the testimony the counsel for plaintiff in error requested the court to instruct the jury as follows:

"Under the rules the switch engine had the right to the use of the main line, protecting itself against only regular trains. The extra was required to proceed through the yard under full control. This requirement applied, not only to the speed of the train, but to such precautions in addition as the dark and foggy night demanded. The switch engine, having the right of way over the extra, it was the duty of the other to be on the lookout for the switch engine, and to take such precautions as the situation demanded to prevent a collision."

The court responded to the said request for instructions as follows:

"Yes, but it did not relieve the switching engine from the exercise of ordinary care in avoiding collisions with trains entering the yard."

To this instruction modifying the defendant's said request the defendant duly excepted before the jury retired. The defendant further requested the court to instruct the jury as follows:

"The rules of the company do not require notice of the movements of extra trains to be given to the crew of a switch engine working within the yard limits, and it is not negligence on the part of the defendant not to have given such notice."

The court charged said request for instructions, but added the following:

"But the crew of the switching engine should take all proper precautions against collisions with trains entering the yard, the character of these precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals."

To this instruction modifying the defendant's said request the defendant duly excepted before the jury retired.

After the verdict the defendant moved for a new trial upon the following grounds: (1) That the collision was due to the negligence of the engineer of the extra engine, a fellow servant of the intestate; (2) that the court erred in instructing the jury that the switch crew should have taken precautions against the approach of the extra train, owing to the darkness and foggy condition of the weather; (3) that the damages were excessive. The court overruled the motion, saying, as to (1): It was a question of fact about which the court had been unable to form a pronounced opinion, and on that account would not disturb the verdict. (2) Notwithstanding the rule requiring extra to look out for all extra trains, it was the duty of the switch crew, owing to the existing conditions, the fogginess of the night, etc., to observe ordinary care and precautions so as to prevent collisions with incoming trains. This duty was imposed upon them by the law, independent of any rule

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of the company. (3) That, but for the decision of the supreme court of the state of South Carolina in case of Nohrden v. Railroad Co., 59 S. C. 87, 37 S. E. 228, holding that damages for wounded feelings could be recovered, he would have reduced the verdict. To which refusals and rulings the defendant duly excepted.

We find no error in the modifications made by the court in giving the instructions requested. After giving the first instruction requested, the court simply said, in substance, that it was the duty of the switching engine to exercise ordinary care in avoiding collisions with trains entering the yard. We cannot conceive of any circumstances under which the operators of a railroad train are relieved from the use of ordinary care to prevent collisions with other trains. This is a duty that devolves upon those running and operating trains at all times. What constitutes ordinary care depends upon the relationship of the parties and the circumstances under which they act, and what would be ordinary care or common prudence under certain conditions would not be under others. It would certainly be incumbent upon the operator of a switching engine moving in a railroad yard, where regular and extra trains are coming and going, to observe a greater degree of caution on a dark, foggy night, when sounds are less distinct, and signals more difficult to be seen, than on a clear night, when such conditions do not prevail; and we therefore think that the second instruction requested, as modified by the court to the jury, was also properly given.

Intestate had orders from the superintendent of the company to proceed with his train to Columbia ahead of No. 62, a regular train, which was belated; and it was the duty of the intestate and his engineer, Fetzer, to obey this order. It was not indicated to them that it would be necessary to look out for any other train or for anything to impede their entrance into Columbia upon the main line, observing the rule, however, that they must approach and run into the yard limits under full control. As to whether intestate observed this rule or not is a question about which there was a conflict of testimony, and which was properly left to the jury to determine.

The only question further for our consideration is that involved in the motion for a new trial on the ground that the damages awarded by the jury are excessive. It is a general principle that an appellate court will be very reluctant to substitute its judgment for that of the jury of the court below, where the judge presiding at the trial has refused to disturb a verdict on account of the amount of the recovery. 8 Am. & Eng. Enc. Law, p. 629. The instructions having been proper, and there having been no attempt, so far as the record shows, at the trial, to magnify the injury or pain, and there having been no appeal to passion, prejudice, or the sympathy of the jury, and nothing at the trial to indicate that the jurors were influenced by any such feelings, the appellate court will not disturb the verdict. Whether the amount of damages allowed in this case is excessive must be determined by the knowledge, judgment, and sound discretion of the presiding judge. Every case must

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necessarily depend to a great extent upon its own peculiar facts. Engler v. Telegraph Co. (C. C.) 69 Fed. 185.

The judgment of the circuit court is affirmed.

THOMASON v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 413.

1. ACTION FOR NEGLIGENCE—DIRECTION OF VERDICT.
Where, in the opinion of the trial court, the evidence is insufficient to sustain a verdict for plaintiff, there is no error in an intimation of an intention to direct a verdict for defendant.

2. NEGLIGENCE—TURNTABLE—PLEADING—BURDEN OF PROOF.
Where a complaint alleged that plaintiff, while attempting to save his younger brother from being crushed by a turntable on which he was playing, was caught between the track of the turntable and the stationary track, and thus crushed and mangled, and there was no allegation of any special negligence of defendant towards plaintiff, the burden of proof was on plaintiff to show that he was injured while rescuing his brother from imminent danger in which he was placed by defendant's negligence, and that he received such injuries while on the turntable for that purpose only.

3. SAME—MAINTENANCE—NEGLIGENCE.
The maintenance of railroad turntables is not per se negligence, though the manner of maintaining them may be negligence.

4. SAME—EVIDENCE—SUFFICIENCY.
In an action for injuries sustained by a boy 12 years old, while trying to save his brother from being crushed by a turntable, the sole testimony was that of one witness, who took plaintiff out of the turntable. The testimony was that plaintiff said "he tried to catch the turntable or tried to hold it off his brother, and got fast in there himself." "He said he caught the turntable, and tried to stop it off his brother." *Held*, that direction of a verdict for defendant was proper.

5. SAME—NONSUIT—JUDGMENT FOR COSTS.
Where plaintiff, in an action for personal injuries, takes a nonsuit, a judgment against him for costs is the only judgment it is proper to enter.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

J. H. Merrimon and Locke Craig (P. J. Sinclair, on the brief), for plaintiff in error.

Charles Price, for defendant in error.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

PURNELL, District Judge. Plaintiff in error, a minor 12 years of age, by his next friend, seeks to recover $30,000 damages for personal injuries received at a turntable maintained by the defendant railway company at Old Fort, N. C., and alleges the injury was caused by the negligence of the defendant. The issues arising on the pleadings were three: First, was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Second, did the plaintiff

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contribute to his injury by his negligence? Third, what damages, if any, is the plaintiff entitled to recover?

After both parties announced they had closed, the trial judge reviewed the testimony, and, upon an intimation of an intention to instruct the jury that the plaintiff was not entitled to recover, the plaintiff took a nonsuit and appealed. This is the practice in North Carolina, and no question is raised in regard to such practice.

Plaintiff excepted to an intimation of the court of an intention to sustain the motion of defendant to direct the jury to return a verdict in favor of the defendant on the first issue, and that the evidence introduced by the plaintiff would not sustain an answer in the affirmative to the issue, was the plaintiff injured by the negligence of the defendant company as alleged? Much of the brief and argument on the hearing is directed to an effort to convince this court that there was error in the intimation of the trial judge that a verdict would be directed. Such course on the part of the court is in accord with the established practice in the courts of the United States. Whatever the rule may be elsewhere, in the courts of the United States, as said by the chief justice in delivering the opinion in C. A. Treat Mfg. Co. v. Standard Steel & Iron Co., 157 U. S. 675, 15 Sup. Ct. 718, 39 L. Ed. 854, "when the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant." To the same effect is the rule laid down in numerous other decisions.

In Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780, quoting Improvement Co. v. Munson, 14 Wall. 448, 20 L. Ed. 867, it was held the true principle was: "If the court is satisfied that, conceding all the inferences which the jury can justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." This rule has been followed in Montclair Tp. v. Dana, 107 U. S. 162, 2 Sup. Ct. 403, 27 L. Ed. 436; Railroad Co. v. Woodson, 134 U. S. 621, 10 Sup. Ct. 628, 33 L. Ed. 1033; Peoples' Bank of Greenville v. Ætna Ins. Co., 20 C. C. A. 630, 74 Fed. 507; Sloss Iron & Steel Co. v. South Carolina & G. R. Co., 85 Fed. 138, 29 C. C. A. 50; Patton v. Railroad Co., 111 Fed. 712, at last term; Supreme Lodge v. Beck, 181 U. S. 52, 21 Sup. Ct. 532, 45 L. Ed. 741, and many decisions.

In the case last above cited, the supreme court, quoting from Railroad Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642, says:

"It is undoubtedly true cases are not to be lightly taken from the jury; at the same time the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunities as jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

If, therefore, in the opinion of the trial judge, the evidence was insufficient to sustain a verdict for the plaintiff, there would have been

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no error if he had directed a verdict. He intimated an intention to do so when plaintiff took a nonsuit. Was this error?

The allegations in the complaint are that George, a brother of the plaintiff, five years of age, was playing on the turntable, and had set the same in motion; that said George was about to be crushed by the track of the turntable coming in close proximity to the stationary track; that plaintiff saw the great peril of his brother, and was not near enough to take him off the turntable before he would be crushed or killed; that he attempted to save his brother George, and did save him, by attempting to lessen the motion of the turntable, and in such attempt was caught between the track of the turntable and stationary track, and was thus crushed and mangled and seriously injured. Having made the allegation, the burden was on the plaintiff to furnish proof thereof. Allegation alone will not warrant a verdict. It was incumbent on him to show he was injured by the negligence of the defendant while he was engaged in rescuing his brother from imminent danger, in which he was placed by reason of the negligence of defendant, and he incurred or received such injury while on the dangerous machine for that purpose only.

Plaintiff was over 12 years of age, and, it seems, capable of distinguishing between places of safety and places of danger. The testimony is he was a bright boy, accustomed to being about the trains selling fruit and for other purposes. In North Carolina it seems to have been the rule, recognized by the supreme court, that even infants, capable of so distinguishing between places of danger and those of safety, could not recover damages when they wantonly placed themselves in places of danger, and their acts were the proximate cause of the injury. In Manly v. Railroad Co., 74 N. C. 655, a child 10 years of age fell asleep on a railroad truck, and it was held there could be no recovery; and to the same effect is the decision in the case of Murray v. Railroad Co., 93 N. C. 92, where a boy 8 years of age was injured while riding on the plow of a yard engine. But it is unnecessary to pursue this line of decisions in the case at bar. The rule is conceded to turn on the question of intelligence, and applicable more to the second issue, which is not under consideration.

Having made the allegation, the burden was on the plaintiff. There is no allegation of any special negligence on the part of the defendant towards the plaintiff. Turntables are necessary to the operation of railroads. Their maintenance is not per se negligence, though the manner of maintaining them may be. The plaintiff was not introduced as a witness, and the only witness who testified as to how he was injured or why he was on the turntable was a witness named Stepp, who took him out of the turntable. Stepp's testimony was, "Plaintiff said he tried to catch the turntable or tried to hold it off his little brother, and got fast in there himself." "He said he caught the turntable, and tried to stop it off his little half-brother." This was all the testimony as to how he came there and what he was doing there. There is no evidence to show that when he saw his brother in a dangerous position he was away from danger himself. In short, this is all the testimony. Is this sufficient

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evidence to sustain plaintiff's allegations? to justify a verdict in the affirmative on the issue, was plaintiff injured by the negligence of defendant? The trial judge thought not. This court concurs in that opinion. An affirmative answer to the issue could not be justified on this testimony, but would, of necessity, have been based on conjecture.

Many of the decisions cited in the brief and by plaintiff's counsel assert sound propositions of law, but they are not applicable to this case, because of a difference in the facts. Having taken a nonsuit, the judgment rendered against plaintiff for costs is the only judgment it was proper to enter. Hence there is no force in the exception to the judgment. A careful examination of the record does not disclose any error.

There is no error. Affirmed.

GORHAM v. BROAD RIVER TP.

(Circuit Court, D. South Carolina. January 31, 1902.)

WRIT OF ERROR—AMENDING PETITION NUNC PRO TUNC.

Leave to amend a petition for writ of error nunc pro tunc, after the case has been removed by writ of error, though perhaps unnecessary, a formal petition for the writ not being essential, will be granted, there being a clear clerical error in using the word "defendant" for "plaintiff."

At Law.

See 109 Fed. 772.

J. E. Burke, for plaintiff.

Wm. B. McCaw, and D. E. Finley, for defendant.

SIMONTON, Circuit Judge. The present is a motion by the plaintiff's attorney to amend his petition for writ of error granted in this case. The defendant's attorney was duly notified thereof, and was represented at the hearing. The judgment in the case tried before the court without a jury resulted in a verdict for the defendant, Mr. Burke, who in the cause represented the plaintiff, filed a petition for a writ of error, accompanying the petition with assignment of errors, the bond of plaintiff, and citation in the name of plaintiff. By an error he begins the petition for the writ in these words: "The defendant, by counsel, comes and says that in the record and proceedings in this cause there is manifest error in this, to wit: in the particulars appearing in the assignment of errors hereto annexed as part of this petition." Then he goes on: "Wherefore, for these and other errors apparent on the record, the defendant, by counsel, prays writ of error," etc. He signs it counsel for petitioner. The writ of error granted is to the plaintiff by name, the bond is that of plaintiff, the citation is in the name of plaintiff. The assignment of errors charge error in not granting judgment to plaintiff.

The first question is, can this court entertain this motion, the term having elapsed? It being a clerical error clearly, the court has jurisdiction to do this. In re Wight, 134 U. S. 136, 10 Sup. Ct.

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487, 33 L. Ed. 865. Can it entertain the motion, the cause having been removed by writ of error to the circuit court of appeals? In U. S. v. Vigil, 10 Wall. 423, 19 L. Ed. 954, the supreme court sustained an amendment by the circuit court of a record sent up on appeal, in order that it might appear that the appeal was taken in open court; and this was also recognized as proper practice in Gonzales v. Cunningham, 164 U. S. 615, 17 Sup. Ct. 182, 41 L. Ed. 572. If this court can entertain this motion,—and from these cases it would appear that it can,—then should the amendment be granted. A petition for writ of error is not essential if the writ be allowed and citation issued. Brandies v. Cochrane, 105 U. S. 262, 26 L. Ed. 989; Brown v. McConnell, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495. The last case says that the statute makes no special provision as to the form of an allowance of appeal. The acceptance of security and the signing of citation is, in legal effect, the allowance of an appeal. The circuit court of appeals, Fifth circuit, in Trust Co. v. Stockton, 18 C. C. A. 408, 72 Fed. 1, decided that a formal petition for a writ of error is not necessary. Even in the case of an appeal it is not necessary if the judge without it signs a citation and approves the bond. Brandies v. Cochrane, supra. If it is necessary, an amendment should be allowed. Every step taken after petition filed shows that the plaintiff was the party aggrieved, who sought a correction of the judgment. The defendant cannot suffer by the amendment.

Let the plaintiff have leave to amend his petition nunc pro tunc so as to strike out the word "defendant" wherever it occurs, and insert the word "plaintiff."

SOUTHERN RY. CO. v. MAYES.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 421.

1. INSTITUTION OF SUIT AGAINST FOREIGN CORPORATION — ADMISSION OF PRESENCE WITHIN STATE.
   The institution of a suit against a foreign corporation in North Carolina is an admission on plaintiff's part that it is doing business and is to be found within that state at the time.

2. SAME—PERSONAL INJURIES—WHAT LAW GOVERNS.
   In an action for injuries to the person, brought against a foreign railroad corporation, at plaintiff's election, in North Carolina, where the injury occurred, plaintiff's rights must be determined by the laws of that state.

3. SAME—LIMITATIONS—COMPUTATION OF PERIOD.
   Code N. C. § 162, provides that, where a person is out of the state when an action accrues against him, it may be commenced within the time prescribed after his return, and if after such accrual he departs from and resides out of the state, or remains continuously absent therefrom, for one year, the time of his absence shall not be computed. *Held*, that where a foreign railroad corporation was operating its road and doing business in North Carolina at the time of plaintiff's injury, and continued to do so during the entire period limited for commencing suit therefor, an action commenced thereafter was barred; the statute recited not being applicable to such case.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

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Charles Price, for plaintiff in error.
Charles W. Tillett (of Jones & Tillett), for defendant in error.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

JACKSON, District Judge. This is an action brought by the defendant in error against the plaintiff in error to recover damages growing out of a collision which occurred on the 11th day of April, 1897, between the trains of the defendant company, near Harrisburg, N. C., whereby it is claimed that the plaintiff, who was a passenger on one of the trains, was greatly injured and damaged. It is not denied that the collision took place at the time and place alleged in the plaintiff's complaint, in the state of North Carolina; that the plaintiff in the action was greatly injured thereby; and that by reason of that fact he instituted his suit in the state of North Carolina to recover damages because of the alleged injuries.

The bringing of the suit by the plaintiff in the state of North Carolina is an admission upon the part of the plaintiff that the defendant corporation was doing business in, and was to be found in, that state; otherwise there would be no jurisdiction over the defendant corporation, either in the federal or state courts. In this action it is to be noticed that upon the trial of this case the court below took judicial notice of the fact that the defendant corporation, as such, was a citizen of the state of North Carolina, and was operating within the boundaries of that state about 1,200 miles of railroad.

This action was brought on the 18th day of September, 1900, as appears from the date of the summons, which, by the provisions of section 161 of the Code of North Carolina, is the date when an action is commenced. To this action the defendant railroad company interposed a plea of the statute of limitations, which is the only question presented in the record of this case for the consideration of the court; and the assignment of error is that the court below erred in holding that the cause of action of the defendant in error was not barred by the statute of limitations of the state of North Carolina, to which ruling of the court below the plaintiff in error filed an exception.

The Southern Railway Company, though a foreign corporation, was nevertheless a citizen of the state of North Carolina at the time of the collision,—at least, so far as the rights of any citizen interested in a claim or demand against it. It was a legal entity, and as such represented the rights of the corporators, and had the same legal power as a natural person either to assert or defend its rights. This principle of law is so well established at this date that we deem it unnecessary to cite authorities to support it.

The claim of the plaintiff below is that the defendant corporation was not to be found in the state of North Carolina, so that process could be served upon it, and, under section 162 of the Code of North Carolina, the statute of limitations does not bar a recovery on this action. The facts in this case show that the defendant com-

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pany was at the time of the accident doing business in the state of North Carolina, and that it has so continued to do up to the date of the said summons, and in fact ever since, and up to the trial of the case. The plaintiff concedes by his action that the defendant company was at the time of the institution of this suit doing business in the state of North Carolina, otherwise he could not have maintained his action in this form. It clearly appears that the status of the defendant company in the state of North Carolina at the time of the accident was the same as at the commencement of the action. If this is true, then the defendant company, although a foreign corporation, was engaged in running its trains over its railroad, and was to be found within the limits of the state, for more than three years after the collision, and prior to the institution of this action. This is an action for damages to the person of the plaintiff, and it is well settled that an action of this character can be maintained wherever the wrongdoer is found. In this case the wrongdoer, as it is claimed by the plaintiff, is the defendant company, which was operating a railroad in the state of North Carolina; and the accident by which the plaintiff was damaged occurring in that state, and he having elected to bring his action in North Carolina, his rights must be determined by the laws of that state.

It is claimed by the plaintiff that, by section 162 of the Code of North Carolina, the defendant company cannot rely upon the plea of the statute of limitations (which is three years) to defeat the action, for the reason that the limitation had not begun to run before the commencement of the action. Section 162 of the Code of North Carolina provides that:

"If when the cause of action accrue, or judgment be rendered, or docketed against any person, he shall be out of the state, such action may be commenced, or judgment enforced, within the time, herein respectively limited, after the return of such person, into this state, and if, after such cause of action shall have accrued, or judgment rendered or docketed, such person shall depart from, and reside out of the state, or remain continuously absent therefrom, for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action, or the enforcement of such judgment."

It will be observed that the statute relied upon has no application to the facts in this case. In the first place, the defendant below was not at any time within the three years after the accident and before the commencement of this suit out of the state; and, in the second place, it did not depart or reside out of the state, or remain continuously absent, for the space of one year or more. Neither provision of the statute has any application to the facts of this case; for said facts show conclusively that the defendant corporation ever since it commenced doing business in the state of North Carolina has had a local abode and habitation in that state, for more than three years prior to the institution of this action. The defendant company is, within the provisions of the fourteenth amendment of the constitution of the United States, a person, having all the rights that a natural person may have in actions for or against it. Assuming this position to be true, we reach the conclusion that the defendant corporation is entitled to rely upon the

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statute as a defense to this action, and that more than three years had elapsed before the suit was commenced.

For the reasons assigned, we are of the opinion that the court below erred in overruling the plea of the statute of limitations, and that the case should be reversed. Reversed.

LYMAN et al. v. WARNER et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 420.

1. LIMITATIONS—PARTIAL PAYMENT—ACKNOWLEDGMENT.
   Payment of interest on a note within three years prior to action thereon is an acknowledgment of indebtedness, taking it out of the bar of the statute.

2. CONTINUANCE—DISCRETION—REVIEW.
   Refusal to grant continuance cannot be reviewed, in the absence of a showing of abuse of discretion.

3. NOTE—ENFORCEMENT BY PURCHASER.
   A purchaser of a note for a valuable consideration may enforce its collection, though there was no indorsement or transfer of it.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Charles Price (F. A. Sondley, on the brief), for plaintiffs in error.

James H. Merrimon and Walter B. Gwyn (J. Gibbon Merrimon, on the brief), for defendants in error.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

JACKSON, District Judge. The defendants in error (the plaintiffs below) instituted their action against the plaintiffs in error (the defendants below), and alleged in their complaint that on the 19th day of October, 1894, A. H. Lyman and C. E. Lyman, defendants below, made and executed their promissory note, in writing, dated the 19th day of October, 1894, payable one year after date; that afterwards Mary E. Blakemore, to whom the note was executed, made and delivered the said note to B. F. Whitman, who likewise indorsed and delivered the same to Cornelia Blakemore Warner, for value, who was the owner and holder of the said note at the commencement of this action, no part of which has been paid to the plaintiffs. The defendants, A. H. Lyman and C. E. Lyman, filed their separate answers, in which they admit the execution of the note, but deny that Cornelia Blakemore Warner was at the time of the institution of this suit the holder and the owner of the note; and they also deny that there is anything due and owing by the defendants to her, and insist that the plaintiffs have no right to maintain this action, for the reason that no legal assignment or transfer of the note was ever made by Mary E. Blakemore to her. The defendants below also suggest, as a matter of defense, that the action is barred, for the reason that the right of action against them

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did not accrue within three years before the commencement of this suit. The first answer to this position is that this was a question of fact, which was submitted to a jury, and they found against the defendants. The second answer is that the defendants paid the interest on this note up to April 19, 1898, within three years prior to the institution of this action. This payment of interest was an acknowledgment of the debt, and an implied promise to pay it. 19 Am. & Eng. Enc. Law (2d Ed.) 327, and the cases there cited. In North Carolina, from which state this case comes, it was held in the case of Hewlett v. Schenck, 82 N. C. 234, quoted in Bank v. Harris, 96 N. C. 118, 1 S. E. 459, that "a partial payment, though the evidence need not be in writing, being an act, and not a mere declaration, revives the liability, because it is deemed a recognition of it, and an assumption anew of the balance." As the plaintiffs in error do not appear to rely upon this defense in their briefs, and have not assigned or complained of it as an error in the proceedings of the court below, we dismiss it without further consideration.

Nine grounds have been assigned by the plaintiffs in error for the consideration of this court:

In the first assignment of errors it is claimed by the appellants that the court below erred in refusing a motion of the defendants to continue the cause, and directing the case to proceed to trial at that time. A motion for the continuance of a cause, addressed to the trial judge, is a matter that always rests in the sound discretion of the court, and is subject to review only for the abuse of his discretion. This was the rule at common law, and, so far as we are aware, the courts of this country have usually followed that rule. The supreme court of the United States, in Woods v. Young, 4 Cranch, 237, 2 L. Ed. 607, ruled "that the refusal of the court below to continue the case could not be assigned for error." This court has in all of its subsequent decisions followed that case, and as late as the case of Means v. Bank, 146 U. S. 621, 13 Sup. Ct. 186, 36 L. Ed. 1107, held that "the question whether a trial shall be postponed on account of the absence of a witness for the defendant, and the illness of one of his counsel, is a matter of sound discretion, and will not be reviewed where no abuse is shown." See, also, 4 Enc. Pl. & Prac. 901, § 2, and notes 1 and 2. As the record in this case does not disclose that the trial judge abused his discretion in refusing a continuance of this case, we are of the opinion there was no error in overruling the motion.

The eight remaining assignments of error involve substantially the same question, and rest upon the fact, as is claimed by the defendants, that the plaintiffs had no right of action for the recovery of the amount of the note upon which this action was founded. It seems to us that a very brief review and discussion of the evidence in this case must dispose of the last eight assignments of error. The evidence taken in this case was all offered by the plaintiffs below, there being no evidence offered by the defendants. What the evidence of the plaintiffs proves and what it tends to establish must be accepted as the undisputed evidence in this case upon which

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the right of action depends. The evidence discloses that the two Lymans, the defendants below, borrowed from Mary E. Blakemore $3,000, payable one year after date; that when the note matured they did not pay it, but they paid the interest for some years on the note, and they finally ceased to pay the interest when they were called upon to pay the note. Some negotiations were had in reference to it. Miss Blakemore, the holder of the note, seems to have been in bad health. She gave instructions to Whitman to try and secure the payment of the note. In this Whitman failed. After the failure, the plaintiff in the action below, Cornelia Blakemore Warner, discovered that her sister was very much worried in not securing the payment of the interest, took the matter in hand, and went to Mr. Whitman and made arrangements with him to take up the note and pay it off, and held it as her own property. It appears from the evidence that B. F. Whitman, a cashier of a bank in Cleveland, and acting as an intermediary between Mary E. Blakemore, the payee and holder of the note, and the defendants, the two Lymans, made to the defendants, for Miss Blakemore, a loan of $3,000 for one year, for which they gave their joint note, upon which this action is founded; that when the note fell due it was not paid, nor was it renewed, but remained unsatisfied up to the date of the commencement of this action, though the interest was paid to April 19, 1898. It further appears that Mary E. Blakemore was in bad health, and the neglect of the obligors to pay off and discharge this obligation seemed to prey on her mind,—so much so that her sister, the plaintiff in this action, became so anxious about her sister Mary's condition that she determined to see what could be done to relieve her sister's anxiety. With this in view, she went to Mr. Whitman, the cashier. After some discussion between them, it was decided that he was to procure from Miss Blakemore the note and all the papers relating to the loan. In doing so he informed her that "arrangements had been made for the refunding of the loan." It is true that the loan was not refunded, but it is equally true that Miss Blakemore was desirous of getting the amount due her on the note paid. The note had been in the custody of Mr. Whitman for collection, for it was sent to him at Asheville for that purpose, which he failed to accomplish. When Miss Blakemore sent the note to him, she had, by her own proper indorsement, transferred the note to him, and he became vested with the legal title to it. It is true that after the note was indorsed he returned the note to her; but it is equally true that when she returned the note to him the second time the indorsement remained on the note unaltered, and by her action at that time he became the legal owner of the note, and could have maintained the action in his own name for the recovery of the amount due. After he got possession of the note the second time, he sold it to Mrs. Warner, the plaintiff in this action, for value, realizing the full amount due on the note. Upon this state of facts the defendants claim and insist that Mrs. Warner cannot maintain this action, and that she had no legal title to the note. We do not think that this defense to this action is either good in ethics or sound in law. The note was payable to

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the order of the payee, and was therefore negotiable. The payee, by proper indorsement, had assigned and transferred the note to Whitman; and he, having possession of the note, transferred it, by his own proper indorsement without recourse, to the plaintiffs in this action. This case was tried before a jury, and the jury found for the plaintiffs, presumably under the direction of the court, as was decided in Thompson v. Onley, 96 N. C. 9, 1 S. E. 620, that, to give title to a note or bond, an indorsement or assignment was not necessary, and the question of the ownership was a matter of fact for the jury to decide.

The answer of A. H. Lyman to the second paragraph of the plaintiffs' complaint affirms that the indorsement on the note in question by Mary E. Blakemore was purely for the purpose of collection. No such condition is attached to the indorsement, and, under the facts proved in this case, it is evident that Mary E. Blakemore intended to give Whitman the full control of the note, in order that he might take such course as, in his judgment, would best subserve her interest and secure the money. No proof is offered by the defendants in support of this allegation in that answer, and for this reason we dismiss the further consideration of that allegation. But suppose, in point of fact, that there was no indorsement or transfer of the note to Whitman or to the plaintiffs; we think that the plaintiffs could maintain this action, even though the note had not been indorsed by the payee. It is a well-settled principle of law that, where the note is payable to bearer or to a designated person, it may be negotiated so as to pass the legal title by simple delivery, without indorsement. In this case the evidence conclusively proves that the payee of this note desired to secure the payment of it. If she received the full amount of the note from Whitman, who was the agent to collect this note, it was a matter of no legal importance, so far as she was concerned, how he secured the money for that note. What she wanted was her money; and her sister, Mrs. Warner, desiring to relieve her of her great anxiety about the payment of this note, went to her authorized agent and purchased the note for a full consideration, and thereby acquired legal ownership of the note. In support of this position we cite 4 Am. & Eng. Enc. Law (2d Ed.) 250, note, giving a long line of authorities. In any view that we can take of this case,—whether this note was transferred by proper indorsement, or whether it was transferred either with or without indorsement, we hold that the plaintiffs in this action, having purchased the note for a valuable consideration, have a right to enforce its collection; and, as we have before said, the defendants have no defense, either in ethics or in law, against the recovery of a judgment in this action.

For the reasons assigned, the judgment of the court below is affirmed.

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CAU v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,081.

CARRIERS OF GOODS — LIMITATION OF LIABILITY FOR LOSS BY FIRE — VALIDITY. A shipper is bound by a provision in a bill of lading exempting the carrier from liability for loss of the goods by fire, where he was chargeable with knowledge that the bill contained such clause, and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

B. K. Miller, for plaintiff in error.

N. W. Finley, W. W. Howe, W. B. Spencer, and C. P. Cocke, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This was an action by the plaintiff in error to recover the value of certain cotton delivered to the defendant in error to be transported from Texarkana, Tex., to the port of New Orleans, La., at an agreed charge for freight of 60 cents per 100 pounds. The petition alleged that, in evidence of the contract, the company delivered to the plaintiff in error its certain bills of lading; that while the bales of cotton were awaiting further shipment, but after they had been received by the railway company as a common carrier and were in its possession as such, and after it had issued its bills of lading to carry the same, the whole of the cotton was destroyed by fire. The petition alleged, further, that by the third clause of the bills of lading the railway company attempted to limit its liability as a common carrier, declaring that it should not be liable for any damages to, or destruction of, the cotton caused by fire; that this clause is wholly inoperative, null, and void against the petitioner, on the following grounds: (1) That plaintiff did not receive any consideration from the railway company for such limitation of its common-law liability; (2) that the destruction of the cotton by fire was due to, and caused by, the negligence of the company, its agents and servants; (3) that the cotton was received by the railway company prior to the issuance of the bills of lading, and it was without authority, after the receipt of the cotton as a carrier, to limit its liability under the common law. The answer, besides the general issue, set up specially the terms of the third clause of the bills of lading, which, so far as necessary to recite, expressed "that neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damage to, or destruction of, said cotton by fire." The case came on for trial, and, the evidence having been closed, counsel for the defendant moved the court to direct a verdict in favor of the defendant, which motion was granted, and the jury, under the direction of the judge, returned their verdict, "We, the jury, find a verdict in favor of the defendant," upon which judgment was duly entered. In act-

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ing on the plaintiff's motion for a new trial, the learned judge of the circuit court said:

"The sole question in this cause is whether the clause in the bill of lading exempting the carrier from liability for loss by fire is binding on the plaintiff. No negligence is charged against the carrier. The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law, and to have been aware that the carrier, if he so desired, was compelled to take the freight under its common-law liability, without the fire clause. Furthermore, it was proven that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office, and in his own time filled them, and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as matter of fact the plaintiff's agent knew of and assented to the fire clause. Shippers have been held bound by the fire clause in a bill of lading, even when they claimed that they did not know that the clause was in the bill of lading, provided they were afforded a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held, under such circumstances, not to avail the shipper. But, of course, the present cause is one in which, as matter of fact, the shipper knew, or must be held to have known, that the bill of lading contained the fire clause. I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud, or misrepresentation by the carrier."

So far as it affects this case, the statement of the law embraced in the foregoing extract from the trial judge's opinion is fully supported by the leading case of York Mfg. Co. v. Illinois Cent. R. Co., 3 Wall. 107, 18 L. Ed. 170, which has been cited with approval by the supreme court as late as the case of The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419.

We have carefully examined the record submitted to us on this hearing, and concur in the view taken by the trial judge that there is nothing in the evidence which would invalidate the bills of lading for duress, concealment, fraud, or misrepresentation by the carrier.

The judgment of the circuit court is therefore affirmed.

CHARNOCK v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,082.

CARRIERS OF GOODS — LIMITATION OF LIABILITY FOR LOSS BY FIRE — VALIDITY.

A shipper is bound by a provision in a bill of lading exempting the carrier from liability for loss of the goods by fire where he was chargeable with knowledge that the bill contained such clause, and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

B. K. Miller, for plaintiff in error.

W. W. Howe, W. B. Spencer, and C. P. Cocke, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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PER CURIAM. This was an action very similar to that of Jovite Cau against the same defendant (just decided), 113 Fed. 91. It was for the value of cotton delivered to the defendant carrier, which issued to the shipper a bill of lading with the fire exemption clause identical in terms with that given in the Cau Case. The cotton was received on a country or plantation switch, which the defendant had put in about the time of the construction of its main line, and which for 10 or 11 years had been used by the planters conveniently adjacent thereto precisely in the manner that this shipment was made. There was a small platform and a small shelter to be used in connection with sending and receiving freight, according to its character and the other conditions at the time of handling, but no agent or employé of the company had ever been put or kept there for the purpose of receiving and guarding freight there received or delivered. The long-established practice was for shippers who had produce to be transported from that point to notify the nearest station agent of the fact, and of the number of cars desired, when the defendant would furnish the cars as requested, and, as soon as they were loaded by the shipper, promptly take them by the first one passing of its local freight trains to the point of destination. There is no evidence that any question or protest was made by this shipper to the contract as limited in the bill of lading. We concur with the trial judge in holding that the evidence does not tend to show negligence on the part of the carrier. There was no dispute as to the goods having been received by the carrier, nor as to the loss falling within the terms of the fire exemption clause. If there was negligence upon the part of the carrier the burden of proving that fact was on the plaintiff, and, as we have said, the proof offered by the plaintiff did not, in our opinion, tend to show such negligence. This case falls clearly within the authority of Clark v. Barnwell, 12 How. 272, 13 L. Ed. 985; Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160; York Mfg. Co. v. Illinois Cent. R. Co., 3 Wall. 107, 18 L. Ed. 170.

The judgment of the circuit court is affirmed.

SULLIVAN v. MILLIKEN.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,080.

BROKERS—RIGHT TO COMPENSATION—SUFFICIENCY OF SERVICES.

A declaration set out a writing by which defendant authorized plaintiff to sell for him certain timber lands and other property for a price stated, such authority to continue for 60 days. It alleged that, by defendant's request, plaintiff prepared a written memorandum more specifically describing the property; that plaintiff procured within the 60 days the making of a written contract between defendant and a third person, which was set out, and by which defendant agreed to convey the property on terms therein stated, and the other party agreed to have the same examined within 60 days, and to purchase the same if it should appear from said examination that the statements contained in plaintiff's memorandum were substantially correct; that, by reason of the premises, defendant became indebted to plaintiff for his services in the sum of

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$100,000, for which judgment was prayed. *Held*, that such declaration must be construed as one to recover commissions as a broker, and was demurrable as failing to state a cause of action, because, under the contract pleaded, plaintiff could recover only by proving (1) either that he had made an actual sale of the property, or (2) that within the time limited he had procured a purchaser able and willing to buy it on the terms stated, and that a sale was prevented by some act or default of defendant, neither of which facts was alleged.

McCormick, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Northern District of Florida.

This action was brought by William Alfred Milliken, a citizen of New York, against Martin H. Sullivan, a citizen of Florida. The case was first tried on a declaration containing 12 counts, and resulted in a verdict for the defendant, Sullivan. A new trial was granted by the circuit court, and the plaintiff amended his declaration by adding counts numbered 13 and 14. These counts differ but little, and counsel for the plaintiff (the defendant in error here) agrees that count No. 14 may be eliminated. The case was tried and is here considered as based on the thirteenth count, which will be referred to herein as constituting the declaration. It is as follows, including the three exhibits:

"The plaintiff sues the defendant, for that before the institution of this suit, to wit, on and before October 12, 1899, the defendant employed the plaintiff to sell the pine timber lands of the defendant in the state of Alabama, comprising about 250,000 acres, lying in the counties of Escambia, Conecuh, Monroe, and Baldwin, together with the railways and mills situated thereon, for the sum of one million five hundred thousand dollars, and defendant's wharf in the city of Pensacola, Florida, for the sum of one hundred thousand dollars, and, as evidence of the said employment, executed and delivered to the plaintiff on October 12, 1899, a written instrument, a copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof; that, for the purpose of a fuller specification and description of the said property, the plaintiff, at the request of and for the defendant, prepared a written memorandum more fully describing the said property, a copy of which memorandum is hereto attached, marked 'Exhibit B.' That in pursuance of the said employment the plaintiff procured that the defendant and one W. D. Mann should and did on November 16, 1899, enter into a written contract by which the defendant agreed to convey the property mentioned in the written authority and memorandum hereinbefore set forth as Exhibits A and B (which memorandum is the memorandum referred to in the said written contract) to a corporation to be organized by the said Mann as set forth in the said agreement, and the said Mann agreed to cause the said corporation to be organized, and to pay to the defendant for the said property five hundred thousand dollars in cash, one million dollars in the first mortgage bonds, and one hundred thousand dollars in the stock, of the said company, all of which is set forth in the said agreement which is hereby referred to, and, as Exhibit C, hereto attached and made a part hereof for greater particularity and exactness. Plaintiff avers that by reason of the premises he became entitled to demand and receive from the defendant and the defendant became obliged to pay to the plaintiff, for his services aforesaid, a large sum, to wit, the sum of one hundred thousand dollars, which sum, or any part thereof, the defendant has refused to pay to plaintiff, although often requested so to do, to the damage of plaintiff of one hundred thousand dollars, whereupon he sues."

Exhibit A.

"New York, October 12th, 1899.

"W. A. Milliken, Esq., N. Y. City.—Dear Sir: I hereby authorize and empower you to sell my pine timber lands in the state of Alabama, comprising about 250,000 acres, lying in the counties of Escambia, Conecuh, Monroe, and Baldwin, together with the railways and mills situated thereon, for the

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sum of $1,500,000; also my wharf in the city of Pensacola, Fla., for the sum of one hundred thousand dollars ($100,000). This authority to remain good for sixty days. I will made a deed in fee, with general warranty, to the purchaser. M. H. Sullivan."

Exhibit B.

"Sullivan Timber Lands.

"Martin H. Sullivan, of Pensacola, Fla., is the owner in fee of two hundred and fifty thousand acres of long leaf yellow pine timber land, in the state of Alabama, situated in the following counties:

County of Escambia	156,000 acres
County of Conecuh	42,000 acres
County of Monroe	40,000 acres
County of Baldwin	12,000 acres
Total	250,000 acres

"This land is in one body, beginning on the northern line of the state of Florida, in the county of Escambia, two and a half miles east of Flomaton Junction, on the Louisville & Nashville R. R. It runs north about 25 miles, into the county of Conecuh; thence west some 8 miles, into county of Monroe; thence south 6 miles; thence west 10 miles; thence south with the county line between Escambia and Baldwin to the Florida state line. Within this outline there are several one-quarter (¼) and one-half (½) sections in the different townships which do not belong to Sullivan. The 12,000 acres in Baldwin county fronts on the Alabama river below old Fort Montgomery, and runs back east to the Escambia county line, connecting with the main body at that point. The great body of this land lies on the head waters of Escambia river, in Escambia county. On the east side the L. & N. R. R. runs through it from Flomaton Junction north to Selma, Alabama. On the south the L. & N. R. R. runs through it from Montgomery, Ala., to Mobile. It is about 50 miles by rail from Sullivan Mill, on this land, to Mobile, and about 45 miles from Flomaton by rail to Pensacola, Fla. The map accompanying this statement shows the position of these lands as marked thereon. The lands are all above overflow, and the timber on every acre is perfectly accessible. The timber on the land is what is known as the 'Long Leaf Yellow Pine'; the trees growing from 70 to 90 feet to the first limb, perfectly straight. The largest will square 12 inches, 70 to 80 feet from the butt. About 200,000 acres of this timber is practically virgin forest. The remaining 50,000 acres has been partially cut prior to 1892. Only the largest trees were cut then, leaving all under fifteen inches in diameter. These lands were carefully selected by Mr. Sullivan, who is a timber expert, having been engaged in the timber business about 40 years. His estimate is that the poorest lands will cut five thousand (5,000) feet, and the entire tract can safely be estimated at seven thousand (7,000) feet per acre; and Sullivan is not a man who will make an overestimate in this matter. On this land Mr. Sullivan has built three railroads of standard gauge, as follows: One road running from Sullivan station, on the L. & N. R. R., out eleven (11) miles through the forest to a former mill site; one from Wallace station, on the L. & N. R. R., some ten (10) miles out into the forest; and another branch from this line, six (6) miles. These lines were laid with 30-lb. rails, and were built to haul logs from the forest to the mills, and the timber from mills to L. & N. R. R., and thence to Mobile and to Pensacola. They were built in 1890 and 1891, and used during that time, but have not been in use since. The rails are in good condition, but the road is not. There are two mills and one mill site on these lands, as follows: One known as 'Wallace Mill,' situated on the L. & N. R. R., near Wallace station in Escambia county. This is a fine steam mill, built in 1891, and with all modern improvements, and cost $125,000. It was run less than 1 year, and is in perfect order, and, with the purchase of a new band, could be put to work at once. It has a capacity of 100,000 feet of timber per diem. It has every facility for handling logs and timber, and the output of this mill can be delivered by rail 55 miles to Pensacola, Fla. Another, known as the 'Pine Log Mill,' is situated in Baldwin county, near the

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Alabama river. This is a water mill of about 35 to 40 thousand feet capacity per diem. It is in moderately good condition. Its output can be shipped down the Alabama river to Mobile, about 75 miles. A mill site known as 'Sullivan Mill' is situated in Escambia county, on the 11-mile branch road running from Sullivan station on the L. & N. R. R. Here is a magnificent boom, and every facility for handling logs and timber. There was a water mill here in 1891–2. The output from a new mill built at this point could be sent by rail to Mobile or to Pensacola. These improvements were put on this land by Mr. Sullivan in 1890–1, when he organized the Sullivan Timber Co., and with a view of carrying on the timber business on an extensive scale. The price of timber declined in '92 to such a point (being about $7.50 per thousand at Pensacola and Mobile) that he preferred to close up the business rather than cut his trees and sell timber at such rates. Since then the trees have been carefully preserved, and to-day the forest is intact. These lands were all high and dry, slightly undulating, good soil, and, where cultivated, produce excellent corn and cotton, and all the fruits of that climate, of fine quality. Lands in these counties, when cleared of timber, sell readily at from $4.00 to $6.00 per acre for agricultural purposes. The climate of this section is delightful, being, of course, mild in winter; and the summer heat is tempered by the ocean winds from the south. The health of these counties is unusually good.

"I consider the following figures as a safe, low estimate of the value of the timber on this land, and the value of the lands after the timber is cut:

The poorest, 50,000 acres, at 5,000 ft.....	250,000,000 ft.
The other, 200,000 acres, at 7,000 ft.....	1,400,000,000 ft.
Making the total timber.....	1,650,000,000 ft.

"There are excellent locations on these lands, where four (4) new steam mills can be erected, on these railroads, of a capacity of 100,000 feet to each per day. These four, together with the two now on hand (changing the water mill into a steam mill), would put out 600,000 feet per day, or 15,600,000 feet per month of 26 working days, or 187,000,000 feet per annum. The present price of timber at Pensacola, Fla., and Mobile, Ala., is $16.50 per thousand. To cut these trees, haul them to the mills, saw into timber, load on cars, and deliver on wharf at Pensacola or Mobile, is less than $5.00 per thousand. These six mills can cut the entire timber from these lands in less than nine (9) years. But it cannot be expected that timber will remain at the present high figures more than a year or two. One can safely, however, count on timber continuing for many years at very remunerative figures. But for the next two years, by putting the 4 new mills in operation, the six mills can put out 187,000,000 feet per annum. This, delivered at Pensacola, will net certainly $10.00 per thousand, or $1,870,000 per annum. This shows the possibilities for the next two years at the present unusually high price for timber. It is proper to state here that the demand for timber at Pensacola and Mobile for foreign shipment is far beyond the output. Contracts can be made there with thoroughly reliable houses for timber for 6 to 8 months' delivery at present rates. These four new mills, of the capacity required, can be built to-day for $50,000 each. It is not necessary to erect so expensive a mill as the one now at Wallace.

"Turpentine. Another source of revenue from this timber, and one not to be overlooked, is turpentine. Contracts can be made with reliable parties to allow them to box these trees ahead of the cutters, so as not to injure them for timber, and from this source from $2.50 to $3.00 per acre can be obtained. None of this timber has ever been boxed. It is in the 'forest primeval.'

"Resale. If the purchaser of this land should desire to do so, this land can be sold off to great advantage in lots from 10,000 to 30,000 acres. Mr. Sullivan will not break his block up, but prefers to sell it as a whole or not at all.

"Stumpage. In this section of Alabama and Florida, stumpage is $2.00 per thousand. A purchaser of this land can sell as much stumpage as he cares

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to at $2.00. Mr. Sullivan considers it a waste to sell it at such figures, and will not do so.

"These are the principal facts in connection with these lands.

"The price of the lands, with everything on them,—mills, mill booms, and railroads, is $1,500,000. Of this $500,000 in cash, and $1,000,000 will be carried on bond and mortgage at four per cent., with a proper sinking fund to retire the bonds when due, running, say, ten years. This land is free from all incumbrances, and a deed in fee, with general warranty, will be given the purchaser by Mr. Sullivan.

"Wharf at Pensacola, Fla.

"In addition to this land, Mr. Sullivan owns a wharf at Pensacola, Fla., which is the principal wharf in the city. It comprises some seven acres, and is filled in with stone, and from eight to ten ocean-going vessels can load from the dock at one time. A double-track railroad belonging to Mr. Sullivan runs on this wharf, connecting with the L. & N. R. R., so that cars from the L. & N. can run on the wharf to a ship's side, and be unloaded from the car into the ship. There is also a large boom in connection with this wharf, into which timber can be unloaded to await arrival of vessels, and from there loaded into the ships. The price of this wharf is $100,000. It can be purchased in connection with the lands, or not, as the purchaser may desire. But together, these lands and wharf, with the mills in operation, make the most valuable property of this character in the Southern states. Sullivan's timber lands are well known in the South by all timber merchants, and are regarded as the pick of that section."

Exhibit C.

"New York, Nov. 16th, 1899.

"Memorandum of agreement this day entered into by and between Martin H. Sullivan, of Pensacola, Fla., and W. D. Mann, of New York City, witnesseth: Martin H. Sullivan agrees to sell and convey by general warranty deed in fee, as hereinafter provided, his timber lands situated in the state of Alabama, in the counties of Escambia, Conecuh, Monroe, and Baldwin, comprising about two hundred and fifty thousand (250,000) acres, together with all mills, booms, and other fixtures now thereon; also railroads situated now on said lands in the county of Escambia; also the wharf property in the city of Pensacola, Fla., now known as 'Sullivan's Wharf,'—for the sum of one million six hundred thousand dollars ($1.600,000), upon the following terms and conditions, to wit: The said W. D. Mann is forthwith to select some one or more persons to go upon said lands and wharf and examine same, and make a report as to the amount of timber per acre on said lands, and value thereof; as to the number of mills and booms on same, condition and value; as to the railroads on same, condition and value; and as to the wharf property in Pensacola, Fla., its condition and value; also as to any and all matters upon which the said Mann may desire information in regard to said property. Said examination and report is to be made within sixty (60) days from this date. Upon the examination of said report, if it shall appear that the statements set forth in the written memorandum given to the said Mann as to said property are substantially correct, then the said W. D. Mann undertakes and agrees to cause to be organized, under the laws of the state of ———, a corporation, to be known as the ——— Company, with an authorized capital stock of $——— (to be fully underwritten at par by bona fide solvent underwriters), and with power to issue bonds for one million dollars ($1,000,000), with interest at four per cent. (4%) per annum, payable semiannually, and due and payable ten (10) years after date, with a sinking fund of ten per cent. (10%) per annum, to be paid in redemption of said bonds, and to cause said company, when organized, to purchase from Martin H. Sullivan said lands, mills, booms, railroads, and wharf property for the sum of one million six hundred thousand dollars ($1,600,000), to be paid as follows: Five hundred thousand dollars ($500,000) to be paid in cash, and one million dollars ($1,000,000) to be paid in the authorized bonds of said company, due and payable as above set forth, and fully secured by a first mortgage on all the lands, mills, railroads, wharfs,

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and other property of said company, and one hundred thousand dollars ($100,000) to be paid in the shares of the capital stock of said company at par. The said Martin H. Sullivan agrees and contracts to convey by deed in fee, with general warranty, the said two hundred and fifty thousand (250,000) acres, more or less, of timber lands, together with the mills, booms, railroads, and all other fixtures now thereon, and the wharf in Pensacola, Florida, to the said company, and receive payment for same as above set forth. This agreement is to be fully executed within ninety (90) days from this date. Witness our hands and seals in this sixteenth day of November, 1899.

M. H. Sullivan.
"W. D. Mann.

"Witness in presence of:
"W. A. Milliken.
"F. W. Weeks."

The defendant, Sullivan, demurred to the declaration, and as grounds of demurrer assigned the following: "(1) It is alleged in said count that the plaintiff was employed to sell the property of defendant, and it is not alleged that any sale was ever made. (2) It is alleged in said count that the plaintiff was employed to sell the property of defendant, and it is not alleged that any sale was ever consummated, or that it failed of consummation by the fault of the defendant. (3) It is alleged in said count that the plaintiff was employed to sell the property of defendant, and it is not alleged that any sale was ever made, but only that a contract was made for a sale; and it is not alleged that any sale resulted from said contract, or that the parties contracting to buy were able to do so, or that the sale failed of consummation by reason of any fault of defendant. (4) It is alleged that the plaintiff was employed to make a sale, and it is only alleged that a contract of sale was made; but it is not alleged that any sale was made, or that it failed to be made on account of any fault of defendant. (5) It is not alleged that any sale was made within sixty days from October 12, 1899." The circuit court overruled the demurrer. The case went to trial on pleas that were filed, and resulted in a verdict and judgment for the plaintiff, Milliken, for $77,890.70. The defendant, Sullivan, brings the case to this court on writ of error, and assigns that the circuit court erred in overruling the demurrer to the declaration. The view we take of the case makes it unnecessary to state and decide the many other exceptions and assignments of error contained in the record.

Thomas H. Watts, H. Bisbee (John B. Jones, F. G. Caffey, and Alexander Troy, on the brief), for plaintiff in error.

W. A. Blount, W. W. Howe (A. C. Blount, Jr., on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Did the circuit court err in overruling the demurrer to the declaration? This is an action by a broker against his principal for commissions for selling real estate. The declaration should contain a statement of facts which entitles the plaintiff to recover. No fact material to recovery should be left to inference. By considering what it is necessary for the plaintiff to prove in such case, we ascertain what must be alleged in the declaration. The issues to be tried involve the questions: (1) What did the broker undertake to do? (2) Has he completed the undertaking within the time and upon the terms stipulated? (3) If not, is his failure attributable to the fault or interference of the principal? If on investigation it be determined that the broker has performed his contract within the

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time and upon the terms agreed on, he is entitled to his commissions. If he has not, he has earned no commissions, unless performance by the agent was prevented by the fault or wrong of the principal. To entitle him to recover, he must prove, and therefore he must allege, (1) that he was employed as an agent or broker to sell the property; (2) that he sold it at the price and on the terms fixed by his principal, or on other terms agreed to by him, or that he found a purchaser ready, willing, and able to buy the property at the price and on the terms fixed or agreed to by the principal; and, if the sale was not made, that the failure to conclude the same was caused by some fault of the principal. The undertaking of the plaintiff was to sell the property. This is specifically averred, and the written authority to sell is made Exhibit A to the declaration. Addressing the plaintiff, the defendant wrote:

"I hereby authorize and empower you to sell my pine timber lands," etc. (briefly describing the property and stating the price). "This authority to remain good for sixty days. I will make a deed, with general warranty, to the purchaser."

The plaintiff acted under this authority. His undertaking, therefore, was, clearly, to sell. The plaintiff, having been employed to sell the property, prepared, at the request of the defendant, an elaborate description of it. In this prospectus he estimates the number of acres; describes the booms, sawmills, and railways; states the value of the timber on the land, the amount of lumber that could be put on the market from the lands, and states the several sources of revenue from the lands. This estimate and description is made a part of the declaration, as Exhibit B. It tends to show the property to be worth much more than the price asked for it. It is not alleged that the defendant was in any way responsible for its contents. He did not sign it. He did not sign any agreement alleging that the statements of this memorandum are true. It is only referred to in the contract between the defendant and Mann as "a written memorandum given to the said Mann." There is no averment that Sullivan gave Mann the memorandum, or that Sullivan knew of its contents. This memorandum was made by the plaintiff, and no fact is alleged that would make the defendant responsible to the plaintiff for the truth of its statements. If the declaration can be construed to make Sullivan responsible to Mann for the truth of the prospectus, it certainly cannot be held, on its averments, that he ever represented to Milliken that the prospectus was true. Milliken, it is averred, and not Sullivan, is its author. It is the plaintiff's handiwork. There is no claim asserted in the declaration that a sale was prevented by the wrong or interference of the defendant. The case, therefore, depends on the allegation as to performance on the part of the broker. It is not alleged that the plaintiff sold the property. It is not alleged that he found a purchaser ready, willing, and able to buy the property. As a substitute for these averments, usual in suits by brokers to recover commissions, the plaintiff alleges that:

"In pursuance of the said employment the plaintiff procured that the defendant and one W. D. Mann should and did on November 16, 1899, enter

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into a written contract by which the defendant agreed to convey the property mentioned in the written authority and memorandum hereinbefore set forth as Exhibits A and B [which memorandum is the memorandum referred to in the said written contract] to a corporation to be organized by the said Mann as set forth in the said agreement, and the said Mann agreed to cause the said corporation to be organized, and to pay to the defendant for the said property five hundred thousand dollars in cash, one million dollars in the first mortgage bonds, and one hundred thousand dollars in the stock, of the said company, all of which is set forth in the said agreement, which is hereby referred to, and, as Exhibit C, hereto attached and made a part hereof for greater particularity and exactness."

The plaintiff, therefore, bases his right to recover on the fact that he procured Mann to make a contract with the defendant on November 16, 1899. The claim is that the plaintiff is entitled to the commissions sued for, because he procured Mann to make this contract. If his contention is well founded, his right to the commissions accrued as soon as the contract was made. There is no averment as to what followed the making of the contract. The case made by the declaration ends with the signing of the contract. It is not alleged otherwise that Mann became the purchaser of the property. The agreement is made a part of the declaration. Reading it, we find that it is clearly binding on Sullivan to sell if Mann finally agrees to buy. But it clearly does not bind Mann unconditionally to purchase. Mann agrees "forthwith to select some one or more persons to go upon said lands and wharf and examine the same, and to make a report as to the amount of timber upon said lands, and the value thereof. * * * Upon examination of said report, if it shall appear that the statements set forth in a written memorandum given to the said Mann as to said property are substantially correct," then, and in that event only, Mann agrees to organize a corporation to buy the property on terms stated in the contract. The contract as to Mann is tentative, his acceptance being dependent on the result of an investigation to be made in 60 days. Can it be true that, as soon as this contract was signed, the plaintiff, who was employed to sell the property, was entitled to commissions, whatever the person or persons selected to examine the property might report? If the prospectus was untrue, was he entitled to commissions? Has he earned the commissions, under an employment to sell, by preparing a prospectus showing the great value of the property, and finding a customer who agrees to take the property if the description and estimated values are substantially correct? Did Sullivan, when he signed the contract with Mann,—a contract not binding on Mann unless Mann's investigations confirmed Milliken's prospectus,—become indebted to Milliken for commissions on the agreed price? Consider the question in this way: The authority which Sullivan gave Milliken to sell the property, of course, authorized him, as Sullivan's agent, to make a written offer to sell it. Except for the changes as to the terms of sale, he might well have signed as agent for Sullivan the contract with Mann. Now, if he had signed an agreement binding his principal to convey the land to Mann on the terms and at the price named in his authority, and Mann had agreed to buy the land, if, on the report of experts to be appointed to examine it, it was found

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that the prospectus prepared by Milliken was substantially correct, would Milliken be entitled to commissions, as on a sale, whether Mann completed the purchase or not? Whether the land was examined by the experts or not? Whether the descriptions and estimates prepared by Milliken were true or not? We cannot think he would have earned his commissions by making such contract. To so hold would give the agent great advantage of his principal, and would encourage him to exaggerate the value of the property in his dealings with customers. If he was reckless in his descriptions and extravagant in his valuations, he might easily find a customer to contract to buy the property if it was found to be as valuable as the agent said it was. Such performance, surely, would not entitle him to commissions.

To show that the contract is binding on Mann, it is said that Sullivan could recover damages for the failure by Mann to complete the purchase. This proposition need not be examined further than to say it is clear that such damages could not be recovered without alleging and proving that the prospectus prepared by Milliken was substantially correct, or at least that the persons appointed to examine the property reported it so. An action for damages might lie on the averment that it was Mann's duty to appoint persons to examine the property, and that he failed to do so, and that the prospectus was substantially correct. But the declaration in question contains no averment of fact which shows that a recovery could be had in damages by Sullivan in a suit against Mann for a breach of the contract.

It is also said that the contract in this case was one of sale, because it could be specifically enforced. The question on this suggestion here is, could it be specifically enforced against Mann, admitting the averments of the declaration to be true? That it is a contract to sell that could be enforced by Mann against Sullivan, if Mann performed his part of the contract, may be admitted. Sullivan bound himself to convey. But Mann has not bound himself unconditionally to purchase. He stipulates for time to have the property examined, and agrees to purchase only in the event that it is found to conform to the prospectus. When it appears by the contract, in its express terms, that it was intended to be binding upon one of the parties alone, it may be specifically enforced against that party, although the remedy cannot be granted to him against the other party. Pom. Cont. § 169. The declaration in this case does not describe a contract for which Sullivan would have a remedy in equity for specific performance. Mann agreed to buy on condition that the prospectus was shown to be substantially correct, and there is no averment that it is correct. Unless the property met this requirement, there was no "true contract" of sale. Id. § 334. The prospectus not being substantially correct, the contract would not bind Mann, or at least he could revoke it. A court of equity will not enforce specific performance against a party who has the power of revocation. Southern Exp. Co. v. Western North Carolina R. Co., 99 U. S. 191–200, 25 L. Ed. 319. The contract pleaded is not a completed sale, and, on the facts averred in the declaration, it is

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not a contract that Sullivan could specifically enforce against Mann. Mayer v. McCreery, 119 N. Y. 434, 23 N. E. 1045. The declaration shows nothing done by Milliken to earn a commission, except to procure the making of the contract with Mann. To show a legal claim to commissions, it must allege a completed sale, or an enforceable agreement for sale. Hammond v. Crawford, 14 C. C. A. 109, 66 Fed. 425; Jacobs v. Shenon, 2 Idaho, 1002, 29 Pac. 44. Securing a preliminary or tentative agreement not shown to have resulted in a complete sale, and not binding on the proposed purchaser, is not sufficient. Hale v. Kumler, 29 C. C. A. 67, 85 Fed. 161. In such cases nothing should be left to conjecture or speculation. "There should have been as much certainty on the one side of the contract as upon the other. * * * The broker must complete the sale (that is, he must find a purchaser in a situation, and ready and willing, to complete the purchase on the terms agreed on) before he is entitled to his commissions." McGavock v. Woodlief, 20 How. 221, 227, 15 L. Ed. 884. The declaration states that the plaintiff, at the request of the defendant, "prepared a written memorandum describing the property." The action, however, is not for such service. The declaration, we think, is properly construed in that respect by the learned attorneys for the defendant in error, in their printed argument, when they say this is an action "to recover $100,000 commissions alleged to have been earned by Milliken by selling," etc. We have so considered it. The services were performed under a special employment to sell, and no right to recover on the quantum meruit is asserted.

Tested by these principles and authorities, the declaration does not show a right of action against the plaintiff in error, and the demurrer to it should have been sustained.

The judgment of the circuit court is reversed, and the cause remanded, with instructions to set aside the verdict of the jury, sustain the demurrer to the declaration, and to grant a new trial, proceeding according to law and the views herein expressed. Reversed.

McCORMICK, Circuit Judge. I agree with my Brethren that the judgment of the circuit court in this case should be reversed, and the cause remanded to that court, with direction to award the defendant a new trial; but I am unable to agree with them in the ground on which they base the decision of the court. I do not construe the thirteenth count in the declaration as an action to recover compensation stipulated for in a written contract. Exhibit A, attached to that count, makes no mention of compensation. It simply authorizes and empowers the plaintiff to sell certain property of the defendant at a price named. Exhibit B shows only some of the services rendered by the plaintiff to the defendant; and Exhibit C helps to show further the services rendered by the plaintiff, and accepted and acted on to the extent therein shown by the defendant. And the count claims that, in pursuance of his employment, the plaintiff procured that the defendant and one W. D. Mann should and did on November 16, 1899, enter into a written contract by which the defendant agreed to convey the property mentioned in the writ-

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ten authority and memorandum set forth as Exhibits A and B, which contract of November 16, 1899, is the Exhibit C attached to the count; and the plaintiff avers that by reason of the premises he became entitled to demand and receive from the defendant, and the defendant became obliged to pay to the plaintiff, for his services aforesaid, a large sum of money, to wit, the sum of $100,000. How this can be construed as other than demanding the reasonable compensation for the services shown to have been rendered, I confess my inability to understand.

The twenty-fourth error assigned is, in my judgment, well taken. It is thus stated in the record:

"Twenty-Fourth Assignment of Error. After the jury had rendered their verdict, to wit, 'We, the jury, find for the plaintiff in the sum of thirty-one thousand nine hundred and fifty dollars, less six thousand nine hundred and fifty credit, with New York interest,' and after the jury had been polled, and each had said that it was his verdict, and after the said verdict had been read and ordered to be received, and after the other proceedings shown in the bill of exceptions, the court said to the jury: 'Gentlemen of the Jury: In this case you have found for the plaintiff, and you have found against the pleas of the defendant. You have found that the plaintiff has a right to recover. The court charged you that the only testimony,—charged you heretofore, and now I repeat, that the only testimony before you bearing, as I recollect it, upon the question of amount, was the testimony of Mr. Milliken, to the effect that in New York City, where the transaction took place, the customary and usual percentage was from five to ten per cent. on the full face value of the one million six hundred thousand dollars, and that he had agreed to take that amount as his compensation,—the amount of five per cent. You will take the case, gentlemen.' The defendant then and there, before the jury retired, excepted to the said action of the court. This assignment is on the ground that after the jury had rendered their verdict, and said verdict had been received by the court and ordered recorded, the court had no authority to again submit the matter to the said jury, or to charge them concerning their verdict."

And on this ground I concur in the judgment of reversal. Taken in connection with the other proceedings shown by the bill of exceptions to have been had at the time, the instruction was equivalent to the general charge to find for the plaintiff on the merits, and to render their verdict for 5 per cent. commissions on $1,600,000, viz., for $80,000, less the admitted credit. The jury so understood it, and returned their verdict accordingly:

"We, the jury, find for the plaintiff in the sum of $80,000, with interest from the commencement of this suit, less the sum of $6,950, with interest from January 8, 1900."

This shows clearly the taking of the case entirely from the jury, and substituting for their verdict the finding of the court.

DE LANCEY v. WELLBROCK et al.

(Circuit Court, S. D. New York. January 9, 1902.)

1. BOUNDARY—LAND BELOW HIGH-WATER MARK.

The inshore boundary of a grant of a strip of land below high-water mark, 400 feet wide, changes with the high-water mark, the shifting of the shore being from natural causes.

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2. GRANT OF LAND BELOW HIGH-WATER MARK.

The state, having granted in fee a strip of land under water, extending out 400 feet from high-water mark, cannot thereafter give another the right to erect a public dock thereon.

At Law.

An action for ejectment to recover the possession of a strip of land under water in front of uplands of the defendants Wellbrock at City Island, in the city of New York, and extending out about 400 feet from high-water mark. The premises are situated under the waters of Long Island Sound, adjacent to Minneford's, now called City, Island, and are part of a large tract which extends 400 feet from high-water mark outward and under the waters of the sound on the east, west, and south sides of the island. This tract of land under water was granted by the English crown to Benjamin Palmer, his heirs and assigns, by royal patent dated May 27, 1763, upon the tenure of free and common socage and upon the express condition that he pay to the said crown or its successors yearly, forever, a certain rent. At the time of this grant Benjamin Palmer was the owner of the entire upland of the island. The colonial assembly, and afterwards the legislature of the state of New York, the people having succeeded to the rights of the crown, passed a number of acts directing the grantees of lands chargeable with perpetual rents to redeem from their defaults, and, in case of their failure to do so, declaring that such lands should be sold by reason of such nonpayment. By chapter 222 of the Laws of 1819 the lands so forfeited were directed to be sold by the comptroller of the state of New York. Under this act the lands were sold on March 26, 1826, but the deed was not delivered until April 5, 1836, when the comptroller duly transferred by patent the said premises about City Island to Elias D. Hunter, who was plaintiff's ancestor and devisor. See De Lancey v. Piepgras, 138 N. Y. 26, 33 N. E. 822, and Same v. Hawkins, 23 App. Div. 8, 49 N. Y. Supp. 469. In 1884 the defendants Wellbrock procured a grant from the state for the premises under water opposite uplands owned by them upon which they erected a public dock or wharf extending about 350 feet into the waters of Long Island Sound. These premises, the subject of this action, are a part of the strip of land under water contained in the Palmer patent, and the dock or wharf so erected upon the premises by the defendants Wellbrock was open to the public upon payment of the usual rates for wharfage.

Walter D. Edmonds, for plaintiff.
George F. Martens and Gratz Nathan, for defendants Wellbrock.
John Hunter, Jr., for defendants Hunter.

LACOMBE, Circuit Judge (after stating the facts as above). I have taken into consideration the various authorities which have been cited,—the earlier cases concerning this City Island property,—and reached a conclusion as to the disposition to be made of the case. Really, there is no question for the jury here. There is no disputed issue of fact. There might be some dispute as to what the facts implied or what legal conclusion the facts called for, but what the facts are is not really in dispute here.

The first question that comes up is as to the extent of the grant originally to Palmer, and subsequently, by sale of the comptroller, passing to the predecessors of the plaintiff. Of course, it is a well-known principle that where courses and distances are given in general terms, with quantities and so on, and the deed is accompanied by a map with metes and bounds laid out, and the map is referred to and made practically a part of the deed itself, the map will sometimes control; but the principle, for all that, is simply the ordinary

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principle of the interpretation of all written documents, that the whole must be taken into consideration; and taking the entire document in, and working it over, it is interpreted according to what the plain intent of it is found to be from an examination of all its parts. Here, despite the circumstance that the map that is recited, and is referred to again in the deed itself in the conveying clause, has distances which are varying, the entire body of the deed—the deed and map together—leaves in my mind no doubt at all as to the plain meaning of what the crown at that time undertook to convey. It is all controlled by the express and specific statements as to width included in it. No matter what may be said, therefore, in the deed or in the accompanying map, as to metes and bounds, or anything else, it was intended to convey a strip 400 feet in width in every part, stretching out from the common high-water mark around the island, except in the places where there was no grant at all.

With that construction, the next question is the location of that tract upon the soil. The inshore boundary is the common high-water mark. There is no indication of any cataclysm that has taken place, making an extraordinary change there. Whatever shifting there has been in or out of the shore line has been only gradual and normal in its character. The evidence points that way. Under those circumstances, it seems to me the rule laid down in Scratton v. Brown, 4 Barn. & C. 485, and which is approved in Trustees v. Kirk, 84 N. Y. 215, 38 Am. Rep. 505, is the rule to be applied that, where the crown grants a subject the soil between high and low water mark, that boundary shifts to such an extent as that the shore itself may shift by entirely natural causes, without any earthquake or anything extraordinary, by the operation of accretion and erosion. Thus, under the circumstances, at one time the grantee of a strip like this might gain land towards the shore, but he would not gain on the whole, because the more he gained inshore by the shifting boundary the more he would lose by his outer boundary, and he would not get any more than 400 feet. And, per contra, he might lose from the land inside, and as long as his 400-foot line did not take him beyond the ownership of the soil of the state he would not lose on the whole, because it would shift his outer line out, though he might lose even then, because there might be no place for his outer line to go. I am of the opinion, therefore, that the common high-water mark, as it stood at the time of the commencement of this suit, or thereabouts, is to be taken as the inshore boundary, from which the 400 feet are to be measured off; and, that being so, clearly the premises which are described in the complaint are within the boundary of this particular grant. That being so, the next question that arises is, what is the effect of the subsequent deed of the commissioner of the land office to Wellbrock? I have gone over these cases (De Lancey v. Piepgras, 138 N. Y. 26, 33 N. E. 822, and Same v. Hawkins, 23 App. Div. 8, 49 N. Y. Supp. 469), and it seems to me that the controlling point of view is just this: The state granted a fee. That has been held by the court of appeals. It granted a title in fee to

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the land under water—that 400-foot strip—to Palmer, and again, through the comptroller's deed, to Hunter. There was an easement reserved in it,—an easement that the people possessed of navigating over it and anchoring and fishing; an easement that the state possessed over land covered with water, where the soil belonged to a private owner and the water was navigable. That also remained as an easement upon the land. It is not necessary for us to discuss here what the state might or might not have done, or might or might not have permitted to be done, in the way of exercising easement itself or authorizing anybody else. What the state undertook to do was to give, again, the fee to another person. That it could not do, in my opinion. I am referred to cases holding that a grant cannot be held void in a collateral action. But it is not necessary to declare it void. It is sufficient to declare that this deed here introduced in evidence does not convey to Mr. Wellbrock the right to maintain upon the land, the fee of which has already been granted to somebody else, the particular structure which he put up. These conclusions lead to the direction of a verdict in favor of the plaintiff.

Another point raised in the case is as to the effect upon the defendants Hunter of deed when they are out of possession of part of the property. As to that, I shall direct affirmative relief in favor of the defendants Hunter, the same as I do in favor of the plaintiff. Of course, all this is with the same proviso that was indicated in the Piepgras Case as proper to be inserted in the judgment. I will therefore deny the motion of the defendant to direct a verdict, with a separate exception on the separate grounds. I deny the motion of the defendant to exclude the defendants Hunter from any affirmative relief, with an exception to such disposition.

A verdict is directed in favor of the plaintiff and of the defendants Hunter, stating their respective titles and rights in the premises, in the ordinary form of a verdict in ejectment, for the premises described, excluding the strip which the testimony of the plaintiff shows to be without the bounds as now plotted, and inserting in the verdict the proviso and reservation contained in the patent to Palmer.

McLEAN v. MAYO.

(District Court, E. D. North Carolina. December 21, 1901.)

INJUNCTION—RESTRAINING PROSECUTION OF SUIT—DISSOLUTION.

In a suit by a trustee in bankruptcy to restrain the prosecution of an action by a third person against a United States marshal for trespass in seizing the stock of goods under a warrant of the bankruptcy court, on the ground that it prevented a settlement of the estate, where defendant's verified answer disclaims any interest in the goods in the trustee's hands, and surrenders all claim thereto, and alleges defendant's election to rely on his remedy in the state court against the marshal individually, and not as an official, the temporary restraining order will be dissolved.

F. H. Burton and B. F. McLean, for plaintiff.

Chas. F. Warren, R. H. Battle, and W. B. Rodinson, for defendant.

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PURNELL, District Judge. A. D. McLean, trustee of Hoyt & Mitchell, bankrupts, asked for an injunction to restrain the prosecution of a suit by Mayo against Dockery for trespass in seizing the stock of goods under a warrant of the bankruptcy court, alleging that it obstructs and prevents a settlement of the bankrupt estate. Mayo files a duly-verified answer to the rule to show cause, disclaiming any interest in the goods in the hands of the trustee, and surrendering any claim therein he may have, and alleging his election to rely on his remedy in the state court against Dockery individually, and not as United States marshal, and raises the question of jurisdiction of the district court to enjoin the prosecution of that suit. See Bryan v. Bernheimer, 21 Sup. Ct. 559, 560, 45 L. Ed. 814, 5 Am. Bankr. R. 629–631. The case here seems to be controlled by the decision of the United States supreme court in Lerough v. Hudson, 109 U. S. 468, 3 Sup. Ct. 309, 27 L. Ed. 1000. That case, it is true, was in the circuit court, while this is in a court of bankruptcy, which may, under certain circumstances, do what the circuit court cannot,—restrain a state court. Considering the case above cited in connection with the recent decisions of the supreme court in Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. R. 163, and Wall v. Cox, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845, 5 Am. Bankr. R. 727, I am of the opinion that the allegation in the petition that the suit of Mayo against Dockery, who, it appears, is fully indemnified, interferes with the process of the bankruptcy court, is too remote to justify this court in exercising the extraordinary power of continuing the injunction forbidding the parties to proceed, or the state court from exercising jurisdiction of the suit of Mayo against Dockery. While the bankruptcy act creates the office of trustee in bankruptcy, such trustee is a quasi officer of the court in a qualified sense. He is in reality elected by and represents the creditors of the bankrupt, under the provisions of the bankruptcy act. The bankruptcy court will protect the trustee in the discharge of his quasi official duties, but, as the representative of the creditors, his duties as such representative must be discharged, not as an officer of the court, strictly speaking, but as provided in the bankrupt act.

It is therefore considered, ordered, and adjudged that the answer of the respondent herein is sufficient, and this court has no jurisdiction in this matter; that the rule be discharged, and the restraining order dissolved.

In re KLEINHANS et al.

(District Court, W. D. New York. January 9, 1902.)

No. 818.

1. BANKRUPTCY—RECEIVERS—SUMMARY PROCEEDINGS—JURISDICTION.

Bankr. Act. § 2, subd. 3, gives the court in which bankruptcy proceedings are pending power to appoint marshals or receivers to take charge of the property of the bankrupt, and section 70 provides that a trustee of a bankrupt's estate is vested with the title of the bankrupt at the date of the adjudication. *Held*, that where a receiver was appointed to take charge

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of the goods of the bankrupt, and prior to his qualification lessors of the bankrupt instituted summary proceedings in the state court to recover the leased premises containing the goods of the bankrupt, but no possession was obtained prior to the qualification of the receiver, he was entitled to an injunction restraining the summary proceedings.

2. SAME—REMOVAL OF ASSETS.

The lessors may petition the court to have the goods of the bankrupt removed and the premises vacated by the receiver.

In Bankruptcy. In the matter of a petition that Horace Kleinhans and Edward L. Kleinhans be adjudged bankrupts. Motion by Seaver & Jenkins and others to vacate an injunction against summary proceedings instituted by them to obtain possession of the premises leased to the bankrupts. Motion denied.

Seaver & Jenkins, for landlords James Mooney and others.
Baker, Schwartz & Dake, for receiver Gabriel Elias.
Shire & Jellinek, for receiver Moses Kochenthal.

HAZEL, District Judge. This is a motion to vacate an injunction against summary proceedings instituted by the landlords of the alleged bankrupts in the municipal court of Buffalo. It appears from the papers read on the motion that on the day of filing the creditors' petition, returnable January 8, 1902, that Horace and Edward L. Kleinhans be adjudged bankrupt, an order to show cause why a receiver should not be appointed was granted. Counsel for petitioning creditors and counsel for the alleged bankrupts appeared in court on the afternoon of the same day that the order was granted, and consented to the appointment of Gabriel Elias as receiver. Mr. Elias was appointed receiver, and duly qualified on December 27, 1901, the following day, and on the same day took into his custody the property of the bankrupts, consisting of men's furnishing goods, contained in store leased by the alleged bankrupts from James Mooney and others. The business was by order of the court continued by the receiver. At this time H. Kleinhans & Co., the alleged bankrupts, were indebted to the lessors of the store in the sum of $3,125.00, the rent for the month of December, payable December 1st in advance. On the same day that the receiver was appointed summary proceedings were commenced in the state court to remove the alleged bankrupts from their store for nonpayment of rent. The removal proceeding was enjoined by this court on the application of the receiver pending a motion to continue the stay until the adjudication. Counsel for landlords lay stress upon the contention that the jurisdiction of this court did not attach before that of the municipal court, and that the receiver did not obtain title to the property prior to the institution of the proceedings in the municipal court.

The question presented here is not whether the receiver obtained title to the property of the alleged bankrupts by virtue of his appointment, but rather whether the bankruptcy court obtained such jurisdiction over the res at the time of filing the involuntary petition to have H. Kleinhans & Co. adjudged bankrupts as to justify this court's intervention in an attempt on the part of the lessors to oust the receivers and officers of this court, to the detriment of the bank-

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rupt estate, from the possession of the leased premises. Counsel for lessors contend that by section 70 of the bankrupt act a trustee of a bankrupt's estate is vested by operation of law with the title of the bankrupt as of the date of the adjudication, and that in the absence of an express provision of the bankrupt act vesting title in the receiver as of the date when a petition is filed it must be held that the title continues in the alleged bankrupts until a trustee is appointed, and therefore the process of the state court to remove for nonpayment of rent ought not to have been enjoined. This contention is unsound. Coincident with the filing of a petition in bankruptcy, either voluntary or involuntary, a court of bankruptcy acquires control over the estate of a bankrupt or person charged with acts of bankruptcy. It may immediately seize and lay claim to all property either in the actual possession of the bankrupt or such as may be reduced to possession. Power is conferred on the court to appoint marshals or receivers to take charge of the property of bankrupts. Section 2, subd. 3, Bankr. Act. It is the immediate duty of the receiver of the property to preserve the estate intact, and to conserve the assets and estate of the bankrupt, pursuing that course pointed out by the act which will best promote and further the interests of the creditors. True, the receiver here is not vested with a title to the property of which he becomes custodian, nor does any provision of the bankrupt act vest him with powers similar to that of a trustee appointed by the creditors. The property, however, corporeal and incorporeal, either comes into his possession as an officer of the court, or such right to possession is obtained as will tend to retain intact the actual and visible assets of the bankrupt, to the end that, when an adjudication is made, the trustee may be vested not merely with the bankrupt's title to the property, but that he may have and receive the actual possession of all assets in the control of the bankrupt at the instant that the protection of the court was invoked. It is insisted on behalf of the lessors that, inasmuch as the receiver did not qualify before the summary process to remove the tenants was issued by the state court, he acquired no such right of possession as to deprive the state court of its jurisdiction. The receiver, however, had qualified, and this court was in possession, through its receiver, before the lessors had obtained possession or the right of possession through their summary proceeding, and before the application for an injunction was made. Manifestly, the jurisdiction of the court having attached before that of any other court, the receiver, in the exercise of his duty, properly invoked the court's jurisdiction to have the proceedings instituted in the state court enjoined. In re Chambers, Calder & Co. (D. C.) 98 Fed. 867. In re Metz, Fed. Cas. No. 9,509, was a case very similar to this. In that case an injunction was granted restraining interference with the property of the bankrupt before adjudication in an involuntary proceeding and restraining the landlord from dispossessing them. The injunction order was made after the proceedings to dispossess the debtors were instituted. Judge Blatchford said:

"The occupation of the premises by the marshal was the occupation of them by the court. * * * A landlord who lets premises to a tenant to

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be occupied for the purposes of trade must be held to do so with the full understanding that the tenant may be proceeded against in bankruptcy, and that the bankrupt court may be called upon to take possession of the goods of the tenant on the premises. In many cases it would be impossible to remove the goods, before a sale of them, without great loss and injury."

The injunction is continued until after an adjudication or the dismissal of the petition. If H. Kleinhans & Co. are adjudicated bankrupts, a further stay may be granted. The question of allowance for rent during the time of occupancy by the receiver is not before me. In view of the fact, however, that quite serious damages may result to the lessors by reason of the receiver's occupancy of the store in question, and that they may be deprived of an advantageous lease for a period of years either at the same or greater rental, it appears to me to be proper to suggest that under such circumstances the lessors may petition the court to have the goods of the alleged bankrupts removed and the premises vacated by the receivers.

In re HENRY C. KING CO.

(District Court, D. Massachusetts. January 22, 1902.)

No. 3,916.

1. BANKRUPTCY—PROOF OF CLAIMS—SURRENDERING PREFERENCES.
If a given payment received by a creditor without knowledge of insolvency need not be surrendered before proof, not being a preference within the bankruptcy act because the result of the whole transaction is to increase the net indebtedness to the creditor, the same payment received with knowledge of insolvency is not a preference, and need not be surrendered.

2. SAME—DECREASE OF NET INDEBTEDNESS.
A bankrupt's clerk, four months before the date of the bankruptcy, had a priority claim against him for wages for $300 and a common claim for $33. During the four months he earned $445, and at the date of bankruptcy, if no payments had been made reducing the same, would have had a priority claim for $300 and a common claim for $478. During the four months he received $404 in goods and money. He applied $333 in settlement of the wages due four months before bankruptcy, and $70 on wages earned within that period, but which had then lost their priority, so that his common claim was reduced to $74. *Held* that, his common claim having been reduced within the four-months period, the clerk had received a preference, and, it not being surrendered, could not prove the balance of his claim, unless willing to do so as a creditor not entitled to priority, in which event his claim would have increased within the four months, and there would have been no preference.

In Bankruptcy.

Wilbur E. Rowell, for creditor proving claim.
Jeremiah J. Mahoney, for objecting creditors.

LOWELL, District Judge. In this case the creditor, a clerk of the bankrupt, had, four months before the date of the bankruptcy, a claim against the bankrupt for wages amounting to $333.19. During four months immediately preceding bankruptcy he earned $445, and within three months preceding bankruptcy earned more than $300. During the four months, however, and with knowledge of the

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bankrupt's insolvency during that time, he received in goods and money $403.77, having an open running account with the bankrupt; on the one side for wages due, and on the other side for groceries, wood, coal, and money received from the bankrupt at irregular intervals. $333.19 was credited in settlement of the wages due four months before bankruptcy. The balance received—$70.58—was credited upon the wages earned within four months of bankruptcy. The creditor now seeks to prove for $300 as a preferred creditor, under the decision of the circuit court of appeals in Dickson v. Wyman, 111 Fed. 726. But that decision is carefully limited to a transaction "without any intention to acquire any unjust preference," "without reasonable cause on [the creditor's] part to believe him insolvent." In the case at bar the creditor knew the bankrupt's insolvency. In spite of the language in Dickson v. Wyman, it would seem that knowledge of insolvency cannot affect the question of preference or no preference. A preference is defined in Bankr. Act, § 60a, without reference to knowledge of insolvency. Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. That case held that the transaction was none the less a preference because the element of knowledge was wanting, and, if this be so, a transaction can hardly be any more a preference because knowledge of insolvency is present; in other words, knowledge of insolvency converts an innocent preference which may be retained if the creditor will forego proof, into a guilty preference which may be recovered back by the trustee. But, since the element of knowledge is excluded from the definition of preference, it follows that even an innocent preference—one received without knowledge of insolvency—is still a preference, and must be surrendered before proof. It follows also that knowledge of insolvency cannot transform into a preference an act which otherwise is no preference. If a given payment, received without knowledge of insolvency, need not be surrendered before proof, because it is no preference, the same payment received with knowledge of insolvency is not a preference. If a payment by the bankrupt which would otherwise be a preference is yet not a preference because the result of the whole transaction is an increase of the net indebtedness to the creditor, this must be equally true whether knowledge of insolvency exists or not. The bankrupt act does not provide that any payment received by the creditor from the bankrupt within four months is a preference, but only when the effect of this payment "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." If this is not the effect of the payment, there is no preference, and if, within four months, the net indebtedness is increased, the court of appeals has held in Dickson v. Wyman that the creditor does not obtain a greater percentage of his debt. If, by reason of increase of net indebtedness, a certain payment does not constitute a preference, then a creditor who, with knowledge of insolvency, receives such a payment, receives no preference, and so, in spite of his knowledge of insolvency, may retain the payment against the trustee, and need not surrender it before proving the rest of his claim. Bankr. Act, § 60b, does not

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provide that the trustee may recover all payments received with knowledge of insolvency, but only preferences so received. This seems to be the inevitable result of Dickson v. Wyman, combined with Pirie v. Trust Co. I must hold, therefore, that knowledge of insolvency did not make a preference of acts which otherwise did not amount to a preference.

But the claim cannot be allowed priority. Four months before bankruptcy the creditor had a claim of $333.19. Though this claim then had priority, it is now without priority. A further claim of $445 accrued within the four-months period. If no payment had been made on either claim, the creditor would now have a priority claim of $300, and a common claim for $478, but the priority claim at the time of bankruptcy would not be that part of the claim which had priority four months earlier. The priority of the earlier claim would have disappeared, and for the purposes of this discussion that claim must be treated as a common claim, because, in these proceedings, it must be proved as such. The creditor seeks to apply the payment which he has received wholly to the common claim. The result of this application will be to leave him a common claim of $74, due at the date of bankruptcy, a sum smaller than the claim which was due four months earlier. If he be now allowed to prove a priority claim for $300 without surrendering the payments he has received, his common claim will have been diminished within the four-months period, and so, under the decision of Dickson v. Wyman, he has received a preference. If any preference has been received, it is undoubtedly a guilty one, and can be recovered back by the trustee under section 60b, Bankr. Act, and this without any set-off as provided in section 60c. That the creditor should be allowed to prove any claim against the estate, whether having priority or not, when the trustee has a claim against him for a guilty preference, is not to be permitted. It was argued that at the beginning of the four-months period the creditor had a claim for $300 having priority, and a common claim for $33, and that at the time of the bankruptcy he had a priority claim for $300 and a common claim for $74, and that, therefore, his common indebtedness had increased within the four months, rather than decreased; but, as has been said, the indebtedness which had priority at the beginning of the four months must, for the purposes of this case, be treated as having lost it, and therefore the common indebtedness must be deemed to have diminished. If the creditor is willing to prove as a creditor not having priority, inasmuch as his claim will then have increased within four months prior to bankruptcy, he may prove without surrendering the payments made to him, but his claim of priority must be disallowed. Unless the creditor desires to withdraw it, his proof of claim will be allowed without priority.

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McNAIR et al. v. McINTYRE et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 417.

1. BANKRUPTCY—PARTNERSHIP—LIENS.
Validity of mortgage given by partnership is not affected by bankruptcy proceedings within four months thereafter against one of the partners alone.

2. SAME—COSTS OF SALE.
The proceeds of property of a bankrupt subject to liens should first be charged with the costs of sale, and the liens be then paid out of the remainder, according to their priority.

3. SAME—PREFERENCE.
A creditor given a mortgage for past indebtedness within four months of bankruptcy proceedings against the debtor may retain the preference, though brought into the proceedings in invitum; no claim being made against the general estate, and the mortgage being executed with no intent to give a preference and no knowledge of the insolvency.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of North Carolina, at Wilmington, in Bankruptcy.

E. K. Bryan, for petitioners.
Iredell Meares, for respondents.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

SIMONTON, Circuit Judge. This case comes up upon a petition to superintend and revise in matter of law proceedings in the district court of the United States for the Eastern district of North Carolina, sitting in bankruptcy. 109 Fed. 857. The facts of the case are these: The firm of McNair & Pearsall were creditors of the firm of Sanderlin & McMillan. On 13th of September, 1900, Sanderlin & McMillan executed to McNair & Pearsall a chattel mortgage to secure a sum of $1,500, of which $1,282.10 was cash then lent, and the remainder an amount then due by Sanderlin & McMillan to the mortgagees on open account. The personalty mortgage was a sawmill plant at McKee's Cut, on the Carolina Central Railroad, in North Carolina. The mortgage was duly recorded. On the same 13th September, 1900, J. B. Sanderlin, one of the firm of Sanderlin & McMillan, executed a chattel mortgage to McNair & Pearsall, securing the sum of $2,500, of which sum $805.52 was cash then advanced to him, and the remainder was the amount of an open account at that date due by Sanderlin to the mortgagees. This also was duly recorded. The firm of Sanderlin & McMillan was dissolved in October, 1900. In January, 1901, within four months of the execution of these mortgages, Sanderlin was adjudged a bankrupt. Stephen McIntyre was made trustee of the estate. The trustee took possession of all the property in which Sanderlin had an interest, including the property covered by these two mortgages, and under proceedings instituted by him in the bankrupt court, to which he made McNair & Pearsall parties, sold the mortgaged property free of all liens. Up

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to the date of these proceedings McNair & Pearsall had not appeared in the bankruptcy court, and had not made any proof of claim.

The question made is as to the disposition of the proceeds of the sales of the mortgaged property. The property mortgaged by the firm of Sanderlin & McMillan brought $2,308.50. That mortgaged by Sanderlin alone brought $2,605.50. The referee proposed to pay out of the proceeds of the first-named mortgage two small liens in existence at its date held by other parties, and then to apply the remainder to the payment of the chattel mortgage given by Sanderlin & McMillan, which firm has not been adjudic ted bankrupt. He also proposes to charge against each lien so paid the proportionate part of the expenses of sale as its amount bears to the total proceeds.

The referee finds, and it is not disputed, that the Sanderlin mortgage was executed in good faith by him, not intended as a preference, and without knowledge on his part or on that of the mortgagees that he was insolvent. He recommends that so much of the mortgage debt as secures the $805.59 advanced in cash be paid, with its interest, out of the proceeds of sale; that the remainder of the proceeds go into the general estate, and that McNair & Pearsall prove the remainder of their claim against the bankrupt estate as general creditors. He makes the same suggestion with respect to the proportionate amount of costs as he made as to the proceeds of the first-named mortgage. Upon review of his report by the district court, the action of the referee in recognizing the validity of the mortgage of Sanderlin & McMillan was affirmed. In this we concur with the court below.

The ruling of the referee with regard to the proportionate division of the costs was reversed, the court ordering that the entire costs be first paid out of the fund, and that the liens be paid out of the remainder, according to their priority. This is the most simple way of settling the costs, and the ruling on this of the court is affirmed.

The district court sustained the referee in his ruling that only $805.59 be paid to McNair & Pearsall out of the proceeds of the Sanderlin mortgage, and that for the remainder of their claim they come in only as general creditors. The surplus proceeds of sale are placed by him in the general fund. It having been found without question that neither the mortgagor nor the mortgagees were aware of the insolvency of Sanderlin, and that the mortgage was executed in good faith, with no intent to give a preference, we are of the opinion that the referee and the court erred in this conclusion. The law upon this subject is declared in Pirie v. Trust Co., 182 U. S. 446, 21 Sup. Ct. 906, 45 L. Ed. 1171. That case decides that, although a creditor may have received a preference within four months of the adjudication of bankruptcy, he may retain it if he did not have cause to believe that it was intended as a preference or with knowledge of the insolvency. If he retain it, however, he loses all claim against the estate of the bankrupt.

It would seem to be a corollary from this case that, if he insists upon his claim against the general estate, he will be held to have waived his lien. In the case at bar, McNair & Pearsall made no such claim. On the contrary, they disclaim all intention so to do.

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They clearly are entitled to hold their lien. It is true that they have come into this case. But this was only in obedience to the order of the court making them parties by proceedings in invitum. These proceedings were instituted for the express purpose of selling the mortgaged property free of lien, and, of course, of transferring the lien to the proceeds. McNair & Pearsall came in for this purpose, insisting on their lien. In this respect the ruling of the district court is reversed.

The case is remanded to that court, with instructions to carry out the points settled by this judgment.

McGAHAN et al. v. ANDERSON et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1902.)

No. 409.

1. APPEAL—BANKRUPTCY—QUESTIONS CONSIDERED.
The motion of a bankrupt to dismiss an appeal from a judgment allowing certain exemptions, for want of jurisdiction, may be denied without consideration on the merits, when the bankrupt fails to take a cross appeal.[1]

2. BANKRUPTCY COURTS—JURISDICTION—EXEMPTIONS.
The bankruptcy court given jurisdiction by Bankr. Act 1898, § 2, subd. 11, to determine all claims of bankrupts to their exemption, has exclusive jurisdiction to determine such claims, as any other rule might create a conflict of jurisdiction, and deprive the bankruptcy court of its right to determine all questions arising under the act.

3. SAME—PLEADINGS—ISSUES.
Where a bankrupt files a schedule claiming his homestead and personal property exemptions as authorized by Bankr. Act 1898, § 7, subd. 8, and the assignee, in filing his account with the court, as required by section 47, gives the estimated value of each article, as required by general order No. 17 (18 Sup. Ct. vi.), which also authorizes exceptions therefrom to be taken within 20 days, and a creditor files exceptions, and the referee certifies the question of exemptions to the court, such question may be considered without being specially pleaded.

4. SAME—EXEMPTIONS—EVIDENCE—SUFFICIENCY.
A bankrupt admitted that he began the erection of a house claimed as a homestead after July 1st, but did not make a candid disclosure as to where he received the money for its construction. He admitted that a portion thereof came from the sale of goods which were not paid for. The house was built on a lot owned by his wife, which was conveyed to him so that he could claim a homestead. An involuntary petition in bankruptcy was filed against him on October 25th, and he was declared a bankrupt within a month thereafter. *Held* not sufficient to show that the bankrupt was solvent, and able to pay his creditors, at the time of the construction of the house, so as to enable him to acquire it as a homestead with money taken from his business.

5. SAME—EVIDENCE—BURDEN OF PROOF.
A bankrupt claiming a homestead exemption has the burden of showing by clear and conclusive proof that he was solvent, and able to pay all claims against him, when he acquired the homestead.

6. SAME—PERSONAL PROPERTY EXEMPTION—UNPAID MERCHANDISE.
Under Const. S. C., which allows a debtor to hold personal property exempt from attachment to the amount of $500, but provides that no

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[1] Appeal and review in bankruptcy cases, see note to In re Eggert, 48 C. C. A. 9.

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property shall be exempt from payment of obligations contracted for the purchase of such property, a bankrupt is not entitled to such exemption out of the proceeds of a sale by the trustee in bankruptcy of merchandise which has not been paid for.

Appeal from the District Court of the United States for the District of South Carolina, Sitting in Bankruptcy, at Charleston.

For former opinion, see 103 Fed. 854.

P. A. Willcox (Claudian B. Northrop, on the brief), for appellants.

W. F. Clayton, for appellees.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

JACKSON, District Judge. It appears from the transcript of the record in this case that the bankrupt filed his petition on the 5th day of October, 1899, praying that he be adjudged a bankrupt, and that on the 18th day of November, 1899, he was adjudged a bankrupt, and at the time of his adjudication he filed a schedule of his property that he claimed as exempt under the constitution and the laws of the state of South Carolina. On the 4th day of January, 1900, the trustee set apart, as being exempted under the laws, personal property to the amount of $500 and realty to the amount of $1,000, making a total of $1,500. On January 9, 1900, exceptions were filed by creditors of the bankrupt to the report of the trustee. On January 11, 1900, the bankrupt filed a notice requiring the creditor T. R. McGahan to make exceptions more definite, and on January 15, 1900, an amendment to the exceptions was filed. On February 28, 1900, the referee made his report on the nature and character of the indebtedness of the bankrupt, under the order of the court before entered, which required him to take such further proceedings as were required by the act. On the 3d day of April, 1900, the referee filed his report upon the exceptions to the exemptions, and reported that the bankrupt was entitled to an exemption of $425 in cash, and $50 for wearing apparel, and $25 for a bicycle, making in all $500; and further reported that he was entitled to his homestead, a house and lot, valued at $1,000. Exceptions were taken to this report of the referee, and heard by the court. The court, in its first opinion, after due consideration, reached the conclusion that the bankrupt was not entitled to an exemption of $425 set apart by the referee, but was entitled to the allowance of articles of personal property of the value of $75, and to the homestead exemption of the value of $1,000. This is briefly the history of the case up to the time of the appeal, which was taken to the ruling of the court upon the questions of the two exemptions.

The first question that we shall consider is the one raised by the appellees upon their motion to dismiss this proceeding for the reason that this court is without jurisdiction. We might very well dispose of this question by stating that there is no cross appeal upon the part of the appellees to raise any such question. The only appeal from the rulings of the court disclosed by the record is that of the appellants, which we will now consider. The learned judge

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well remarked that "by section 2, subd. 11, of the bankrupt act, this court has jurisdiction to determine all claims of the bankrupt to exemptions." In the nature of things, this must be so. The bankrupt court, as a necessity, must alone deal with the exemptions of the bankrupt. If any other tribunal was to intervene to determine this question, it would be the exercise of a jurisdiction, which might result in a conflict of authority, and deprive the bankrupt court of its rightful power to speedily determine all questions of law and right arising under the bankrupt act, which was clearly the intention of congress when it enacted the law. The supreme court, which was designated by the bankrupt act to promulgate certain general orders in bankruptcy, expressly prescribed in general order 17 (18 Sup. Ct. vi.) the duties of the trustee after receiving the notice of his appointment, one of which was to make a report to the bankrupt court within 20 days after receiving said notice of the articles set aside by him. We think that we may fairly infer that the supreme court would not have adopted general order 17 (18 Sup. Ct. vi.) if it had any doubt about its power and authority to do so; certainly it cannot be contended that congress, in the passage of a general bankrupt act, has not the right to determine the terms and conditions upon which a bankrupt may secure the benefit of the act. This principle has been recognized in every bankrupt act which has been passed by congress since the creation of our government. The express provision in this act which we have now under consideration makes it the duty of the trustee to set apart such property to the bankrupt as provided for under the laws of the state in which he lives as being exempt from seizure under any legal process whatever. This appears to have been done by the trustee as required by the act. It does not appear to us that it is necessary to cite any authorities to support this position, but, if any were needed, it would be found, after an examination of the case of In re Mayer, 47 C. C. A. 512, 108 Fed. 602, that it fully sustains this position, the court holding that by section 2 of the bankrupt act the courts of bankruptcy are given jurisdiction to determine all the claims of the bankrupt to their exemptions. The supreme court, in the case of Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, we think, fully sustains this position.

The first error assigned by the appellants is to the ruling of the court below in reference to the homestead exemption in the real estate. The learned judge below, who heard this case upon a rehearing of this question, held, in his second opinion, that the case was "not before him in such a shape that would enable him to decide it." It is to be observed that by section 7, subd. 8, of the bankrupt act, the bankrupt is required to file his claim for such exemptions as he may be entitled to. Evidently the purpose of congress in the enactment of this statute was to protect an insolvent debtor at least to the same extent that he was protected by the laws of his state, provided that the exemption claim did not exceed the amount allowed under the laws of the state in which the bankrupt lives. When the bankrupt had exercised this right under the act of congress by filing his schedule as prescribed by the act, then it

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became the duty of the trustee to set aside the property specified in the exemption for the benefit of the bankrupt and his family, if any he had. As soon as the property was set apart under the claim of the bankrupt, he became invested with the title thereto free from all existing debts; but such title or claim to such exemption might be challenged, which challenge must be heard by the bankrupt court, as it alone could determine the right to the property between the bankrupt and the trustee, who alone represents the rights of the creditors in the matter. It might be otherwise if it were a contest between the bankrupt and a third party, who claimed any portion of the property set aside under the exemption, or, in fact, any other property of the bankrupt that the trustee might seek to recover from a third party. We concur with Judge Jenkins in his able opinion in the case of In re Mayer, supra, when he says undoubtedly the bankrupt court is given jurisdiction, which before the act was lodged in all the courts of general jurisdiction, to determine, if there be any dispute, as to the rights of the bankrupt under his claim of exemption. So far as this question is raised by the appellants in this case, we hold that the bankrupt court under the act possesses full and plenary power to dispose of these questions. The learned judge below in his first opinion allowed the homestead exemption, but in his subsequent opinion he held that the question of the homestead exemption was not properly before him, and could not be determined upon the exceptions to the allowance of the homestead. In this conclusion we must differ with the court below. Certainly this question has been raised by the bankrupt filing his claim and schedule of exempted property, and the action of the trustee setting aside the property claimed as exempt, and the exceptions to the action of the trustee taken by the creditors before the referee in bankruptcy, and the action of the referee and his report upon the exemptions, in which he disposes of the question certifying the whole matter to the judge of the court for his opinion. This is in strict compliance with general order 17, which requires the trustee to make his report to the court under the provisions of section 47 of the act, giving the estimated value of each article, to which report any creditor may file exceptions within 20 days after the filing of the report. This general order directs that the exceptions be argued before the referee, and at the request of either party his action shall be certified to the court for final determination. This course was pursued in this case. Not only was the question relating to the personal property, but the exemption relating to the homestead was certified to the judge of the court for his action. This certificate makes a well-defined issue founded upon the pleadings and evidence in the case, which invokes the judgment of the court. In the view that we take of this case, no necessity exists for any special pleading. The only question for the court to consider is whether or not this bankrupt is entitled to the homestead exemption that he claims. The history of how and when he acquired this property that he claims to be set apart as a homestead is fully disclosed by the evidence. In his schedule he claims the property. The trustee set it apart and assigned it

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to him. Exceptions were taken to this assignment by the creditors, and the matter referred to the referee in bankruptcy, who, in an elaborate opinion, overruled all the exceptions, and approved the report of the trustee, and the referee certified his conclusions to the court for its action. We cannot agree with the conclusions of the referee in regard to either exemption. As to the homestead exemption, the evidence of the bankrupt is by no means satisfactory. He admits that he began the erection of the "house in July or August, 1899,—after July 1st." He does not make a candid disclosure as to where the money came from to build this house, but, when pressed, admitted that a part of it "came from the sale of goods which he had not paid for." He fails to disclose how much money came from the goods which he had purchased and never paid for. He alone was possessed of the information upon the subject. It was his duty, in setting up a claim to a homestead, to show by clear and conclusive proof that at the time he built the house upon the property he was in a solvent condition, and able to satisfy all the claims against him, before he could take money from his business for the purpose of securing a homestead. The fair deduction from all the evidence in this case tends clearly to prove that at the time he commenced the erection of this house he was in a failing condition, if not insolvent. He built this house upon a lot owned by his wife, and afterwards had it conveyed to himself in order that he might have it set apart as a homestead. This is a most potential fact to show that he was shaping his course to protect himself as far as possible from the consequence of bankruptcy, which the evidence tends to show was imminent at that time, for on the 25th day of October following a petition of involuntary bankruptcy was filed against him, and in less than a month he was adjudicated a bankrupt. We deem it unnecessary to discuss the evidence in detail filed in this case, but content ourselves with the conclusions that we have reached based upon all the evidence, more particularly on the evidence of the bankrupt himself.

In the view that we take of this case, we reach the conclusion that the bankrupt court has the power to dispose of this question upon the issue raised by the pleadings and the evidence as they exist in this record, and that upon the evidence and pleadings the bankrupt has no right to have the property that he claims as a homestead set aside, for the reason that we are of the opinion that he had no money that he could justly call his own at the time when he commenced to erect the building upon the lot of his wife, which was subsequently conveyed to him, as we think, for the purpose of claiming it as a homestead. Exceptions were also taken to the action of the trustee in setting apart $500 as personal property, for the reason that $425 was money which was set apart as exempted property under the law. It is true that the trustee did not set apart specific articles of property as exempt, but it appears that there was an understanding between the trustee and the bankrupt that the entire stock of goods should be sold, and that the bankrupt should receive his exemption of personal property in cash. The trustee deemed it to be for the best interest of all the creditors to do so.

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and the referee approved the action of the trustee in this respect, and directed that the entire stock of goods should be sold. To this action of the referee there was an exception taken, which exception raised an issue as to the right of the trustee to sell the entire stock of goods, and to give the bankrupt $500 in cash, the amount of his exemption in personal property. This action of the referee was not approved by the court, the court holding that only the $75, of the $500, could be set aside, and overruled the action of the referee in setting aside the $425 in cash as a personal exemption. In this conclusion of the court below we concur, for the reason that under the provisions of the constitution of the state of South Carolina money derived from the sale of merchandise on which purchase money is still due cannot be set aside as an exemption, and it would be unjust to the creditors to do so.

In the view that we take of this case it is unnecessary to pass upon the other exceptions, as the ones we have passed upon necessarily dispose of the two exemptions claimed by the bankrupt. For the reasons assigned, we are of the opinion that so much of the judgment of the court below as holds that the bankrupt court has not the power to dispose of the question of the homestead exemption be reversed. This court holds that it has such power, but is of the opinion that the bankrupt is not entitled, under the pleadings and evidence in this case, to the homestead exemption of the house and lot claimed by the bankrupt in Schedule B. The court is further of the opinion that the exception to the judgment of the court below as to the personal exemption of $500 should be overruled, this court holding that the allowance of $75 as a personal exemption, and the disallowance of $425, is correct.

For the reasons assigned, we are of the opinion that the judgment of the court below be reversed, and this cause remanded to that court, with direction to conform its action to the judgment of this court. Reversed.

In re KELLOGG.

(District Court, W. D. New York. January 27, 1902.)

No. 448.

1. BANKRUPTCY—PROPERTY VESTING IN TRUSTEE—MORTGAGED REALTY.
Wherever a bankrupt holds the legal title to mortgaged property when the adjudication is made, it will pass into the custody of the bankruptcy court, and, by operation of law, the title of the bankrupt will vest in the trustee as of the date of such adjudication.

2. SAME—ESTATE OF MORTGAGOR—WHAT LAW GOVERNS.
The estate of a mortgagor in mortgaged premises situated in New York must follow the rules laid down by the state tribunal.

3. SAME—NATURE OF MORTGAGE—ESTATE CREATED.
A mortgage on real estate in New York has none of the characteristics of a conveyance, but is merely a chose in action, giving the mortgagee no legal estate in the land, but merely a lien on the property.

4. SAME—JURISDICTION OF BANKRUPTCY COURTS.
The jurisdiction conferred on bankruptcy courts by Bankr. Act, § 2, subd. 7, giving them jurisdiction to cause the estate of bankrupts to

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be collected and distributed, and to "determine all controversies in relation thereto, except as herein otherwise provided," depends—First, on whether the controversy has reference to property actually in the possession of the bankruptcy court or belonging to the bankrupt estate; second, whether it arises in the bankruptcy proceedings, and the property becomes, therefore, subject to distribution to creditors; or, third, whether, by the nature of the controversy, power is conferred on the court to determine conflicting liens and apportion assets.

5. SAME—DETERMINING VALIDITY OF MORTGAGE.
Where mortgaged property owned by a bankrupt is in the custody of the bankruptcy court, and the legal title thereto is lawfully held by the trustee in bankruptcy as a part of the bankrupt's estate, the federal district court has jurisdiction to hear and determine a question as to the validity and amount of the mortgage lien.

6. SAME—RIGHT OF TRUSTEE TO PLEAD USURY.
Where a trustee in bankruptcy sues to set aside a fraudulent conveyance by the bankrupt, and the fraudulent grantee thereupon conveys the property involved to the trustee, the latter stands in the same relation to a mortgage thereon executed by the bankrupt as the bankrupt himself, and, therefore, though the defense of usury is personal to a borrower, may attack it as invalid on that ground.

7. SAME—KNOWLEDGE OF USURY.
A mortgage which expressly provides for the payment of lawful interest will not be invalid for usury unless exacted with the knowledge of the lender as a condition of the loan.

8. SAME.
Where a loan is negotiated by an agent of the lender, it must be established by proof that the lender knew, or must be presumed to have known, that usury was exacted.

9. SAME—DEVICE TO COVER USURY.
The inhibition of the statute against usury follows the making of a contract with a third person, where it appears to have been a mere device to cover the unlawful undertaking, and that such scheme was in contemplation of the parties.

10. SAME—RIGHTS OF BONA FIDE HOLDER.
Under the laws of New York, a mortgage void for usury in its inception is not valid in the hands of a bona fide holder.

11. SAME—MORTGAGE ADJUDGED USURIOUS.
A bankrupt who had received but $15,000 on a $25,000 mortgage thereafter agreed in writing to pay the mortgagee's agent, who negotiated the loan, and who was the brother of the mortgagee's husband, 5 per cent. on the gross sales of her business, on the agent's assurance that otherwise no more money would be forthcoming. A new mortgage was then executed for the same amount as the first, and the remaining $10,000 paid. Afterwards the mortgage was assigned to the mortgagee's mother-in-law. The evidence showed a community of interest. *Held* sufficient to show an intent to exact usurious interest on the part of the mortgagee, and that a finding that the mortgage was void in its inception was therefore supported.

12. FAILURE TO PRODUCE WITNESSES—EFFECT.
Where a party has it in his power to produce a material witness, and fails to do so, a presumption arises that the testimony would be unfavorable to him.

In Bankruptcy.
See 112 Fed. 52.

Frank H. Robinson, for trustee and creditors.
Pierre M. Brown, for mortgage creditor.

HAZEL, District Judge. On March 1, 1901, Clara E. Kellogg was adjudged a bankrupt on her voluntary petition. A temporary

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receiver of her property was appointed by this court on the same day. Thereafter, at a meeting of creditors, the receiver was appointed trustee. Immediately after his qualification, the trustee commenced an action against the C. E. Kellogg Company, a Delaware corporation, to set aside, as a fraud on creditors, a transfer of property made to that company by the bankrupt January 29, 1901. On the same day that the case was commenced, the Kellogg Company, by its board of directors, rescinded its transfer, and reconveyed the property to the trustee. On June 6, 1900, the bankrupt executed and delivered to Una R. Goslin a mortgage upon this same property, consisting of real estate, which included an extensive planing mill plant. The amount secured by the mortgage was $25,000. The transfer to the Kellogg corporation was made subject thereto. Subsequently, on March 20, 1901, Sophie M. La Grave, of Paris, France, to whom Mrs. Goslin assigned the mortgage, instituted a suit in the supreme court of the state of New York to foreclose it. The trustee thereupon filed in this court a petition praying for an order directing that the assets in his actual possession, including the property mortgaged as hereinbefore stated, be sold free from all incumbrances, and that all liens should be transferred to the proceeds of the sale, their validity and amount to be determined by the bankruptcy court. Notice of this application was given to all creditors, and on the return day proof was made by the mortgagee, Mrs. La Grave, as to the consideration of the mortgage and her status as a lienor. She objected to the jurisdiction of the court, on the ground that the referee had no power to determine in a summary proceeding the question of the validity of the mortgage, and maintained that the validity of the lien could only be determined by plenary suit commenced by the trustee in the proper state tribunal against the holder of the mortgage. The objection was not sustained by the referee. Proofs were then taken, both parties being heard, tending to show that the mortgage lien was usurious in its inception. The referee found that the bankruptcy court had acquired complete jurisdiction over the res; that the lien was asserted to property, title of which was vested in this court, and in the actual possession of the trustee; the transfer to the Kellogg corporation was in fraud of creditors, and therefore the trustee, on reconveyance of the property to him, stood in the same relation to the mortgage as the bankrupt. The referee also found, from all the evidence in the case, that the circumstances conclusively justified an inference that the mortgage executed by the bankrupt to Mrs. Una R. Goslin was invalid for usury. The comprehensive opinion of the referee is found in 6 Am. Bankr. R. 389.

The questions for review are as follows: (1) Is the defense of usury available to a trustee in bankruptcy as against an obligation of the bankrupt? (2) Can the question of validity and amount of a mortgage lien upon property in the bankrupt estate be determined in a summary proceeding before a referee? (3) Did the supreme court of the state of New York acquire jurisdiction of the property, to the exclusion of the United States district court, by

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the filing of the summons, complaint, and notice of pendency of action in foreclosure before the trustee was appointed, the bankruptcy court having previously acquired jurisdiction by the filing of the petition in bankruptcy and the appointment of a receiver, who had qualified and taken possession of the property prior to the commencement of said action of foreclosure? (4) Where the mortgagor, with intent to hinder and delay her creditors, conveys the mortgaged property to a corporation participating in such intent, and the trustee repudiates such transfer on account of such fraud, and takes possession of the property, and by mutual consent the fraudulent grantee and the trustee rescind such conveyance, does the fact that the property upon which the mortgage was an apparent lien was transferred by the mortgagor to the said corporation, after the recording of the mortgage and subject to the lien thereof, before the beginning of the bankruptcy proceedings, preclude the trustee from pleading usury? (5) Was the mortgage void for usury as a matter of fact?

The second and third questions may be considered together. At the outset, therefore, it is important to inquire of what did the estate of the bankrupt consist at the time of the adjudication. Assuming that the bankrupt, Mrs. Kellogg, held the legal title to the mortgaged property in question when adjudication was made, it passed into the custody of this court, and therefore, by operation of law, the title of the bankrupt vested in the trustee as of the date of such adjudication. The estate of the mortgagor or mortgagee in mortgaged premises within the state of New York must, of course, follow the rules laid down by the state tribunal. In re Novak, 7 Am. Bankr. R. 27, 111 Fed. 161. A mortgage on real estate in the state of New York has none of the characteristics of the conveyance, but is merely a chose in action, giving no legal estate in the land, but entitling the owner of the mortgage to a lien thereon, as security for the debt thereby secured. Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623. The property was therefore protected from any action which might have been taken other than in a suit instituted to foreclose or establish a lien of the mortgage. The entire property, subject to whatever lien Mrs. La Grave possessed, came within the control of the court of bankruptcy. This court had undoubted authority, after an adjudication in bankruptcy, to stay the foreclosure suit commenced by Mrs. La Grave. No less had it authority to direct a sale by the trustee in bankruptcy free and clear of all liens and incumbrances, and transfer a lien to the proceeds. In re Worland, 1 Am. Bankr. R. 450, 92 Fed. 893; In re Pittelkow (D. C.) 92 Fed. 903. The purpose and object of the bankrupt act is to vest such power and authority in the courts of bankruptcy, at law and in equity, as will give jurisdiction to carry out and enforce the provisions of the act. By subdivision 7 of section 2, jurisdiction is conferred to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The claim, therefore, that this court has jurisdiction must be based upon the authority conferred on it by clause 7 of section 2. The

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supreme court said in Bardes v. Bank, 178 U. S. 535, 20 Sup. Ct. 1005, 44 L. Ed. 1175:

"The chief reliance of the appellant is upon clause 7, § 2. But this clause, in so far as it speaks of the collection, conversion into money, and distribution of the bankrupt's estate, is no broader than the provisions of section 1 of the act of 1867, and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to 'determine controversies in relation thereto,' it is controlled and limited by the concluding words of the clause, 'except as herein otherwise provided.'"

The court then said the clause providing that United States circuit courts shall have jurisdiction of all controversies at law and in equity, etc., "indicated the intention of congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

In Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, the supreme court said, quoting section 2, subd. 7, and the words, "except as herein otherwise provided":

"The exception refers to the provisions of section 23, by virtue of which, as adjudged at the last term of this court, the district court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy. Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175."

This last sentence from the Bernheimer Case, particularly in view of the fact that elsewhere in the opinion the court limits the application of the Bardes Case, would seem to clearly indicate the scope of the Bardes Case upon the point at issue. It is clear that the decision of the supreme court is that controversies not strictly or properly part of proceedings in bankruptcy should not come within the jurisdiction of the district courts of the United States without the consent of the proposed defendant. Now, what are controversies of that nature? The court removes all doubt by declaring, in unmistaken language, that such controversies have reference to independent suits brought by the trustee in bankruptcy to assert title to money or property as assets of the bankrupt against adverse claimants. Such suits obviously are actions brought to set aside fraudulent transfers, and to recover property of the bankrupt wrongfully withheld by a third person. But, where the property is in the actual possession of the court, the right to decide conflicting claims is paramount, if not inherent, in the court first acquiring possession. Counsel for the mortgagee contends that this is a controversy between the bankrupt and an adverse claimant, and that a summary proceeding, in which a trustee assails the title to property held by him, or the validity of a lien against it, is just as much a controversy between the trustee and an adverse claimant as an action brought against a third party holding the property adversely, and therefore is not cognizable by the

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bankruptcy court in any form of action or proceeding. But the case at bar is clearly distinguishable from the cases cited by counsel. The proceeds of the sale of the mortgaged property, indeed the property itself before the sale was directed by the bankruptcy court,—the mortgaged property,—was in the custody of that court. It was part of the res over which this forum gained control by virtue of the adjudication in bankruptcy. It was held by the trustee as part of the bankrupt's estate, and the district court, therefore, had jurisdiction to hear and determine the issues presented in the nature of a claim to, or lien upon, the assets of the bankrupt estate. White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; In re Whitener, 44 C. C. A. 434, 105 Fed. 180; In re Matthews (D. C.) 109 Fed. 603. It may be quite true that the trustee, in the exercise of discretion, had a right to institute an action in the proper tribunal to annul the mortgage on account of its invalidity due to its usurious origin. But, manifestly, where two remedies are open to a trustee, one affording relief in the forum creating his trust, and pointing out a very simple and less expensive method of attaining his end than is attainable by the other, then the trustee's duty is to pursue that remedy according to the nature of the controversy, where congress intended such remedy or procedure should be instituted. In re Baudouine, 3 Am. Bankr. R. 651, 101 Fed. 574, cited by counsel for mortgagee, is clearly distinguishable from the case at bar. There a trustee in bankruptcy claimed that the income to which the bankrupt was entitled as a beneficiary of a trust created by will was applicable to the payment of the bankrupt's creditors, and therefore instituted proceedings against the bankrupt and testamentary trustee in the bankruptcy court to compel the payment to him of such funds. The bankrupt's interest in the estate was merely in the nature of a chose in action against the testamentary trustee who held funds under and by virtue of his trust. These trust funds never came into the possession of the bankruptcy court. Judge Wallace, speaking for the circuit court of appeals, in that case said:

"The language of clause 7 would seem to be sufficiently comprehensive to authorize the determination by courts of bankruptcy of every controversy relating to the estates of bankrupts. * * * Nevertheless, it is capable of a narrower construction, and can be read as extending only to controversies about property which actually belongs to the bankrupt's estate, or which arise strictly in the bankruptcy proceeding, such as those in reference to the marshaling of assets, or the extent and priority of conflicting liens."

In the light of this decision, considering the scope of section 2, subds. 6, 7, of the bankrupt act, the jurisdiction here depends upon (1) whether the controversy is one having reference to property actually in the possession of the bankruptcy court or belonging to the bankrupt's estate; or (2) whether it arises in the bankruptcy proceeding, and the property in question, therefore, becomes subject to distribution to creditors; or (3) whether by the nature of the controversy power is conferred on the court to determine as to conflicting liens and apportion assets. No application was made to the court to restrain the sale of the property by the trustee, nor to require him, in the interest of the mortgagee, to interpose a possible

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defense in the foreclosure suit instituted in the state court. Had such an application been made, it may well be that the court, in the exercise of its discretion, because of the character of the defense and the existing conditions, would have directed the trustee to interpose any defense to the validity of the mortgage in the state court where the suit had been commenced. This course not having been adopted, and the mortgaged property or its proceeds being in the actual custody of the trustee, all persons interested in the res, including lienors and mortgagees, became parties to the bankruptcy proceeding. Carter v. Hobbs, 1 Am. Bankr. R. 215, 92 Fed. 594. The property or interest in property claimed under such circumstances, although adverse to the bankrupt or in hostility to the trustee and general creditors, must be adjudicated by the district courts in the manner pointed out by subdivisions 6 and 7 of section 2 of the bankrupt act. In re Pittelkow, supra, and cases cited; In re Whitener, supra; In re Russell, 41 C. C. A. 323, 101 Fed. 248. The circuit court of appeals for this circuit, in Re New York Economical Printing Co. (C. C. A.) 110 Fed. 514, had before it a case where a chattel mortgagee of the bankrupt laid claim to the funds in the bankruptcy court realized from a sale of the mortgaged property pursuant to an order of the bankruptcy court. There the bankruptcy court had, as in the case at bar, directed the mortgaged property in its custody to be sold, and provided that all liens upon the property should attach to the proceeds. The circuit court of appeals then disposed of the validity of the chattel mortgage as against the proceeds. Manifestly, this principle applicable to the proceeds realized on sale of personal property upon which there was a chattel mortgage certainly applies in a case where real estate was sold free of incumbrances by order of the bankruptcy courts, and the order provides that all liens on the property should attach to the proceeds. The question of the validity of the mortgage in question here was not determined upon a mere motion or affidavits. A full hearing was had before the referee, and the mortgagee had abundant opportunity to present all possible evidence in support of the validity of her lien.

Since writing the foregoing, the court's attention is called to memorandum of opinion by the circuit court of appeals for the Ninth circuit, in Re San Gabriel Sanatorium Co. (C. C. A.) 111 Fed. 892 (Jan. 7, 1902), where it is held that the district court was right in granting leave to the mortgagee to make the trustee in bankruptcy a party defendant to the foreclosure suit commenced in the state court, and in denying trustee's application to restrain the foreclosure suit. The syllabus states that "the bankruptcy act does not confer upon a district court of the United States as a court of bankruptcy jurisdiction of a controversy between a trustee and a mortgagee of the bankrupt to determine the validity of the mortgage unless with the consent of such mortgagee." An examination of the facts of this case, which appear where it is previously reported in 42 C. C. A. 369, 102 Fed. 310, discloses that the title to the property in question was not in the trustee at the time this question was before the court for determination. Therefore the jurisdiction was clearly lacking, under the doctrine of the Bardes Case, supra. The court is therefore of

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the opinion that, inasmuch as the property was in the lawful possession of the trustee in bankruptcy and of the bankruptcy court, the district court is vested with jurisdiction to determine the question of validity and amount of a mortgage lien upon property in the bankrupt's estate, such as exists in the case at bar, and that the supreme court of the state of New York did not acquire jurisdiction of the property to the exclusion of the United States district court.

The question of usury must now be determined. It is quite true that usury is a personal defense to the borrower, and that grantees taking property subject to an existing mortgage cannot be heard to plead the invalidity of that mortgage because of its usurious origin. Merchants' Exch. Nat. Bank of City of New York v. Commercial Warehouse Co. of New York, 49 N. Y. 635; Bullard v. Raynor, 30 N. Y. 206; Insurance Co. v. Nelson, 78 N. Y. 150; Ord. Us. § 131; 27 Am. & Eng. Enc. Law (1st Ed.) 954; Hartley v. Harrison, 24 N. Y. 172.

In the case at bar the trustee stands in the place of the mortgagor, and, by express provision of the bankruptcy act, he is vested, immediately upon his appointment and qualification, with the title of the bankrupt to the mortgaged premises. He is empowered and it is his duty to have set aside transfers and incumbrances made in fraud of creditors. Section 67 of the bankrupt act provides that property conveyed by the bankrupt in fraud of creditors becomes, by virtue of the adjudication, a part of the assets of the estate. Conveyances made with intent to defraud creditors are declared to be null and void. The conveyance to the trustee by the Kellogg Company, a fraudulent grantee, therefore, places the trustee in the position of the original grantor and mortgagor, and the right to interpose a plea of usury is preserved. The agreement to pay usurious interest is not apparent from the mortgage in controversy, or from the contract whereby a commission of 5 per cent. is agreed to be paid from the gross earnings of the business carried on by the bankrupt. The mortgage expressly provides for the payment of lawful interest. It is essential, therefore, that it be proved either by direct proof or evidence circumstantial in its nature, leading to a conclusion beyond reasonable doubt that the intendment of the contract was to demand and receive a usurious exaction. It must be exacted with the knowledge of the lender as a condition of the loan. When a loan is negotiated by an agent of the lender, it must be established by proof that the lender knew or is presumed to have known that a greater sum was to have been paid for the loan or forbearance than is permitted by statute. The inhibition of the statute follows the making of a contract with a third party when it appears to have been a device and scheme to cover the unlawful undertaking, and that such scheme was in contemplation of the parties. Clarke v. Sheehan, 47 N. Y. 198; U. S. v. Waggener, 9 Pet. 378, 9 L. Ed. 163; Call v. Palmer, 116 U. S. 98, 6 Sup. Ct. 301, 29 L. Ed. 559. The proofs show that $15,000 only was advanced on the execution and delivery of the first mortgage, dated in April, 1900. The remaining sum of $10,000 was withheld. A demand was made upon Miss Kellogg, the mortgagor, that she execute a contract of assignment of a one-third interest in

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the business conducted by her at Canisteo, N. Y., to E. F. Goslin, who aided in negotiating the loan. Mr. Goslin is the brother-in-law of the original mortgagee, and son of the present holder of the mortgage. It was also demanded of Miss Kellogg that she pay to E. F. Goslin 5 per cent. of the gross sales of the business as a condition of the payment of the balance unpaid on the mortgage of April, 1900. Neither of these conditions was assented to at the time, but Miss Kellogg subsequently executed an agreement in writing embodying the latter arrangement. A new mortgage for $25,000 was made in place of the one already mentioned, and then the balance of $10,000 was paid at different times. Miss Kellogg testified that E. F. Goslin, who negotiated or aided in negotiating the loan, said "there would be no more money forthcoming"; that "they never loaned any money at 6 per cent., and never would"; and she needed the money, and, in order to obtain it, assented to the contract. This was not a new contract with a third party. The same persons who negotiated the original mortgage were instrumental in withholding the payment of the mortgage for which the mortgage stood security. It is clear that both transactions, the one relating to the first mortgage and the other to the mortgage now in controversy, as well as the intervening negotiations, are intimately connected; each of them is a part of the other. The conflict of evidence relating thereto has been resolved by the referee in favor of the trustee. He found that the circumstances of the transaction, as shown by the evidence presented, constitute the offense of usury. The evidence, and his conclusions thereon, are presented by him in an able opinion, with much fullness and painstaking. The court is of opinion that the effect of the entire transaction and of the circumstances surrounding it was to secure to the mortgagee, or the person who actually made the loan it represents, a greater rate of interest than 6 per cent. per annum. In Fiedler v. Darrin, 50 N. Y. 443, it is held that the intent is essential to constitute the offense of usury, and the court says:

"The intent must be deduced from, and determined by, the acts. The intent which enters into and is essential to constitute usury is simply the intent to take or reserve more than seven per cent. per annum for the loan or forbearance of money. There are cases in which an act is lawful or unlawful, depending upon the particular intent of the actor."

The 5 per cent. contract above described was evidently intended to cover the usurious act, and the condition incorporated therein, that E. F. Goslin was to act as the New York agent for the sale of lumber of Miss Kellogg, was a pretext and a cover to avoid the consequences of the unlawful exaction. The all-important questions in the case are whether the mortgagee had such knowledge of the acts of her representatives as to render her chargeable with them, or were the acts of the representatives and lender so interwoven as to justify a presumption of knowledge and participation on the part of the mortgagee? The mortgage and contract, the basis of this contention, must be governed by the laws of the state of New York. By the statutes of that state, it is declared that all securities whatsoever, whereupon or whereby there shall be reserved or taken a greater sum or value for a loan or forbearance of any money than

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the rate of $6 upon $100 for one year, shall be void. Rev. St. N. Y. (9th Ed.) p. 1855. This statute has many times been construed by the highest court of the state. It is held that, where a usurious instrument is considered void in its inception, it will remain void in the hands of a bona fide holder. Webb, Us., § 183; Miller v. Zeimer, 111 N. Y. 441, 18 N. E. 716; Morgan v. Tipton, Fed. Cas. No. 9,809. It follows, therefore, that, if the mortgage was void for usury because of knowledge or participation in a usurious agreement on the part of Una R. Goslin, her assignment of the mortgage to an innocent holder for value will not remove the taint. The authorities also uniformly hold that a lender cannot be charged with taking unlawful interest when the transaction was completed by an agent, where the agent, for his own benefit, exacted more than the lawful rate, unless the lender had knowledge of the usurious acts of the agent. Call v. Palmer, supra; Barrietto v. Snowden, 5 Wend. 181; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Bell v. Day, 32 N. Y. 165; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379. In the case last cited, Judge Earl, speaking for the court of appeals, said:

"The defense of usury, involving crime and forfeiture, cannot be established by mere surmise and conjecture, or by inferences entirely uncertain. If, upon the whole case, the evidence is just as consistent with the absence as with the presence of usury, then the party alleging the usury has failed."

These authorities, however, have no application here, other than to show the liability of the lender for the acts of the agent making a bargain prohibited by the statute because of usury, and to amplify the well-settled rule that the proofs to sustain a corrupt and usurious agreement shall be clear, convincing, and consistent with the presence of usury. The court has carefully weighed the circumstances of this case adduced by the evidence, and is reluctant to hold that the mortgage is invalid for usury, inasmuch as no usurious sum was paid, and because the bankrupt obtained and used in her business the sum borrowed, and the bankrupt estate has the benefit of the loan thereof. The evidence of the unlawful bargain, and the evident purpose and intent to evade the statute, is so clearly to be inferred that the court is constrained to concur with the referee on his finding that the mortgage was void and usurious at its inception. This finding rests upon substantial grounds. The wisdom of the usury statute is not to be questioned by a judicial tribunal. It is the duty of this court to enforce the law, and not to legislate. Where the proofs are clear and satisfactory, the court is bound to apply the remedy, without giving consideration to the drastic and penal features of the statute applicable to the facts under consideration. The proofs show with sufficient clearness that although the mortgage was executed in favor of Una R. Goslin, wife of A. R. Goslin, and subsequently assigned by her to Mrs. La Grave, her mother-in-law, that the loan was in fact made and controlled by her husband. He seems not to have been prominent in the negotiations for the loan and the execution of the usurious contract. That was left to the brother. He was, however, so connected with it as to preclude an innocent intent. It does not clearly appear whose money it was. The finding of the referee is that a

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community of interest existed between the lender and those who negotiated the loan. The testimony offered by the mortgagee, that the contract was in consideration of E. F. Goslin acting as agent for Miss Kellogg, and that pursuant to the contract he transacted business as such agent, is not convincing, in the view that the court has taken that the entire transaction was a corrupt and unlawful scheme to evade the provisions of the usury statutes. The mortgagee had it in her power to produce witnesses by whose testimony any doubt with reference to the scope of the authority by which those who acted or presumed to act for her would have been removed. This she failed to do. No denial of complicity or community of interest is made. Neither Una R. Goslin, the original holder of the mortgage, nor E. F. Goslin, who aided in negotiating the loan, and for whose apparent benefit the usurious contract was made, has appeared to affirm the righteousness of the transaction and to remove the taint attached thereto. The fact that they possessed knowledge enabling them to clarify the transaction, and withheld it, must be considered against the holder of the mortgage. The rule is that, under such circumstances, a presumption is created that the testimony would be unfavorable. Graves v. U. S., 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021; Runkle v. Burnham, 153 U. S. 217, 14 Sup. Ct. 837, 38 L. Ed. 694; American Bell Tel. Co. v. National Tel. Mfg. Co. (C. C.) 109 Fed. 1018. Miss Kellogg testified that she never asked E. F. Goslin or A. J. De Kantstein to represent her, and that she never received any orders from them, and that, prior to her assenting to the contract to pay 5 per cent. commission, E. F. Goslin said that no more money would be forthcoming, and that they never loaned any money at 6 per cent., and never would. This evidence believed by the referee to be reliable and credible stood uncontradicted. Considerable evidence is also introduced in the case by the trustee to show the connection existing between the parties and the existence of the unlawful agreement. The silence of E. F. Goslin and Una R. Goslin, the mortgagee, must be considered against them upon the question of the alleged usurious contract. The inference which necessarily followed from the entire evidence with reference to Mrs. Goslin's knowledge of or acquiescence in the transaction must be construed against her. If she had no knowledge of the transaction, if what was done was without her acquiescence, it was her duty to herself to testify concerning thereof, if the truth was otherwise than as found by the referee. Her failure to testify deprived the trustee of an opportunity to show more clearly on her cross-examination that she had knowledge of her agent's acts. Obviously, her testimony might have dispelled all doubt with reference to her knowledge of the unlawful acts.

From the foregoing, it follows that the first, second, fourth, and fifth questions submitted for review are answered in the affirmative, and the third in the negative. The report of the referee is affirmed.

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In re GAYLORD et al.

(District Court, E. D. Missouri, E. D. February 8, 1902.)

BANKRUPTCY — STOCKBROKER AND CUSTOMER — NATURE OF RELATION—SURRENDERING PREFERENCES.

The relation existing between stockbrokers and customers maintaining running accounts with them and buying stock on a margin is not fiduciary in its character, but is that of debtor and creditor, and a customer of a bankrupt broker, who has received a preference, is therefore within Bankr. Act, § 57g, which declares that the claims of creditors who have received preferences shall not be allowed unless the preference is surrendered.

In Bankruptcy.

See 111 Fed. 717.

George D. Reynolds, for trustee.

Isaac H. Orr, for claimant.

ADAMS, District Judge. The bankrupts, under the firm name of Gaylord, Blessing & Co., were brokers engaged in the business of buying and selling stocks, bonds, cotton, grain, and provisions for their customers. D. M. Gilbert was one of their customers. As the result of prior dealings with the bankrupts, he had to his credit on their books on October 31, 1900, the sum of $1,419.82. On November 3, 1900, he deposited with them the further sum of $250, which went to his general credit in an account kept with him by the bankrupts. The bankrupts had before then purchased for him 250 shares of the common stock of the St. Louis Transit Company, the purchase price for which, with commissions, etc., amounting to $5,400, stood on their books as a debit charge against Gilbert. On different dates between December 3, 1900, and March 4, 1901, the last-mentioned shares of stock, by Gilbert's direction, were sold for him by the bankrupts, resulting in a net profit of $424.50. This went to his credit in the general account. That account, on March 4, 1901, showed a balance due Gilbert of $2,094.32 as a net result of all the debit and credit entries. On the following day—March 5, 1901—the bankrupts, being then insolvent, and having been so insolvent for nine months theretofore, paid to Gilbert $1,200 on account, and charged the same to him in his account. This left a balance then due Gilbert of $894.32. On March 11, 1901, the bankrupts made a voluntary assignment under the laws of the state of Missouri, and on March 20, 1901, proceedings were instituted by their creditors to secure an adjudication of bankruptcy against them. An adjudication followed in due course. The main question submitted by the certificate of the referee is whether Gilbert can prove his demand for the sum of $894.32 without first surrendering the $1,200 so received by him on March 5th, within 15 days of the institution of the proceedings in bankruptcy. The payment of the $1,200 to Gilbert at the time and in the manner hereinbefore stated constituted a transfer of property by the bankrupts, so as to be an unlawful preference within the meaning of section 60 of the bankruptcy act. By the provisions of section 57g, the

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receipt of such a preferential payment precludes proof of any claim for the balance due the preferred creditor, unless he shall first surrender the amount of the preferential payment. This is conceded to be the law, and it is also conceded that, if the relation existing between the bankrupts and Gilbert was that of debtor and creditor, the general rule is applicable to this case, requiring the surrender of the payment of $1,200 as a condition to the allowance of the demand presented. It is contended by the claimant that the bankrupts' relation to him was that of bailee or agent, acting in a fiduciary capacity, and that the legal consequence of that relationship is that the agent is pro hac vice the principal, and therefore that what he holds as such agent is held and owned by the principal. This theory really is that the fund in the hands of the bankrupts is a trust fund belonging to the beneficiary absolutely, but the claimant does not seem to carry his theory to its legitimate result. If he did, he would be here tracing a trust fund, and asserting exclusive right and title to the same as against all other creditors of the bankrupts. Instead of so doing, he presents a claim for the allowance of a general demand upon which he will ultimately receive only his pro rata share of all distributable assets. It is represented to the court that this case is one of many, and that its decision will govern others of like character now pending before the referee. Accordingly, careful consideration has been given to the merits of the matter.

Section 63 of the bankruptcy act provides: "Debts of the bankrupt may be proved and allowed against his estate, which are * * * (4) founded upon an open account or upon a contract express or implied." The facts found by the referee show that for some time before bankruptcy proceedings were instituted the bankrupts had an open running account on their books with the claimant. It does not appear that the claimant had ever actually purchased any stocks through the agency of the bankrupts, so as to finally receive any certificate upon full payment therefor. He had, on the other hand, been putting up "margins" as and when required to secure the bankrupts against fluctuations in market prices, ordering the purchase of one stock or another at a given price, and ordering the same sold when, in his judgment, he had made profit enough to satisfy his requirements, or sustained the limit of loss to which he was willing to submit. So far as he was concerned, his transactions seem to have amounted to a wager on the market price from day to day or week to week, and, so far as the bankrupts were concerned, the transactions, while doubtless in some instances of the character which might have bound the claimant to a legal liability to take and pay for the stock actually ordered purchased and actually purchased for his account, were in fact not intended for such purpose, but rather as bookkeeping transactions, intended by them as well as by the claimant to be closed out for a profit when possible, and at a loss when necessary. The account kept in the books was a running account, showing on one side credits to the claimant for all moneys put up as margins, and also for any and all profits when such were realized on sales, and on

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the other side debits for commissions, interest on money employed, and losses sustained. The bankrupts intermingled claimant's money with their own and that of other customers. The parties treated each other as debtor and creditor. The books showed that relation, and the account presented for allowance in this case emphasized that fact. The certificate of the referee shows that it was admitted as a fact by the claimant "that the effect of the payment of $1,200 made to him by bankrupts on March 5, 1901, was and will be to enable claimant, as a creditor of bankrupts, to obtain a greater percentage of his debt than any other creditors of bankrupts of the same class." This admission, though adding nothing to the legal import of the facts themselves, strikingly shows that the claimant's pretensions are violative of the fundamental principle of equality, which underlies the bankruptcy act. Merchants who keep a debit and credit account with their customers in the usual way do not, in my opinion, occupy any substantially different relation to their customers than do these bankrupts to such a customer as Gilbert; yet merchants are required to surrender any and all preferential payments before being allowed to make proof of any balance shown to be due from the bankrupts. The immunity claimed for customers of brokers, resulting in the substantial defeat of the main purpose of the bankruptcy act, and also invidious distinctions between them and customers of merchants, should not be allowed, unless the dealings between them and their customers clearly disclose a fiduciary or trust relation with respect to the particular money or property in controversy; indeed, such a relation as vests title to the same in the customer so completely that he might successfully maintain an action at law or in equity for the recovery of the same in specie. If such be the situation, then the customer may not merely prove his claim for any such money or property, and share in the assets pro rata with other creditors, but he may successfully assert claim to the same to the exclusion of all others; and this on the distinct theory that such money or other property forms no part of the bankrupts' assets, but is the money or property of the customer himself, and that the customer may, if he is able to do so, trace the trust fund or property, and reclaim the same for his own use or benefit. Unless the situation is of the kind just mentioned, the customer's rights are simply those of a general creditor. In my opinion, the relation shown to exist between the bankrupts and Gilbert in this case was not of a fiduciary character. It was purely that of debtor and creditor.

Counsel were unable at the argument to call my attention to any authorities arising under the bankruptcy act of 1898 relating to the subject now before the court, and I have been unable to find any such authorities. But fortunately the bankruptcy acts of 1841 and 1867 gave occasion for consideration by the supreme court of the United States of questions kindred to those involved in the present inquiry. By the provisions of the bankruptcy act of 1841 (5 Stat. 441, § 1) the benefits of the acts were withheld from persons owing debts "created in consequence of a defalcation as a public officer or as executor, administrator, guardian or trustee or while acting in any

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other fiduciary capacity"; and by the provisions of the same act (section 4) no person was entitled to a discharge who had applied trust funds to his own use. By the provisions of the bankruptcy act of 1867 "no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer or while acting in any fiduciary character shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of such debt." Rev. St. 1878, § 5117.

In the very early case of Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236, a case arose involving the interpretation of the foregoing provision of the act of 1841. The important question for determination was whether a commission merchant or factor who sells for others was indebted in a fiduciary capacity, within the meaning of the act of 1841, if he withheld the money received from property sold by him for his principal. The supreme court, speaking by Mr. Justice McLean, said, on this subject:

"If the act embraces such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act."

The court finally concludes that a factor occupies no such fiduciary relation to his principal as to create a trust as distinguished from a debt, within the meaning of the bankruptcy act.

In the case of Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565, the supreme court, speaking by Mr. Justice Bradley on the subject of what is a fiduciary debt within the purview of the act of 1867, states the question before the court as follows:

"We have to decide the question whether a discharge in bankruptcy under the act of 1867 operates to discharge the bankrupt from a debt or obligation which arises from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty, and his failure or refusal to return the same after the money has been paid or the duty performed; or whether a debt or obligation thus incurred is within the meaning of the thirty-third section of said act (section 5117, Rev. St.), which declares that 'no debt created by the bankrupt * * * while acting in any fiduciary character shall be discharged under this act.'"

It seems to me that this question presents a case fully covering the contention now before this court. If the appropriation of collaterals given to secure advances does not create a debt of a fiduciary character, certainly the balance found in the running account, resulting from mutual dealings between a broker and his principal, such as is disclosed in this case, does not constitute a trust fund in favor of the principal.

After so stating the question before the court, Mr. Justice Bradley first takes up the opinion in Chapman v. Forsyth, supra, and approves the same. He afterwards reviews many other cases, federal, state, and English, and concludes thus:

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"The creditor who holds collateral holds it for his benefit under contract. He is in no sense trustee. His contract binds him to return it if its purpose as security is fulfilled; but, if he fails to do so, it is only a breach of contract, and not a breach of trust."

He also remarks as follows:

"It is no doubt true, as said in Chapman v. Forsyth, that a construction of the excepting clauses which would make them include debts arising from agencies would leave but few debts upon which the law could operate."

The following cases also afford ample authority for holding that the relation between the bankrupts and Gilbert was not fiduciary in its character within the meaning of the bankruptcy act, but was only that of debtor and creditor: Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931; Fleitas v. Richardson, 147 U. S. 538, 13 Sup. Ct. 429, 37 L. Ed. 272; Cronan v. Cotting, 104 Mass. 245, 6 Am. Rep. 232.

Collier, in the third edition of his work on Bankruptcy (page 206), says as follows:

"If factors are not fiduciary debtors, agents clothed with similar powers cannot be regarded as fiduciary debtors. Thus agents authorized by agreement to make sales, and to collect moneys and carry them into account, and pay over monthly or at other regular intervals, are to be treated as debtors, and not as trustees. They do not occupy a fiduciary capacity."

He cites in support of the text the following cases: Grover v. Clinton, Fed. Cas. No. 5,845; Kaufman v. Alexander, 53 Tex. 562; Guilfoyle v. Anderson, 9 Daly, 64; Cronan v. Cotting, supra. These cases have been examined, and, in my opinion, fully sustain the text.

The definition of a provable debt (section 63 of the act of 1898, supra) seems also to satisfactorily determine that the obligation of the bankrupts to Gilbert is a debt within the meaning of the act. It is undoubtedly founded upon an open account, and likewise creates an implied promise or contract on the part of the bankrupts to pay any balance appearing thereby to be due to Gilbert. According to the definition aforesaid, an obligation "founded upon an open account, or upon a contract, express or implied," is a provable debt under the bankruptcy act. There is no showing that the bankrupts kept Gilbert's money by itself. On the contrary, it sufficiently appears that the same was intermingled with that of other customers as well as that of the bankrupts themselves. The parties permitted the account to run for months in such a way as to clearly indicate their purpose to establish the relation of debtor and creditor between themselves. The obligation to pay was not only implied, but Gilbert, by presenting a claim for a debt instead of a claim for a trust fund belonging to him exclusively, affirmed the reasonable legal import of the relation between himself and the bankrupts to be that of debtor and creditor. On reason as well as authority I have reached the conclusion that Gilbert cannot be allowed to occupy any other position, and cannot make proof of any balance due him from the bankrupts, without first conforming to the provisions of section 57g, and surrendering the preferential payment received by him on account only a few days before bankruptcy proceedings were instituted.

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No occasion is found to pass upon the other proposition submitted by the referee as to whether the fictitious purchase and sale of certain shares of Southern Railroad Company's stock created any obligation on the part of Gilbert to account for the fictitious loss sustained thereby. If Gilbert surrenders his preference, and proves up his claim, some such question may arise, and it will then require adjudication. Likewise the discrepancy between the amount of $850 actually claimed by Gilbert and the $894.32 which he might have claimed requires no present consideration.

The vital question in controversy has been determined. The result is that the action of the referee in allowing the claim of Gilbert without a previous surrender of the preferential payment received by him was error, and the same is disapproved. An order will now be made vacating the allowance as made, leaving Gilbert to take such action in the future as seems advisable to him.

In re HOOVER.

(District Court, W. D. Pennsylvania. January 21, 1902.)

No. 1,620.

1. BANKRUPTCY—LIEN FOR RENT—EQUITABLE EXECUTION.
Where a court of bankruptcy takes possession of goods liable for rent, under Purd. Dig. p. 842, pl. 70, which provides that goods, etc., demised for years or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for rent due at the time of taking such goods in execution, not exceeding one year's rent, its process whereby the same is sold will, for the purposes of such statute, be regarded as an equitable execution.

2. SAME—PRIORITY—PROPERTY IN HANDS OF TRUSTEE.
Purd. Dig. p. 842, pl. 70 (Laws Pa. 1835–36, p. 777) provides that goods, etc., demised for years or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for rent due at the time of taking such goods in execution, not exceeding one year's rent. Bankr. Act, § 64, cl. 5, gives priority to debts owing to any person who by the laws of the state or the United States is entitled to priority. *Held*, that property of a bankrupt subject to a landlord's rent lien, as against which the bankrupt had waived the benefit of the state exemption law, remains subject to such lien when the trustee in bankruptcy takes possession thereof.

3. SAME.
Where a landlord, prior to his tenant's bankruptcy, has distrained for rent overdue on a lease, waiving the benefit of the exemption laws of the state, the bankrupt is not entitled, as against the landlord, to claim exemption of articles distrained; the rest of the distrained articles being insufficient in value to pay the rent.

In Bankruptcy.

Way, Walker & Morris, for trustee.
J. McF. Carpenter, for landlord.
W. C. Stillwagen, for bankrupt.

BUFFINGTON, District Judge. In this case $85, the rent of Hoover, the tenant, was in arrear, and his landlord lawfully distrained for that sum. Under the statutes and decisions of Pennsylvania he

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thereby acquired a lien to that amount upon all the personal property on the premises, for by lease the tenant had lawfully waived the benefit of the exemption law of the state. Pending a sale of the distrained goods, Hoover filed a petition in bankruptcy, and therein claimed as his statutory exemption an automobile then held by the bailiff under the distress warrant. Thereafter the goods were taken from the bailiff's possession by the trustee, who awarded the automobile to the bankrupt as exempt, and sold the balance of the property. The amount realized therefrom was not sufficient to pay the rent. The landlord filed objections to the allowance of the bankrupt's exemption, which objections the referee dismissed, and certified the question "whether, under the first exception filed to the trustee's report of exempted property, and the facts shown in the testimony taken under said exception, the bankrupt is entitled to be allowed the exemption set apart to him in said report." After due consideration, this question is answered in the negative. The Pennsylvania statute (see Act June 16, 1836; Laws 1835–36, p. 777; Purd. Dig. p. 842, pl. 70) provides:

"The goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life or years, or otherwise taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: provided, that such rent shall not exceed one year's rent."

The bankrupt court having taken possession of this property, thus liable for the rent, its process whereby the same was sold must, for the purposes of this statute, be regarded as an equitable execution. The case is within the equity of the statute. Longstreth v. Pennock, 87 U. S. 575, 22 L. Ed. 451. The property sold was, when received by the bankrupt court, subject to a lawful lien by reason of the distress, and by the act quoted was made liable for the rent due. Such lien and priority, by virtue of the Pennsylvania statute, was one recognized and enforced by section 64, cl. 5, of the bankrupt act. The claim, then, being one whose validity and priority were recognized both by state and bankrupt law, and the property coming to the bankrupt court for administration subject to a lien as against which the owner had waived the benefit of the exemption law, it is clear the bankrupt cannot, by claiming the benefit of such waived statute, annul or lessen the grasp of such existing lien. The case of In re Bolinger, 6 Am. Bankr. R. 171, 108 Fed. 374, decided by this court, does not rule the present one. Its facts were different. It was there said:

"The preference created by the execution being illegal, the incident of such execution preference, to wit, the waiver of the exemption as against the enforcement of the debt on valid lawful process, must be deemed to have fallen with the expired unlawful preference."

The present case turns on its own facts, and what is now decided is that where a landlord, prior to his tenant's bankruptcy, has distrained for rent overdue on a lease waiving the benefit of the exemption law of Pennsylvania, the bankrupt is not entitled, as against the landlord, to claim an exemption of articles distrained, where the rest of the distrained articles are not sufficient in value to pay the rent.

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In re CARVER et al.

(District Court, E. D. North Carolina. February 7, 1902.)

1. BANKRUPTCY—REPORT OF REFEREE—EXCEPTIONS.
Where no exceptions to the report of a referee in bankruptcy are filed, as provided by equity rule 83, requiring the errors to be specifically pointed out, the findings of facts are conclusive.

2. SAME—ASSIGNMENTS UNDER STATE LAW—WHEN REVIEWABLE.
The accounts of an assignee in an assignment for the benefit of creditors under the insolvency act of North Carolina (Acts 1893, c. 453), made more than four months before the adjudication of the debtor as a bankrupt, will not be reviewed in the bankruptcy proceedings, the assignment being valid until the suspension of the state law by the operation of Bankr. Act 1898, which, by section 3, limits the time within which the making of a general assignment constitutes an act of bankruptcy to four months; and hence the assignee can only be required to account for the property of the bankrupt in his hands at the commencement of the bankruptcy proceedings.

In Bankruptcy.

Jno. H. Cook, assignee, in pro. per.
B. F. McLean and Patterson & McCormick, for trustee.

PURNELL, District Judge. The following are certified as the findings of fact by the referee:

"That on the 27th day of February, 1901, the bankrupts executed a deed of assignment for the benefit of creditors. That the assignee, John H. Cook, disbursed the funds which came into his hands as set out in the statement attached, more than four months prior to the institution of the bankruptcy proceedings. That, at the time of the assignment to him by bankrupts, and at the time of the disbursements, John H. Cook, assignee, was a member of the firm of Cook & Morrison. That since the institution of these bankruptcy proceedings, to wit, last November, 1901, the said firm has been dissolved. At request of attorneys for creditors, I find, as a fact, that the check for $62.48, given by John H. Cook to B. F. McLean, trustee, was drawn by the said Cook upon his personal account in the Bank of Laurinburg. That John H. Cook stated in open court that the answer of bankrupts set forth the facts relied upon as the defense by him in the present status of the case."

No exceptions being filed, the findings of fact are conclusive. Equity rule 83; Railroad Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164; In re Covington (D. C.) 110 Fed. 143. The court will not look through a voluminous record to find other facts. On the hearing, out of an abundance of caution, this part of the record was read over to counsel, and, there being no omission suggested, it must be conceded these are all the facts.

Then in the report is added:

"As conclusions of law the referee holds: That the assignee for the benefit of creditors is not an adverse claimant as to the trustee in bankruptcy, so far as property in his hands, or which has been improperly paid out by him, is concerned, and that the four months' time limit has no application to the question presented. In the opinion of the referee the cost of administering this estate by J. H. Cook, assignee, is excessive, and with a proper administration the assignee would still have funds on hand. That the trustee should proceed in the proper tribunal to call the assignee to account. The referee is of the opinion that the trustee should proceed by a petition in bankruptcy court, and that John H. Cook, assignee, should be

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required to appear at a time fixed by the court to show cause why the amounts paid as attorney's fees, the amounts retained as commissions, and the amounts charged as expenses should not be reduced."

To the above conclusions of law, John H. Cook objects, excepts, and appeals to the judge.

Act Cong. 1898 (Bankrupt Law), is the exercise of a general grant of power, but the exercise of this power does not per se abrogate state insolvent laws. When the act of congress is invoked, or its provisions put in operation, state insolvent or assignment laws are suspended as to the res affected thereby. This must be properly done in apt time. The act of congress limits, not because of any special reason therefor, but arbitrarily, the time within which certain acts are acts of bankruptcy. General assignments, as in the case at bar, are so limited. Section 3. After the four months have expired creditors cannot take advantage of such acts in an involuntary proceeding, as this is, of a general assignment, but the creditors are presumed to have assented to or condoned the act, and the bankrupt law affords them no relief on this account. It is in the nature of an estoppel in pais. To avail themselves of the rights and remedies provided for in the act of congress the act must be invoked within the time prescribed. The state law (Acts 1893, c. 453) contemplates and provides for general assignments for the benefit of creditors, and how settlements shall be made. This state law is not abrogated by the bankrupt law, but when proceedings in bankruptcy are instituted, and an adjudication made, the state assignment law is suspended, and the bankrupt estate administered in the court of bankruptcy. The assignment made by Carver & Co. was in accordance with, and valid under, the provisions of the state law. The act of congress was not invoked by the filing of a petition in bankruptcy until more than four months after such assignment was made, and the estate partly distributed in pursuance thereof. The assignment thus becomes valid, and whatever was done under its provisions is also valid. Creditors who have slept on their rights cannot complain. It appears not only the assignment was made more than four months before the proceedings in bankruptcy were instituted, but the payments were made. The creditors seem to have been taking chances. They delayed too long. They are entitled to only what was found in the hands of the assignee belonging to the unadministered trust. The court of bankruptcy cannot take retroactive cognizance of trusts beyond four months. To do so would be to upset business settlements, which was never contemplated. The provisions of the act as to involuntary proceedings were suspended, to take effect four months later than the provisions as to voluntary proceedings, showing conclusively this was the legislative intent. Hence the court of bankruptcy has no authority to inquire into or review settlements made over four months prior to the adjudication, but will administer the estate as it exists at the time of the adjudication. The assignee is not an adverse claimant; he is the agent of the bankrupt, but what he has done as such agent under the assignment cannot be inquired into after the lapse of time. The law favors vigilance. It does not protect those

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who do not protect themselves, or neglect to claim its protection in apt time.

The decision of the referee is modified accordingly, the case remanded to be proceeded with, and the assignee to be required to account for such funds or property of the bankrupts as remained in his hands at the time this proceeding was instituted.

In re ROYAL.

(District Court, E. D. North Carolina. January 27, 1902.)

1. BANKRUPTS—DISCHARGE—SUCCESSIVE APPLICATIONS.
A bankrupt is not entitled to file a second petition for a discharge when his first petition is denied after investigation on the merits.

2. SAME—RIGHT TO DISCHARGE—PRESUMPTIONS.
The court will not seek for grounds to refuse the discharge of a bankrupt, unless properly presented by the parties, but, if no objection is made, will presume that it should be granted.

3. SAME—REHEARING—REFEREE'S FINDINGS—CONCLUSIVENESS.
Where objections are interposed to the discharge of a bankrupt, and the case is heard, and the discharge refused on facts found by a referee, to whose findings no objections have been filed, the findings are conclusive, and the cause will not be reheard on allegations that they may be disproved if the cause is reopened and another reference made.

In Bankruptcy.

W. R. Allen, for petitioner.

PURNELL, District Judge. This case was heard at Wilmington in October, 1901, on what was then certified by the referee as the facts in the premises. Counsel were understood to concede the facts as then stated to be true, and later the question of the right of petitioner to a discharge was maturely considered and duly decided. A discharge was refused. A petition is now filed asking for a rehearing, alleging that petitioner did not have the amount of money ($109.38), or any other amount, to his credit in bank which was omitted from his schedules. No newly-discovered testimony is set out. It is simply alleged that what heretofore appeared were to all intents and purposes conceded to be the facts are not facts, but may be disproved if the cause is reopened and referred to the referee to take further testimony. Since the former decision of this cause ([D. C.] 112 Fed. 135) the matter has been before a grand jury on a bill of indictment drawn by the United States attorney, and that body ignored the bill,—indorsed it, "Not a true bill." This only proves that body did not have sufficient testimony before it to make out a prima facie case. It is as important in bankruptcy proceedings as in any other that parties should deal fairly with the court, and there should be an end of litigation. Petitioner was fully heard before the referee, to whose findings of fact he filed no exception, as required by the rules of practice, and before the judge of the district, represented on both occasions by able counsel. Having filed no exceptions, he risked his case on a finding of facts which he and his counsel thought en-

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titled him to a discharge from all his debts. The matter was fully argued, and after mature consideration the court was constrained to decide against him,—refuse a discharge. This should end the matter. A bankrupt is not entitled to file a second petition for discharge when his first petition is denied after investigation of its merits. In re Brockway (C. C.) 23 Fed. 583. The petition is, in effect, a second application or petition for a discharge. Petitioner has had his day in court. When not otherwise provided in the act the equity rules govern. Exceptions to findings of fact by a referee who is a special master, under district rules in proceedings for a discharge, must be filed in accordance with equity rule 83, as construed by the supreme court. Upon newly-discovered testimony, excusable neglect or oversight, the court might grant a rehearing. It is discretionary, even if the court is justified in exercising such discretion, of which no opinion is now expressed. In the case at bar there is nothing which would justify the exercise of such discretion. Proceedings in bankruptcy must be orderly, and according to the rules of court. The court will not seek for grounds to refuse a discharge unless they are properly presented by the parties. In re Schuyler, Fed. Cas. No. 12,494; In re Rosenfeld, Fed. Cas. No. 12,057; In re Frey (D. C.) 9 Fed. 376. If the parties do not object, the court will presume they consent, or that no reason exists for not granting a discharge. But when objections are interposed, the case heard on facts found by a referee, to whose findings of fact there is no objection filed, the finding of fact is conclusive (equity rule 83); and, when the cause is decided on such facts, then it is a final disposition of the cause.

Petition dismissed. Rehearing refused.

In re HOLDEN et al.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1902.)

BANKRUPTCY—LIFE INSURANCE—EXEMPTION.

A husband and his wife were each adjudged bankrupt, and the same trustee appointed for both. His life was insured, the policies payable to her, but provided that, if she should not survive him, payment should be made to his executors, administrators, and assigns. They claimed the policies as exempt under Laws Wash. 1895, p. 336, providing that the proceeds or values of all life insurance shall be exempt from all liability for any debt, and Bankr. Act, § 6, providing that the act shall not affect the allowance to bankrupts of the exemptions prescribed by the state laws. *Held*, that such section 6 does not control the provisions of section 70a, that when the bankrupt has an insurance policy which has a cash surrender value, payable to himself, his estate, or personal representatives, the policy shall pass to the trustee as assets, unless the bankrupt pays such value to the trustee; and, as the wife could not hold the policies payable to her, nor the husband hold them when payable to his personal representatives in the event of her prior death, the policies passed to the trustee.

Petition for Revision of Proceedings of the District Court of the United States for the Northern Division of the District of Washington.

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P. P. Carroll and John E. Carroll, for bankrupts.
Bausman & Kelleher, for petitioner.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

McKENNA, Circuit Justice. This is a petition filed under section 24b of the bankruptcy law of 1898 to review an order of the district court for the district of Washington, Northern division, made and entered in the above-entitled cause. The said D. N. Holden and Lizzie Holden were separately proceeded against in bankruptcy by their creditors. The causes were consolidated by consent, and "one and the same answer" filed to the petitions. Subsequently it was adjudged that the "respondents and each of them are bankrupts within the true intent and meaning of the acts of congress relating to bankruptcy." The respondents then prayed exemption from the claims of creditors of two life insurance policies. The claim was disallowed by the referee, who made due report of his action to the court. The respondents filed exceptions to the report, and, after hearing, the court, by an order duly entered on the 16th of July, 1901, vacated the report, and adjudged the policies to be exempt. To review this order of the district court the present petition was filed by J. A. Stratton, the duly-appointed trustee of the estates of said bankrupts. No answer has been filed to the petition, and the question is whether, upon the facts stated, the order of the district court should be revised.

The policies in question were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wis., and were respectively numbered 206,383 and 303,921, and were respectively for the amounts of $5,000 and $2,000. Daniel L. Holden was the insured in both, and Lizzie Holden was the beneficiary in both, with the provision, however, that, if she should not survive him, payment should be made to his executors, administrators, and assigns. It is provided in policy No. 206,383 that it is "issued on the semitontine plan, and its tontine dividend period is twenty years," and the following is indorsed on the policy:

"Upon surrender by the insured and beneficiary of a policy for $10,000 of like number and kind dated May 2nd, 1890, this policy for $5,000 is issued at their request in lieu of one-half of the former policy; in all other respects this policy is made and accepted pursuant and subject to the application upon which the original policy was issued. A full-paid life nonparticipating policy, number 303,931, for $2,000, is issued in consideration of the surrender of one-half of the original policy."

It is alleged in the petition that the policies have a present cash surrender value, combined, of about $2,200; and it was stated on the argument that the creditors of each of the bankrupts are the same. It is provided by the laws of the state of Washington "that the proceeds or values of all life insurance shall be exempt from all liability for any debt." Laws 1895, p. 336. By section 70a of the bankrupt law of 1898 it is provided that:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon

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his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Section 6 of the bankrupt law is as follows:

"Exemptions of Bankrupts. (a) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The effect and extent of section 6 was considered by this court in Re Scheld, 44 C. C. A. 233, 104 Fed. 870, 52 L. R. A. 188, and it was said that the purpose of the section did not pervade the whole act, but was controlled by section 70a, and that under the latter section policies of insurance payable to the bankrupt himself, his estate, or personal representatives, passed to the trustee of the estate. But we also said:

"It will be seen that the clause of section 70 above quoted does not include policies of insurance payable to the wife, children, or other kin of the bankrupt, but is limited to policies the proceeds of which are payable to the bankrupt himself, his estate, or personal representatives. The enactment does not deprive the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but it does prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same, while seeking a discharge from their debts through the bankruptcy act."

What is the character of the policies in the case at bar? Are they covered by the proviso of section 70? It will be observed that the policies were not payable to either Holden or his wife absolutely, but to her only if she survived him, and to his personal representatives if he survived her. Subject to such contingent interest in him, the policies and the money to become due under them belong to her, and it is beyond his power to transfer them to any other person, or to surrender them. In re Heilbron's Estate, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602, citing Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370, and other cases. Under the laws of Washington her interest in the policies became her separate property, and was assignable by her. 2 May, Ins. 399q, and cases cited. Each, therefore, has an interest in the policies, and each

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must be held to have an insurance policy which has a cash surrender value payable to him or her, or to his or her estate, or personal estate or personal representatives, and subject, therefore, to the provisions of section 70; in other words, passed to their respective trustees as assets of their respective estates. It may be that neither could surrender the policies without the consent of the other, but such right of surrender passed with the policies to their respective trustees. In Steele v. Buel, 44 C. C. A. 287, 104 Fed. 968, the circuit court of appeals of the Eighth circuit has decided that the rule of exemption of section 6 pervades the whole act, and is to be read into every other section and provision of the act. The difference of opinion between that learned court and this court demonstrates the ambiguity of the bankrupt act, and, while not insensible to the necessity of harmony in the decisions of the courts of appeal, we are not disposed to depart from the ruling in Re Scheld. There is a way open to respondents for a further review of the questions involved.

It follows that the order of the district court should be revised in accordance with this opinion, and it is so ordered.

DOWNS v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 430.

1. CUSTOMS DUTIES — COUNTERVAILING DUTY — BOUNTY OR GRANT ON EXPORTATION.

Section 5 of the tariff act of 1897, which provides that whenever any country "shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country" which is dutiable under the act, an additional duty equal to such bounty or grant shall be collected thereon upon its importation into the United States, is a protective measure, and is intended to cover every case where by the laws of a foreign country the exporter is given, either directly or indirectly, a pecuniary benefit from the exportation, whether by way of a direct bounty paid from the public treasury, by the remission of taxes, or by exemption from taxes which would otherwise be imposed on the article.

2. SAME—LAWS OF RUSSIA—REMISSION OF TAXES ON EXPORTED SUGAR

The laws of Russia bestow a bounty or grant upon the exportation of so-called "free sugar," so as to work a benefit or advantage to the exporter in two ways: (1) By remitting the excise tax due upon the sugar exported, and (2) by the issuance by the government to the exporter of a certificate of exportation, which authorizes the sale in the domestic market of an equal quantity of "free reserve or free surplus" sugar without the payment of the additional tax otherwise required to be paid thereon, and which certificate is transferable and has a substantial market value; and such sugar, when imported into the United States, is subject to the additional or countervailing duty imposed by section 5 of the tariff act of 1897.

3. SAME—AUTHORITY OF SECRETARY OF TREASURY—CONCLUSIVENESS OF DECISION.

Under the provision of section 5 of the tariff act of 1897, that the net amount of any bounty or grant paid or bestowed by a foreign country on the exportation of an article or merchandise "shall be from time to

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time ascertained, determined, and declared by the secretary of the treasury," the decision of the secretary as to such amount is conclusive, and cannot be reviewed by the courts; but the question whether a country pays or bestows such bounty or grant, where it depends upon the construction of the laws of such country, is a judicial one, and, while it is to be decided primarily by the secretary, his decision thereon is reviewable.

Appeal from the Circuit Court of the United States for the District of Maryland.

Ernest A. Bigelow, for appellant.
John C. Rose, U. S. Atty.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

GOFF, Circuit Judge. This is an appeal from a decree of the circuit court of the United States for the district of Maryland, entered in the matter of the petition of Robert E. Downs concerning the decision of the board of the United States general appraisers, rendered April 19, 1901, as to the construction of the law and the facts respecting the classification of, and rate of duty imposed on, certain Russian sugar, imported by said Downs at the port of Baltimore, Md. The collector of that port, acting under the provisions of section 5 of the tariff act of July 24, 1897, assessed and levied an additional or countervailing duty on said sugar, which was paid under protest by the importer, who, under the fourteenth section of the act of congress of June 10, 1890, had the action of the collector in so assessing such duty reviewed by the board of United States general appraisers. That board, after the questions involved had been carefully examined, affirmed the decision of the collector, and thereupon the importer, as he was authorized by law to do, asked the court below to review the matters of law and fact involved in said affirmance, which that court in due time did, and passed the decree affirming the decision of the board of general appraisers, now complained of.

We reach the conclusion that the collector of the port of Baltimore, under the provisions of the fifth section of the tariff act of July 25, 1897, properly imposed the duty now complained of by the appellant. We find that the Russian exporter of sugar obtains from his government a certificate, solely because of such exportation, which is worth in the open markets of that country from 1 ruble and 25 kopecks to 1 ruble and 64 kopecks per pood, or from 1.8 to 2.35 cents per pound. Therefore we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia, and we think it was from such indirect grants as this that the congress of the United States intended to protect the manufacturers of this country, by authorizing the secretary of the treasury to make all proper regulations for the assessment and collection of such additional duties as were imposed by the collector on the sugars imported by the appellant. The act of which said fifth section is a part was not only intended

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to aid in the collection of revenue, but also to encourage the industries of the United States, as is clearly stated in its title. One method of protection the congress had in mind was the imposition of an additional duty on all articles of merchandise imported into the United States from any country which had paid or bestowed, directly or indirectly, any bounty or grant upon the exportation of such merchandise, the same being dutiable under that act; such additional duty to be simply the net amount of the bounty or grant which had been allowed for the purpose of facilitating the exportation.

In affirming the decree of the court below, we also affirm the judgment rendered by the board of general appraisers, whose opinion so fully expresses our views, and so ably presents the facts involved herein and the law applicable thereto, that we deem it entirely appropriate to adopt the same as part of the opinion of this court. It is as follows:

"The importation in this case consists of refined sugar, which was exported from Russia, and arrived at the port of Baltimore as shown above. No controversy arises as to the proper classification of the sugar as made by the collector; his action in this particular not being challenged. The only question for decision relates to the imposition of a so-called countervailing duty, levied under the provisions of section 5 of the tariff act of July 24, 1897, which reads as follows:

" 'Sec. 5. That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the secretary of the treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.'

"Under the authority conferred by this law, the secretary of the treasury has duly 'ascertained, determined, and declared' the net amount of the bounty or grant which, in his judgment, was bestowed by the laws of the Russian government upon the exportation of this sugar. T. D. 20,407, dated December 12, 1898; T. D. 22,814, dated February 14, 1901. It is not denied by either party to this suit that, if in fact any bounty or grant was bestowed, the secretary's finding as to its amount was correct. Moreover, it would seem that the decision of that officer as to this particular fact, being made in pursuance of a special statutory authority, would be quite as conclusive on this board and the courts as the finding of the value of foreign coin by the director of the mint, under the provisions of section 25 of the tariff act of 1894, a statute strictly analogous, which finding has been held to be conclusive, and not reviewable by this board or the courts. U. S. v. Klingenberg, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647; Wood v. U. S., 72 Fed. 254, 18 C. C. A. 553, explaining Klingenberg's Case; Hadden v. Merritt, 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333. It is conceded, however, that the decision of the secretary as to whether the laws of Russia do in fact bestow such a bounty or grant is reviewable by this board, as it involves the construction of the laws of Russia relating to the precise subject-

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matter covered by said section 5, above cited. The jurisdiction of the board in this particular has been sustained by the United States circuit court of appeals for the second circuit in the recent case of U. S. v. Hills Bros. Co., 46 C. C. A. 167, 107 Fed. 107. Alluding to this phase of the subject, Hon. Lyman J. Gage, secretary of the treasury, has made the following observation: 'Do the Russian government regulations have such a bearing upon the facts of the case as to bring Russian sugar within the intent of said law as disclosed by its terms? While the question in its initiative lies with the administration of the treasury department, the question is of a judicial, rather than of an administrative, character, and its importance demands determination by a judicial tribunal. The board of general appraisers constitutes such a tribunal, and from its decisions appeal may be taken to the United States courts.' Cong. Record, 56th Cong., 2d Sess., p. 3335 (speech of Hon. J. R. Mann, of Illinois).

"The word 'bounty,' in its ordinary signification, may be defined to be 'an additional benefit conferred upon, or a compensation paid to, a class of persons.' 1 Bouv. Law Dict. (Ed. 1897) p. 260. The subject of sugar bounties has been a matter of consideration for the past 30 years or more, and has been discussed by various international conferences of the European powers, specially convened for the purpose of considering some suitable method for their suppression or modification, so far as relates to the continent of Europe and Great Britain and her colonies. A conference of this character was held at Brussels in June, 1898, the proceedings of which, under the denomination of 'Sugar Bounties,' have been published by authority of congress as senate document No. 171, fifty-sixth congress, second session, under the direction of the senate committee on finance. After an elaborate discussion and exchange of views between the delegates to this conference, the consensus of opinion among them seemed to be (page 61) that 'bounties whose abolition is desirable are understood to be all the advantages conceded to manufacturers and refiners by the fiscal legislation of the states that, directly or indirectly, are borne by the public treasury.' It was furthermore stated that 'there should be classified as such, notably: (a) The direct advantages granted in case of exportation; (b) the direct advantage granted to production; (c) the total or partial exemptions from taxation granted to a portion of the manufactured products; (d) the indirect advantages growing out of surplus or allowance in manufacturing effected beyond the legal estimates; (e) the profit that may be derived from excessive drawback.'

"It is important to observe, in the consideration of this subject, that section 5 of the tariff act of 1897, under which this case arises, does not use the word 'bounty' in any narrow or technical meaning. It embraces 'any bounty or grant' bestowed or conferred by the government, whether directly or indirectly. The word 'grant' is more comprehensive in meaning than the term 'bounty.' It implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character, upon a corporation, person, or class of persons. Under the ancient laws of England this was deemed in many cases to be the prerogative of the king, who possessed large powers for the regulation of trade and commerce. It is stated, for example, by Macaulay, as follows: 'In addition to his [King James I.'s] undoubted right to grant special commercial privileges to particular places, he long claimed a right to grant special commercial privileges to particular societies and to particular individuals.' And again: 'He readily granted oppressive patents of monopoly.' 4 Macaulay, History of England, pp. 222, 223. A well-known instance of a similar grant was in the great 'Case of Monopolies' (Coke's Reports, pt. 11, p. 86), where a patent had been granted to the plaintiff, giving him the sole right to import playing cards and the entire traffic in them, and the sole right to make such cards within the realm. The court held that the grant to have the sole benefit of making them was 'against the common law and the benefit and liberty of the subject.' See comment on this case in Slaughter-House Cases, 16 Wall. 36, 103, 21 L. Ed. 394. In more modern times, the grant of special privileges by the Louisiana legislature to a particular class of persons, giving them a monopoly of establishing slaughter houses in the city of New Orleans, is another illustration. The supreme court, per Miller, J., speaking of the act of the legislature,

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remarked: 'It is true that it grants, for a period of 25 years, exclusive privileges.' And again: 'We think it may be safely affirmed that the parliament of Great Britain * * * continued to grant to persons and corporations exclusive privileges,—privileges denied to other citizens,' etc. See, also, 15 Am. & Eng. Enc. Law, p. 711, 'Monopoly.'

"These cases are cited for the purpose of illustrating the broad and comprehensive meaning of 'grant,' which differs in many respects from 'bounty.' While it involves the idea of a favor or benefit conferred by the government, sometimes of an exclusive character, it does not necessarily embrace the act of appropriating or paying money out of the public treasury. Indeed, the word 'grant,' in its broad signification, may well include the remission of a tax already levied and assessed by the authority of government. It has been held that, in the absence of special statutory remedies, and sometimes in addition to such remedies, actions of debt may be maintained for the collection of taxes. Dollar Sav. Bank v. U. S., 19 Wall. 227, 240, 22 L. Ed. 80, 82, citing numerous English cases; also U. S. v. Lyman, 1 Mason, 482, 26 Fed. Cas. 1024 (No. 15,648), in which the question is exhaustively treated by Judge Story. There would seem to be no difference between the remission of a tax, and the resulting cancellation of the debt due the government, and a case where the tax may have been actually collected and paid into the treasury and then refunded and repaid by authority of law. A law enacted by the sovereign power, remitting the taxes due by a citizen for a single year or a specified number of years, in consideration of his rendering a service or engaging in an enterprise deemed of advantage to the public, would unquestionably be construed to be a 'bounty or grant' as fully as if the like amount of money had been actually collected and refunded under the technical name of a bounty. It has long been the practice in many of the American states for the legislature to confer charters on banks, railroads, and especially on manufacturing corporations, containing a special grant of exemption from taxation under the general laws of the state. Railroad v. Guffey, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. Ed. 732; Given v. Wright, 117 U. S. 656, 6 Sup. Ct. 907, 29 L. Ed. 1021. In this connection, the remarks of Chief Justice Fuller in U. S. v. Passavant, 169 U. S. 16, 28, 18 Sup. Ct. 219, 222, 42 L. Ed. 644, 646, are of importance: 'Doubtless, to encourage exportation and the introduction of German goods into other markets, the German government could remit or refund the tax, pay a bonus, or allow a drawback. And it is found that, in respect of these goods, when "purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate." The use of the word "bonification" does not change the character of this remission. It is a special advantage, extended by government in aid of manufacturers and trades, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is "a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all."' And again: 'Exoneration from its payment (i. e., payment of the tax) was a mere special advantage extended by the German government, as we have said, in promotion of manufactures and commerce.'

"The question, then, which is before us for consideration, is reduced to this: Did the laws of Russia and the regulations made by the minister of finance for the purpose of carrying such laws into execution operate to confer a 'bounty or grant,' directly or indirectly, upon the exportation of this sugar from the Russian dominions? And in making this inquiry it is immaterial in what manner the 'bounty or grant' was paid or bestowed. The law regards substances, not shadows; things, not names. The Russian law covering the production and exportation of sugar is an exceedingly complex scheme, both as it stands upon the statute book and as it is administered in actual practice. The system was pronounced by one of the delegates to the Brussels conference to be 'an extremely ingenious device,' and it was further said that 'the Russian empire is indebted to it for the notable increase in the output of sugar which has taken place since it came into operation,—all this with the appearance that no premium, in the narrow mean-

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ing of the word, has been applied.' The leading features of the Russian law and regulations, as set forth in the stipulated agreement of facts and shown by the record, may be summarized as follows:

"Under the Russian law of November 20, 1895, sugar is divided into the three following classes (page 2 of stipulation, section IV.): '(a) "Free sugar," which consists of a certain quantity of sugar, which the Russian government permits a factory or refinery to sell for home consumption under an excise tax of 1.75 rubles per pood. (b) "An obligatory or indivertible reserve" of sugar, which consists of a certain quantity kept at each factory or refinery by order of the government, and which may not be sold or removed without the special permission of the government. (c) "Free reserve or free surplus," which consists of such sugar as is manufactured over and above the quantity of "free sugar" and "obligatory or indivertible reserve." This sugar may not be sold for home consumption, except upon payment of the regular tax of 1.75 rubles and an additional tax of 1.75 rubles, or 3.50 rubles in all.' And the Russian government fixes and determines the following conditions: '(a) The total quantity of sugar required for home consumption. (b) The quantity of "free sugar" allowed to each factory and the "obligatory reserve" which each factory or refinery shall keep on hand. (c) The maximum price at which sugar may be sold for domestic consumption.'

"It is admitted that the sugar imported in this case consists of 'free sugar,' as above defined, and would have been subject to a tax of 1.75 rubles per pood, if sold in Russia (about 2½ cents per pound, allowing 36 pounds to the pood). With the view of protecting home producers of sugar against foreign competition, the Russian government imposes an import duty on sugar of 3 rubles per pood, which is equivalent to about 4.28 cents per pound. Other important provisions of the Russian law are as follows:

" '(10) The delivery of sugar from factories and beet sugar refineries is allowed only upon permits of the excise supervisor, who certifies by his signature upon the transit document to the regularity of the delivery.'

" '(5) Sugar in excess of the normal production cannot be put on the home market otherwise than upon payment of an additional tax; the normal tax being payable according to the general regulation. However, it is allowed to the manufacturers to keep this excess of sugar as free reserve, and in such case, so long as the sugar does not leave the factory, they are not required to pay either the additional or the regular excise.'

"An important provision enabling the Russian government to control prices is found in section 7 of the law, which reads as follows:

" '(7) In cases where the prices in the home market exceed the normal prices fixed, the minister of finance authorizes the issuance of sugar from the obligatory reserve and from the free reserve (if necessary) in sufficient quantities to cause a decrease of prices without payment of the additional tax, but with payment of the normal excise.'

"Section 9 runs as follows:

" '(9) Upon the exportation from factories of the excess of sugar, the same is exempted from excise and additional tax in full measure.'

"The minister of finance, acting in conjunction with a committee of ministers, is authorized either to reduce or to suspend totally for a given period of time the provision of the Russian law which exempts exported sugar from not only the normal tax, but also the additional tax as well. Such action would operate to subject imported sugar to the full tax of 3.50 rubles per pood (equal to about 5 cents per pound). The particular bounty or grant which seems to be conferred by the Russian law upon the exportation of sugar accrues under section 39 of said law, providing that 'a manufacturer may cede to another manufacturer his right to place on the home market free—i. e., without the payment of an additional tax—his allotted quota of sugar.' This cession can be made only in accordance with certain rules prescribed in section 40 of said law, by which notice of such transfer is required to be given to the local excise board, authorizing the reduction of the quantity of free sugar in one mill and the increase thereof by assignment at another mill. This cession or transfer is accomplished by means of gov-

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ernment certificates or vouchers, which operate as follows: Refiner A. is authorized to get the benefit of the failure of refiner B. to supply the home market with his full quota of free sugar. Home refiner A. becomes willing to pay refiner B. a certain required sum if he will export a portion of his allotted quota of sugar, and he accordingly gives A. the official evidence of such exportation in the form of a voucher or certificate, as above described; and this, under the operation of the Russian law and regulations, authorizes A. to sell in the home market, at a tax of 1.75 rubles per pood, an equivalent portion of the sugar produced by him (A.) in excess of his quota. One of the purposes of these transfers is expressly stated to be 'in order to facilitate the exportation of the surplus to foreign countries.' Sections 39, 40.

"The character and value of these certificates are further explained in the following extracts from the stipulated agreement of facts in this case:

" '(VI.) That, upon the exportation of said sugar from Russia, the Russian government, under its laws and regulations, released said sugar from said tax of 1.75 rubles, either by a refund of the tax, or a cancellation of indebtedness, or otherwise.

" '(VII.) That, in addition to remitting said excise tax, the government issued to the exporter a certificate certifying that he had exported such a quantity of so-called free sugar. The said certificate and such certificates for free sugar have a substantial market value, and are transferable, and the price thereof is usually determined by the difference existing at the time between the price obtainable for the sugar on the home market and the price obtainable abroad.

" '(VIII.) That said certificates are sold to and used by sugar manufacturers or refiners, who are thereby enabled to transfer from their "free reserve or free surplus" to their "free sugar" an amount of sugar equal to the amount shown by said certificates to have been exported, which amount may then be sold for domestic consumption on paying the ordinary tax of 1.75 rubles per pood (to which free sugar is regularly subject).'

"The following statement on this subject is made in the report of the American consul to the treasury department, and which was admitted in evidence at the hearing:

" 'On shipment abroad of sugar which cannot be placed on the home market without the payment of additional excise, the latter—i. e., the excise—is guarantied by approved securities, and for this sugar a certificate is given to the effect that the same has been manufactured at such a factory in such a year and figures in the category of "free reserve," and is being sent abroad through such custom house. When thereafter this sugar arrives at the custom house and has been shipped abroad, the customs authorities make an indorsement on the certificate and also issue to the shipper quittances, which are accepted in lieu of payment of the excise computed as being due on that sugar. The manufacturer presents this certificate to the local excise administration, which sets the securities free which were deposited when the sugar was being removed from the factory. To avoid the necessity of giving securities as guaranty for additional excise, and, in general, for the greater freedom in business transactions, the manufacturer is granted the right to export abroad "free sugar,"—i. e., that on which no additional excise is payable. For such sugar, on its being taken from the factory, a certificate is given, on which is written "Free Sugar." When thereafter the sugar is exported abroad, and an indorsement is made on the customs certificate, then, on presentation of this certificate to the local excise inspection, the latter transfers to the "free sugar" an equal quantity from the "free reserve." It is, of course, understood that on the exportation abroad of free sugar the customs authorities also issue quittances, which are valid in lieu of payment of excise on sugar. It is permitted to export free sugar abroad, not only for the purpose of liberating for admission to the home market the "free reserve" of any one factory, but also of any other factory. For this purpose the owners of the factories who enter among themselves into such an agreement must notify their local excise officials, and these in turn must notify each other. That factory which desires to export abroad its free sugar, say 5,000 poods, for the account of

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another factory indicated by it, asks for the transfer in its factory and excise books of 5,000 poods from the category of "free sugar" to the category of "free reserve" in order that from the category of the "free reserve" of the other manufacturer 5,000 poods may also be transferred to the category of "free sugar." The other manufacturer hands in a notice for the liberation of 5,000 poods of the free reserve from the additional excise and its transfer to the category of free sugar, in view of the fact that in its place 5,000 poods of the free sugar have been transferred to the free reserve of the first manufacturer. Consequently the first manufacturer ceded to the second his right of placing on the home market 5,000 poods, which he can now only sell abroad or pass out into the home market after payment over and above the excise of the additional excise of 1.75 rubles per pood. As the first and second methods of disposing of this sugar are less advantageous than placing the article on the home market as free sugar, the manufacturer who ceded his right receives from the manufacturer who acquired the right the price per pood agreed upon between them, which is usually determined by the difference existing at the moment between the price obtainable for the sugar and on the home market and the price obtainable by sale abroad. This is what is termed a "transfer." Dependent upon the fluctuations in price of sand sugar in Russia and abroad, the price of these transfers also varies. Therefore, the person who sells the transfer (the right of issue into the home market) charges several kopecks more than the difference mentioned above. This is done on account of the risk that is taken that sugar prices abroad may fall, and also for the trouble involved in exporting, etc. Example: Price of sand sugar at a station in the southwestern region: (a) For the home market, Rs. 4.25 per pood, or, without excise, Rs. 2.50; (b) for abroad, Rs. 1.25. Consequently the difference or value of transfer is Rs. 1.25; but in that case, for the reasons given, Rs. 1.28 to Rs. 1.30 is paid for the transfer. * * * For example, four sugar factories far away from the shipping port have to export 50,000 poods each, or in all 200,000 poods. Another factory situated near a shipping port, to which the freight is cheaper, and with the demand for sugar not great, finds it more profitable to export its entire output (250,000 poods), and receives export certificates for this quantity. These certificates are given to the owners of the four factories mentioned, and these in turn deliver 200,000 poods of sugar, which can be sold on the home market whenever the owner pleases. It should have been stated that certificates to the extent of 200,000 poods are exchanged for the same quantity of sugar, and not 250,000 poods. These certificates can be sold to a bank, or to a speculator who has engaged to deliver sugar at the port abroad to which the sugar was shipped. The government also takes these certificates in payment of excise at par; i. e., 1 ruble 75 kopecks a pood.'

"The natural result of the Russian laws governing the sugar industry is the accumulation of a large surplus of sugar, and the disposal of such surplus has proved a problem of no small difficulty. Much of it has necessarily gone abroad for export, even at a loss to the manufacturers. It is manifest from the foregoing considerations that the exporter of sugar from the Russian empire, under the provisions of the Russian laws already mentioned, as enforced by the regulations of the minister of finance, receives a valuable bonus through the operation of such laws and regulations, and that this bonus accrues to him upon the exportation of his sugar. The export certificates or vouchers, to which we have referred, are only the legal evidence of this valuable privilege or grant conferred by the government, without whose authority such transfers of sugar would be valueless and of no effect. Our conclusion, therefore, is that a bounty or grant, within the meaning of section 5 of our tariff act, has been paid or bestowed by the Russian government upon the exportation of this sugar, so as to work a benefit or advantage to the Russian sugar exporter, as follows: First. Upon the exportation of the sugar, the government remitted or refunded the excise tax due thereon, or otherwise canceled the indebtedness of the sugar manufacturer, so that he was enabled to place his product upon the market free from the burden of either the regular or additional excise tax. Second. The certificate which the government issued to him upon the exportation

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of his sugar had a substantial market value, and was transferable, and operated as a premium, grant, bonus, or reward. Looked at from the Russian standpoint, these advantages might, perhaps, be described as a bounty on production; but (in the language of the circuit court of appeals in the Hills Bros. Co. Case, supra), 'from the standpoint of other countries,' they become a bounty or grant on exportation. It will be observed, too, that in the Hills Bros. Co. Case it was the fact alone of the remission of the excise tax by the Dutch government which brought into operation the bounty received by the sugar makers. In other words, it created it; for without such remission there would have been no bounty. It is immaterial, we may add, whether the price obtained for the exported sugar reaped a profit or inflicted a loss upon the manufacturer or producer. The simple inquiry is whether, at whatever price he may have sold it, he received a bounty or grant of pecuniary value, upon its exportation by reason of and through the operation of the system of laws of the Russian empire designed for the regulation of the sugar industry, both for home consumption and exportation.

"There is nothing in the decision of the circuit court of appeals in the case of U. S. v. Hills Bros. Co., supra, which, in our judgment, conflicts in any manner with the conclusions we have reached in this case. On the contrary, the reasoning of the court is strongly confirmatory of the views we have expressed. That decision, it may be noted, reversed the decision of the circuit court holding that the bounty paid by Holland was a bounty on production (99 Fed. 425), and affirmed the decision of this board, which held it to be a bounty on exportation. In re Hills Bros. Co., G. A., 4261. In examining the mass of evidence introduced in this case, and in construing the Russian laws and regulations, we have borne carefully in mind the principle laid down by Mr. Justice Miller in Henderson v. Mayor, 92 U. S. 259, 268, 23 L. Ed. 543, 547, that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.'

"Testing the Russian sugar laws by this standard, and giving to the importer the benefit of every reasonable doubt as to the construction of the law, we are impelled to the conclusion that the Russian sugar statutes and regulations operate to pay or bestow a bounty or grant, directly or indirectly, upon the exportation of sugar. The protest is overruled, and the decision of the collector is affirmed."

The decree appealed from is affirmed.

FIDELITY TRUST CO. v. McCLAIN.

(Circuit Court, E. D. Pennsylvania. February 1, 1902.)

No. 7.

1. INTERNAL REVENUE—PASSAGE OF LEGACIES—INTERVENING ESTATES.
Prior to the passage of the revenue act of 1898, providing for a tax on legacies or distributive shares arising from personal property passing, after the passage of the act, from any person possessed of such property, by will or otherwise, a testator died leaving a will giving real and personal property to his wife for her life, with remainder to his children named in the will, with a power to the wife to direct by her will the respective shares to be received by such children. Testator's wife died after the passage of the revenue act, leaving a will in which, pursuant to the power given by her husband's will, she made division of the estate among his children. *Held* that, notwithstanding the wife's intervening estate, the legacies passed to the children by virtue of the will of their father, who was the person possessed, within the meaning of the statute, and hence such legacies were not subject to the tax thereby imposed.

2. SAME—PERSON HOLDING INTERVENING ESTATE—POWER TO APPORTION.
The wife's power to direct the respective shares to be received by the children did not prevent the legacies from passing to them by their

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father's will, since the legacies as created and fixed by the will of the father could not be changed by that of the wife, but merely ascertained or apportioned.

At Law. Action to recover United States internal revenue taxes alleged to have been unlawfully assessed by the defendant as collector. The defendant demurred to the plaintiff's statement.

John Marshall Gest, for plaintiff.

J. Whitaker Thompson, Asst. U. S. Atty., and Jas. B. Holland, for defendant.

ARCHBALD, District Judge.[1] The plaintiff declares for internal revenue taxes assessed by the defendant on certain legacies, and paid by it under protest. The facts set out in the declaration, to which the defendant has demurred, are about as follows: George H. Crosman died May 28, 1882, leaving a widow and four children, and the issue of two others, who were dead. By his will, which was probated June 6th following, after one or two specific bequests, he gave to his wife, Hannah B. Crosman, the rents, issues, and profits on all the residue of his estate, real and personal, for life, and upon her death he provided that:

"After the termination of the entire life interest hereinbefore given to my wife, I do give, devise, and bequeath to my six children, or their issue, as the case may be, in regard to any who may be deceased at the time of the death of my wife, namely, George, Heron, and Mary Crosman, and Margaret Phillips, and the issue of my deceased sons, Frederick and Alexander Crosman, all the rest, residue, and remainder of my whole estate, real and personal, in such manner, shares, and proportion, however, as she, my said wife, Hannah B. Crosman, by her last will and testament, shall order, direct, limit, and appoint. And in case she, my said wife, should not, by any such will and testament, order, direct, limit, and appoint the respective shares and proportions of my said children or their issue, or the manner in which they shall be held, then the said rest, residue, and remainder of my estate, after the death of my said wife, shall be equally divided, share and share alike, among my children, their heirs and representatives; the issue of my deceased child or children taking, however, and only receiving, such part or shares thereof as his, her, or their deceased parent would have had and taken if living."

He also appointed his wife executrix. Mrs. Crosman lived until December 28, 1898, and then died, leaving a will, in which, in execution of the power of appointment given her by her husband, she directed that to the actual amount of his estate should be added the advancements made by him to his children in his lifetime, the whole to be then divided into six equal shares, each share being charged with the advancements made to the child to whom it was to go, one such share being given to each of the four children, George H. Crosman, J. Heron Crosman, Margaret C. Phillips, and Mary C. Thornton, and one share to her executors in trust for the children of Alexander F. Crosman, deceased, and another in trust for her granddaughter Frederika J. Crosman, daughter of Frederick E. Crosman, deceased.

After the death of Mrs. Crosman, the Fidelity Trust Company, as her executor, filed an account for her as executrix of her husband,

[1] Specially assigned.

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upon which the orphans' court of Philadelphia made distribution in accordance with the directions given by her will, and upon the legacies so ascertained the collector levied the tax claimed. The question is whether they were subject to it, and this depends on when the legacies passed,—if by the will of the father, then, as that long antedated the passage of the revenue act of 1898, they were not so taxable; but if by the will of the mother, in December, 1898, then they were.

That it is the passage of the legacy, and not the time of its vesting, which determines whether it is subject to a tax, is clearly pointed out in McClain v. Pennsylvania Co., 47 C. C. A. 529, 108 Fed. 618; and the same case decides that "the person possessed," within the meaning of the statute, is the decedent from whose estate the legacy really comes, and not the one to whom it may have been given by him intermediately in charge or trust for such beneficiary. This case, in effect, disposes of the question now in controversy. The present legatees take from their father, and by virtue of his will, notwithstanding that the mother was given the power to determine the amount to which they should be relatively entitled. It is their father's estate that is distributed to them, and not their mother's. Neither can she be regarded as the person possessed because she had a precedent life interest, and theirs is an interest in remainder after her. The relative rights of their mother and themselves were fixed by the will of the father, and both passed from him to them thereby. They took nothing from their mother; they simply took after her. The corpus of the estate was indeed passed on to them from her after she was through with it, but it was passed simply in continuation of its original passage from their father, who was clearly the person possessed, within the meaning of the act. In no sense are they the legatees of their mother, while they are the direct legatees and beneficiaries of their father, having been actually named by him in his will.

It adds nothing to the argument in favor of the tax that the extent of the children's interest was left to be determined by Mrs. Crosman if she so desired. The exercise of this power did not extend to the naming of the persons who were to take. They were fixed by the will of the father, and could not be changed. Wickersham v. Savage, 58 Pa. 365. She simply had authority to decide what should be the share of each. The legatees were not created by her will; they are merely ascertained by it.

In Com. v. Duffield, 12 Pa. 277, the testator, a resident of Maryland, left a fund to his executors in trust, to pay the income to his sister for life, and empowered her to dispose of one-half of the principal at her death. She executed the power by a bequest to her niece, and the question came up, on the probate of her will in Pennsylvania, whether a collateral inheritance tax was due on the fund so passing, and it was held that it was not. "An appointee," says Gibson, C. J., "derives title immediately from the donor of the power, by the instrument in which it was created, and consequently not under, but paramount to, the appointor by whom it was executed." The case of Com. v. Williams' Ex'rs, 13 Pa. 29, is quite

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similar. A testator devised real and personal estate in trust for his daughter for life, and after her death for the use of such persons as she by will should appoint, and it was held that the estate passed to her appointees, not by virtue of her will, but by that of her father, she having a mere power to designate. This was a tax case also, and the question when the estate passed was directly in issue; for, if it went by the will of the daughter, as the beneficiaries were collateral it was subject to a collateral inheritance tax, while if they took from the original testator they were lineal descendants, and it was not. Both these cases go further than is necessary to meet the one in hand, for here we have the parties who are to take, directly established by the original will, and only the extent of their taking to be determined by the donor of the power, while in each of those cited the fixing of the beneficiaries was also left open, and yet the estate was held to pass at the death of the first testator.

The English cases on the subject are instructive. By the rule which there prevails, as a general power of appointment enables the donor of the power to dispose of the property in his own favor it is regarded as in effect a part of his estate, and it might therefore be supposed that an interest which is created by the exercise of such a power would be held to have been derived from it. But such is not the case. In Braybrooke v. Attorney General, 9 H. L. Cas. 182, it was decided that the interest was derived, not from the person exercising the power, but from the one who created it. This was followed in Re Barker, 7 Hurl. & N. 109, where the facts were as follows: A testator died in 1850, devising his estate to his wife for life, and after her death on such further trusts as she by will might appoint. The wife died in 1859, devising the estate to the testator's niece. In the meantime the act of 16 & 17 Vict. c. 51, had been passed, imposing a succession tax on "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of the act," but varying it according to relationship, and the question came up as to the rate to be paid. If the estate which the niece took was to be regarded as derived from the appointment of the wife, they being strangers in blood, the duty would be 10 per cent., but if from the husband, who created the power, it was but 3 per cent., and it was held taxable only at the latter rate. Attorney General v. Pickard, 3 Mees. & W. 552, is to the same effect, Lord Abinger declaring that "nothing can be better settled than the general rule that interests created by the execution of a power take effect precisely in the same manner as if created by the instrument which gives the power"; and this being made the basis of determining the succession tax there decided to be due. In re Lovelace's Settlement, 4 De Gex & J. 340, is the same way, and, after a review of all the cases, the doctrine was again asserted in Attorney General v. Mitchell, 6 Q. B. Div. 548. So, in Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033, it was held that the donor of a power, rather than the donee, must be regarded as the decedent whose estate is liable to taxation under the act im-

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posing a tax upon legacies and successions, and this was followed in Balch v. Shaw, 174 Mass. 144, 54 N. E. 490. A similar ruling is also to be found in Re Stuart, 131 N. Y. 274, 30 N. E. 184, 14 L. R. A. 836.

Not only on principle, therefore, but by authority, there seems no escape from the conclusion that the legacies in the present instance passed by virtue of the will of George Crossman, the original testator, in 1882, and not by that of his wife, Hannah, and that they were not, therefore, liable to the tax which the plaintiff, as executor, has been compelled to pay. There are no facts in dispute, the point of law involved being the only matter in controversy, and, this being found against the defendant, the case is in shape for final disposition, the right of the plaintiff to recover being sustained.

Let judgment be entered on the demurrer in favor of the plaintiff for the taxes declared upon, with interest and costs.

FOOT v. BUCHANAN, United States Marshal.

(Circuit Court, N. D. Mississippi, W. D. January 14, 1902.)

1. WITNESSES—EVIDENCE—INCRIMINATING—PROTECTION—CONSTITUTION — STATUTE.

Under the fifth amendment of the constitution of the United States, providing that no person shall be compelled in any criminal case to be a witness against himself, a witness before the grand jury cannot be required to answer as to his participation in, and knowledge of, a combination to regulate and control the price of cotton seed and the product and price of oil throughout certain states, in violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat. 209), notwithstanding Rev. St. § 860, providing that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court in any criminal proceeding, since such section does not exempt the witness from prosecution for the offense which may be disclosed by his testimony.

2. SAME — INTERSTATE COMMERCE ACT — VIOLATION — WITNESS — EXEMPTION FROM PROSECUTION — UNLAWFUL MONOPOLIES — PROHIBITION — APPLICABILITY OF EXEMPTION.

Act Cong. Feb. 11, 1893 (27 Stat. 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, applies only to proceedings connected with the act of February 4, 1887, and does not apply to a prosecution for violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat. 209), so as to abrogate in relation thereto Const. U. S. Amend. 5, providing that no person shall be compelled in a criminal case to be a witness against himself.

3. SAME—QUESTION FOR JUDGE.

Where a witness claims that the answer to a question will tend to incriminate him, it is not for the witness, but for the judge, to decide whether, under all the circumstances, such might be the effect, and the witness entitled to the privilege of silence.

4. SAME—NATURE OF TESTIMONY.

Where a person has already been indicted for an offense about which he is to be examined as a witness, and the questions asked him tend

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to connect him with such offense, the testimony sought is within the inhibition of Const. U. S. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself.

5. SAME—ASSURANCE OF SAFETY—RELINQUISHMENT OF PRIVILEGE.
Where a witness before a grand jury declines to answer certain questions, and is taken before the judge, who assures him that he can safely answer, as his testimony cannot be used against him, he is not compelled by such assurance to relinquish his constitutional privilege, where the answer may tend to criminate him.

6. SAME—CONTEMPT—COMMITMENT—HABEAS CORPUS—RELIEF.
Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on habeas corpus because some of the questions might be safely answered.

Habeas Corpus.

Lawrence Foot was subpœnaed as a witness before the grand jury for the district court of the United States for the Western division of the Northern district of Mississippi. He was sworn and examined in relation to violations of an act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209). This act is intended to suppress conspiracies or trusts in restraint of trade, and it provides that every person who shall violate its provisions shall, on conviction, be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or both, in the discretion of the court. The assistant United States attorney propounded to the witness a number of questions, among which were the following:

"State whether or not you attended any meeting, called either at Memphis or New Orleans or Meridian or elsewhere, in the early part of this fall, or at any time within the past eighteen months, to discuss fixing a price upon cotton seed, or the products of cotton seed?

"Has your mill, or any other, to your knowledge, contributed anything to the selection of a committee whose duty it is to see that the various mills in the states of Mississippi, Louisiana, and Tennessee keep up a uniform rate on cotton seed and its products?

"If your mill should immediately advance the price of cotton seed, or lower the price of products, would you be subject to any sort of forfeiture, censure, or supervision from any source whatever?

"Is there any sort of understanding existing between the mills in Mississippi, Tennessee, or Louisiana, either written or verbal, by which the various mills are to be allowed to press a certain amount of seed; and, in the event any greater amount is pressed by any mill, is there any obligation on the part of such mill to account for the same to any committee whose duty it is to look after such matters?

"Is it pot a fact that within the past six months one oil mill will not invade what is known as the 'territory' of another oil mill to purchase seed; and is it not a fact that all the mills in a certain territory have an agreement whereby each day, or every few days, they communicate with each other over the telephone, by letter, or otherwise, and inform each other what they are paying for seed, or what they intend to pay next day or next week, and by virtue of such communications or agreements do not all the mills pay the same price for seed and sell all products within such territory at the same price, and has this not been the practice this fall?

"During the past six months has there existed an agreement between the oil mills of Memphis, or those of Mississippi, Tennessee, and Louisiana, that you will all be governed, in purchasing cotton seed and selling the products thereof, by the Memphis or New Orleans market, and do you strictly adhere to said agreement?"

The witness refused to answer these questions, and gave as the reason for his refusal that "in answering the questions he would criminate himself, and put the government in possession of information as to the details of

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said alleged combine and agreement, and the names of parties and witnesses, which might supply the means of convicting him of the same offense." For this refusal to answer, on report of the grand jury, the witness was carried before the district court, where he repeated his reasons for declining to answer. The court required the witness to return to the grand jury and answer the questions, and, on his refusal to obey the order of the court and answer the questions, he was committed to jail, "there to remain from day to day and term to term of this court until he shall answer said interrogatories, or be otherwise discharged by due course of law." Being in the custody of the United States marshal for the Northern district of Mississippi under this order of the court, he filed a petition for the writ of habeas corpus. The petition alleges the facts which have been stated, and also, on information and belief, that the petitioner "at the time of his refusal to answer the questions propounded to him by the grand jury aforesaid, and at the present time, stands indicted in the district court of the United States at Jackson, Mississippi, for the same identical offense which the grand jury was seeking to investigate in propounding the questions aforesaid to your relator." The writ was issued, and the return of the marshal shows that the petitioner was held under the said order of the court. The United States attorney, who, by order of the judge granting the writ, was notified of the proceedings, filed the following addition to the marshal's return: "We admit that the questions in the petition were asked, but deny that the defendant is entitled to the relief sought, and state the facts to be that the defendant was assured by the court that no information given by him in answer to the questions would or could be used against him in any prosecution in any United States court in this state. And we deny that the defendant knew of any indictment against him at the time the questions were asked, etc., but admit that he was under indictment."

A. K. Foot and James Stone (J. C. Wilson, on the brief), for petitioner.

M. A. Montgomery, U. S. Atty., for respondent.

SHELBY, Circuit Judge (after stating the case as above). 1. It is a rule of the common law that a witness will not be compelled to answer any question, the reply to which would supply evidence by which he could be convicted of a criminal offense. This doctrine was firmly implanted in the common law of Great Britain and of the colonies long before the adoption of the constitution of the United States. The principle is held so sacred in this country that it is embodied in the respective constitutions of all the states, as well as in the federal constitution. The principle, as applied to this case, is found in the fifth amendment to the constitution: "No person shall be compelled in any criminal case to be a witness against himself." The question here is, does this provision protect the petitioner in declining to answer the questions propounded to him? The general power of the court to punish a witness for contempt who refuses to answer is unquestioned. But that power is limited by the language quoted from the constitution. Any exercise of jurisdiction or power violative of this provision is void, and the witness imprisoned by an order made in excess of the court's authority is entitled to be discharged on the writ of habeas corpus. Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; Rev. St. § 752. Was the order of the district court requiring the petitioner to answer these questions, and committing him for his refusal to answer, in excess of the court's authority?

In 1890 Charles Counselman was subpœnaed before the United

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States grand jury for the Northern district of Illinois which was engaged in investigating alleged violations of an act to regulate commerce, approved February 4, 1887 (24 Stat. 379). Questions were propounded to him, the answers to which would tend to criminate him. He declined to answer, and was carried before the court. The court held (Judge Gresham presiding) that section 860 of the Revised Statutes of the United States provided that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him, in any court of the United States, in any criminal proceeding, and that he was fully protected by this statute; that therefore he should be required to answer. It was held, in view of this statute (Rev St. § 860), that the witness could not claim the privilege of silence under the fifth amendment of the constitution. Counselman's petition seeking to be discharged on habeas corpus was dismissed, and he was remanded to the custody of the marshal. In re Counselman (C. C.) 44 Fed. 268. Counselman took an appeal to the supreme court. The decision of the lower court was reversed. The supreme court held that the witness could not be required to answer. Referring to section 860, the supreme court said:

"It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which would be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." And again: "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for the offense to which the question relates." The court concluded: "From a consideration of the language of the constitutional provision, and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer." Counselman v. Hitchcock, 142 U. S. 547, 564–585, 12 Sup. Ct. 195, 198–207, 35 L. Ed. 1110, 1114–1122.

By the unanimous judgment of the supreme court the appellant, Counselman, was discharged from custody.

That case seems conclusive of the case at bar. But the learned district attorney contends that "the case of Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, is virtually a repeal of the case of Counselman v. Hitchcock." Is that contention true? After the opinion in Counselman v. Hitchcock was rendered, the congress passed an act, approved February 11, 1893, to give immunity to witnesses in certain cases. It provides, in brief, that no person shall be excused from testifying in interstate commerce actions, or from producing books, papers, contracts, etc., before the interstate commerce commission, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress entitled "An act to regulate commerce," ap-

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proved February 4, 1887, on the ground or for the reason that the testimony or evidence required of him would tend to criminate him or subject him to a penalty or forfeiture, and that no person shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he may testify or produce evidence before said commission, or in obedience to its subpœna, or in any such case or proceeding. 27 Stat. 443. The supreme court having decided that section 860 of the Revised Statutes did not confer complete indemnity on witnesses, this act was evidently passed to confer such indemnity in the cases to which it refers. The act has no application to the case at bar. It is confined by its terms to proceedings connected with "An act to regulate commerce," approved February 4, 1887, and amendments thereto. The petitioner in the case at bar was examined before the grand jury in reference to offenses under "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209; 1 Supp. Rev. St. p. 762). In the case of Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, cited by the district attorney, the court construed the act of February 11, 1893 (27 Stat. 443). The court held (four of the justices dissenting) that the act affords absolute immunity to the witness in the cases to which the act relates against prosecution, state or federal, for the offense about which the witness is examined, and deprives the witness of his constitutional right to refuse to answer. This act, as we have said, by its terms is confined to a certain class of cases, and has no application to the case at bar. There is no statute applicable to the case at bar which tends to protect the witness, except section 860 of the Revised Statutes, and that has been held by the supreme court not to afford the protection furnished by the constitution. The principle established by the decision in Counselman v. Hitchcock, so far as it is applicable to the case at bar, is unaffected by the opinion of the court in Brown v. Walker. The result of the two cases is (1) that since the statute of February 11, 1893 (27 Stat. 443), parties or witnesses in cases or proceedings under the act of February 4, 1887 (24 Stat. 379), to regulate commerce, and amendments thereto, may be required to answer questions that tend to criminate the witness or party; but (2) witnesses or parties in other cases may not be required to answer criminating questions, because section 860 of the Revised Statutes does not afford complete indemnity to the witness or party. The first result is established by a bare majority in Brown v. Walker. The second proposition is established without dissent in Counselman v. Hitchcock.

2. It is true that the witness cannot avoid answering questions upon his mere statement that his answers to them will tend to criminate him. It is for the judge to decide whether his answer will reasonably have such tendency, or whether it will furnish an element or link in the chain of evidence necessary to convict him. In determining whether or not the witness is entitled to the privilege of silence, the court may look at all of the circumstances of the case, and determine whether or not there is reasonable ground to appre-

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hend danger to the witness from his being compelled to testify. If the fact that the witness is in danger appears, great latitude should then be allowed to him in judging for himself of the effect of any particular question. A question which might appear at first a very slight and innocent one might, by establishing a link in a chain of evidence, become the means of convicting the witness. Ex parte Irvine (C. C.) 74 Fed. 954. In the case at bar it appears that the defendant was already indicted for the offense about which he was examined, and the questions tended to connect him with the offense for which he is indicted. There can be no doubt that under such circumstances, when the questions are such as seek to connect him with the crime under investigation, the court will not require him to answer them.

3. It is set up in the answer filed by the district attorney that the petitioner, when carried before the court upon his failure to answer questions before the grand jury, was assured by the court that no information given by him in his answers to the questions would or could be used against him in any prosecution in any court of the United States. The petitioner could not be required to waive his constitutional privilege upon such an assurance by the court. He has a right to stand upon his constitutional privilege, notwithstanding such assurance, and to remain silent whenever any question is asked, the answer to which may tend to criminate him. Temple v. Com., 75 Va. 892.

4. It is argued by the district attorney that some of the questions asked (we have not stated them all) could have been answered without endangering petitioner, and that, if any one of them did not call for a criminating answer, he is not entitled to relief. We cannot accept that view. He was carried before the court, and the court required him to answer all of the questions. He is under commitment for refusal to answer all. It was one examination, relating to one subject, and the questions culminated in an effort to show the witness' connection with the misdemeanor charged. Where there is a series of questions, the examiner cannot "pick out one, and say, if that be put, the answer will not criminate him." If it is one step having a tendency to criminate him, he is not compelled to answer. People v. Mather, 4 Wend. 230, 254; Paxton v. Douglas, 16 Ves. 240, 243.

The act to protect trade and commerce against unlawful restraints and monopolies is the law of the land, and should be enforced. We would make no order that would tend to obstruct its proper enforcement. It confers jurisdiction on the United States courts, and provides a remedy in a civil action "by way of petition setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited." 26 Stat. 209, § 4. This provision does not prevent the criminal prosecution of those guilty of its violation. But the procedure against violators of the act must conform to law. The penalties of fine and imprisonment provided by the act may be imposed by the same procedure sustained by the same kind of evidence, either direct or circumstantial, that is admissible in prosecutions for other misdemeanors, and it ought not to be necessary, and certainly is

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not permissible, to resort to methods in conflict with the constitutional rights of the citizen.

It is ordered that the petitioner, Lawrence Foot, be discharged from custody. Petitioner discharged.

PARDEE and McCORMICK, Circuit Judges, who were present at the hearing of this case, concur in this opinion.

STANDARD CASTER & WHEEL CO. v. CASTER SOCKET CO., Limited.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1901.)

No. 1,016.

1. PATENTS—INVENTION—ADAPTING DEVICE TO NEW USE.
The transfer of a device from one art to another does not amount to invention where it performs the same function in both without any change of form to adapt it to the new use.

2. SAME—MAKING SEPARATE PARTS IN SINGLE PIECE.
The mere making in one piece of a device formerly made in two parts mechanically attached is not invention, and the exception to the general rule must depend upon special facts indicating the presence of the inventive faculty in a degree greater than the mere mechanical knowledge required by so simple an improvement.

3. SAME—FURNITURE CASTERS.
The Berkey patent, No. 318,533, for a caster socket provided with an interior spring made integral with one side of the socket and from the same material, the purpose of which is to press against the bulbous head of the caster shank, and prevent it from dropping out when the furniture is raised from the floor, was anticipated by the Kane & Brown patent of 1866, which showed the same spring, except that it was made of a separate piece of metal, and mechanically attached to the socket.

4. SAME—EVIDENCE OF INVENTION—EXTENSIVE USE.
It is only when the patentability of a device is doubtful that its general use may turn the scale.

5. SAME—INFRINGEMENT.
Infringement cannot ordinarily be escaped by merely cutting in two a device made in one piece, or by making integral an article formerly made in two; but to render such change a defense to the charge of infringement special facts must appear to show that it is not merely colorable.

6. SAME—FURNITURE CASTERS.
The Berkey & Fox patent, No. 345,613, as to claims 3, 4, 5, and 6, covering a track plate for furniture casters, though narrow, was not anticipated, shows invention, and is valid. Also *held* infringed.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Willard Parker Butler, for appellant.

Arthur Denison, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from a decree sustaining two patents as valid and finding infringement. Both patents belong to the appellee, the Caster Socket Company, and both relate to improvements in furniture casters. The first patent involved was issued May 6, 1885, to Julius Berkey, and is numbered 318,533; the

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second is dated July 13, 1886, is numbered 345,613, and was issued to Julius Berkey and Wm. R. Fox.

1. The Berkey patent is for an improved socket for receiving the shank of a furniture caster, said socket being provided with a spring made integral with one side of the socket, and from same material. The object of this integral tongue or spring is to hold the caster in place so that it will not drop out when the furniture is lifted from the floor, but not so firmly but that it is readily removed and inserted. The socket is described as made in two parts, which when in use are put together, thus forming a socket, which may be driven into the opening provided for it. To better understand the device, we insert below certain drawings from the specifications:

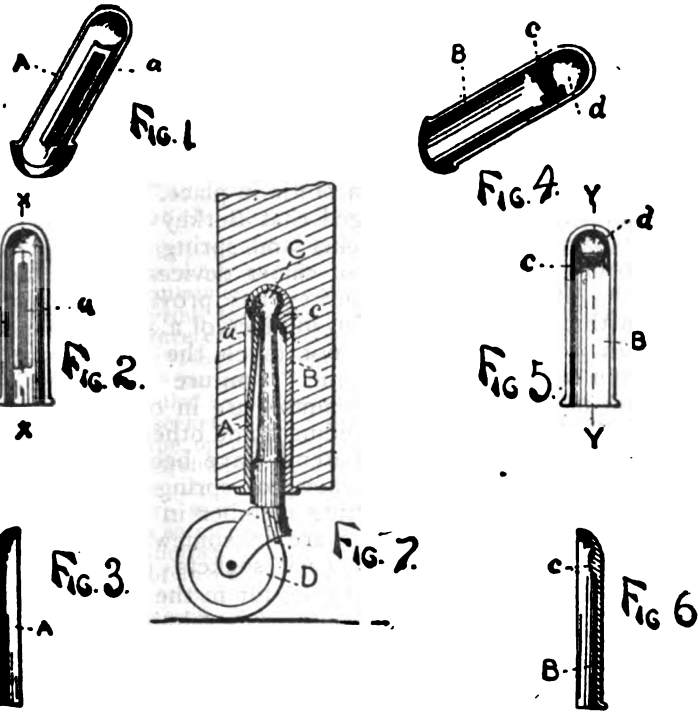


Fig. 2 of the drawing is a plan view of the half socket, "A," and Fig. 3 is a sectional view of the same on the line X—X of Fig. 2. Fig. 5 is a plan view of the half of the socket without the spring tongue, provided with a ridge for holding the ball of the caster shank. Fig. 6 is a sectional view of the same half socket on line Y—Y of Fig. 5. Fig. 7 is a sectional view of the entire socket in position in the furniture with caster in place. The only claim of the patent is in these words:

"In a caster socket, the half socket, A, provided with a tongue, a, integral with and formed of a part of the half socket, A, substantially as and for the purposes described."

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The prior art shows many forms of what are known as "hold-up casters." The patent to Kane & Brown of February 6, 1866, is beyond all question an anticipation, unless the fact that Berkey's spring is made integral with one-half of his socket constitutes a patentable improvement. The Kane & Brown patent was for a socket made in two parts, each half containing a curved, flat spring "riveted in the inside," as described in the specifications. This spring performed the same function as the integral spring of the Berkey patent, and, to quote from the opinion of the court below, "only differs in that the tongue is mechanically attached, while the tongue in the Berkey device is formed out of one side of the socket." But is the mere making in one piece a structure which had theretofore been made of two or more pieces mechanically attached invention? Or, to put it in another form, is it a patentable invention to substitute for a riveted spring in a caster socket a spring made integral with the socket? A spring, either made integral with the supporting member or mechanically attached, for holding a pintle in place, was not new, and this the patentee concedes on the face of his specifications when he says, "I am aware that a spring is not broadly new for holding a pintle in place." The only ground, then, upon which it can be urged that Berkey has made a patentable improvement over the socket and spring of Kane & Brown, to say nothing of a long line of caster devices not so clearly approximating Berkey, is that Berkey has provided a spring made integral with one-half of a socket, in place of a spring riveted to the socket. In doing this he has not taken the idea of an integral spring from what counsel call the "furniture caster art," but has found such integral spring in common use in other arts as a well-known method of seizing and holding some other part of a structure in place. A large number of patents have been filed by appellant for devices in which a spring tongue or spring finger is shown attached integrally to the supporting member in distinction to being riveted thereto. Some of these are in somewhat analogous arts, as in watch sockets, pen and pencil sockets, candle sockets, etc. We need not specially consider these, for in the printed brief of the very frank counsel for the appellee it is admitted "that a spring tongue or a spring finger formed of the same piece of metal as the body of the article, and adapted to seize and hold some other article placed in contact therewith, was a common thing in sheet metal structure." But it is said that in the "furniture caster art" such a spring made integral with the caster socket is not shown, and that it may be invention to transfer a device from one art to another. For this, C. & A. Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, is cited. But the transfer has plainly been made from arts where the spring was integral with a socket, and where its purpose and function was precisely that to which it is applied in Berkey's device. No change in form has been made to adopt the device to a new application. No difficulties of adaption have had to be cleared away. Such a change from even a non-analogous art cannot be regarded as involving invention. The case in this aspect is governed by Stearns & Co. v. Russell, 29 C. C. A.

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121, 85 Fed. 218, where Judge Taft, for this court, gave thorough consideration to the limits of the doctrine of C. & A. Potts & Co. v. Creager. There a device taken from button-making and printing-press machinery, for lifting and holding small articles by exhausting the air in hollow points, and applied in the pill-making art to hold pills while dipping them in a bath for the purpose of coating them in gelatine, was held not to involve invention. Said the court, in that case:

"Here the old use was lifting and holding paper and small articles, and the new was lifting and holding pills. We are of opinion that, notwithstanding the utility and success of the new application of the device to pill-dipping, the circumstances that no change or form was necessary to the new application, and that the functions or purposes new and old were not wholly different and distinct, but were substantially the same, make this a different case from Potts v. Creager and lead to a different result."

To the same effect is the decision of this court in L. Schreiber & Sons Co. v. Grimm, 19 C. C. A. 67, 70, 72 Fed. 671, 674, where a ball and socket joint was applied in a device for furnishing an adjustable seat for caster support. It was urged to be invention to carry the device from other arts to one in which it had not been used. Speaking for the court, Judge Severens said:

"The ball and socket joint was a common construction, and was in universal use in mechanics wherever the requirements indicated its utility. In this instance the requirement was for a joint between the saddle and its seat, which would permit the saddle to rock laterally and longitudinally so as to permit the surface of the saddle to adjust itself to the surface of the casks. The ordinary hinge susceptible of only one of these movements would not answer the purpose. It would seem that it would be obvious to a mechanic fairly skilled in his business to meet the requirement by interposing the ball and socket device. Again, no new appliances are here provided which affect the operation of the joint. That is perfect for all the functions that are required of it, and there is no new result substantially distinct in its nature. It is simply the case of an employment for a new use, and nothing more, and falls within the general doctrine of those cases in which it has been so many times held that the mere extension of a well-known device into another field of usefulness, where the transfer does not involve the faculty of inventive genius, will not support a patent. Tucker v. Spalding, 13 Wall. 453, 20 L. Ed. 515; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Ansonia Brass & Copper Co. v. Electric Supply Co., 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327; Manufacturing Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307,—where many of the previous cases are collected."

But it is said that the mere making in one piece a device theretofore made in two or more, which were soldered or otherwise mechanically attached, may involve invention. There are cases in which, under very special circumstances, such an improvement may show patentable invention. The case of Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, is relied upon as giving countenance to this claim. The device involved there was a collar button made out of one piece of sheet metal. Such buttons had been theretofore made out of two or more pieces soldered together. The improvements involved an improvement in form, strength, and lightness, and, being generally made of gold, an important cheapening in the cost. The case was a very close one, and finally turned upon its universal adoption. The case of How-

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ard v. Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039, involved a patent upon a stove grate, where the alleged invention consisted in casting in one piece an article which had formerly been cast in two pieces and put together by nuts and bolts. This was held not to involve invention. In Manufacturing Co. v. Holtzer, 15 C. C. A. 63, 67 Fed. 907, the circuit court of appeals for the First circuit held that the right to improve on prior devices by making solid castings in lieu of attached parts is so common and universal in the arts as to cast a heavy burden upon any one claiming patentability for such an improvement to show special reasons in support of his claim. The mere fact that an article made in one piece instead of in two mechanically attached is more durable, and the cost of construction cheapened, is not in itself enough to constitute invention. That result the court in the last case cited said was "the ordinary consequence of dispensing with joints by casting solid, well known in all the arts."

The conclusion from all the cases must be that the mere making in one piece of a device formerly made in two parts mechanically attached is not invention. The exception to the general rule must depend upon special facts indicating the presence of the inventive faculty in a degree greater than the mere mechanical knowledge exhibited by so simple an improvement. Much stress has been laid upon the alleged large use and sale of this improved socket. The evidence upon this point is not very forceful in respect to this particular invention. The sales were chiefly of a structure which included track plate and socket, or these in combination with a caster, the track plate and caster being the subject of other patents; and it is not made plain that any more of the alleged success of the sale of the track plate socket was due to the socket than to the track plate. However this may be, we do not think the question of patentability doubtful, and it is only when the patentability of a device is doubtful that the general use of the patented article may turn the scale. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Duer v. Lock Co., 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707.

We find it unnecessary to consider the limitations upon this patent or the question of infringement. We are satisfied that the patent, for the reasons stated, is invalid, and the decree upholding it must be reversed.

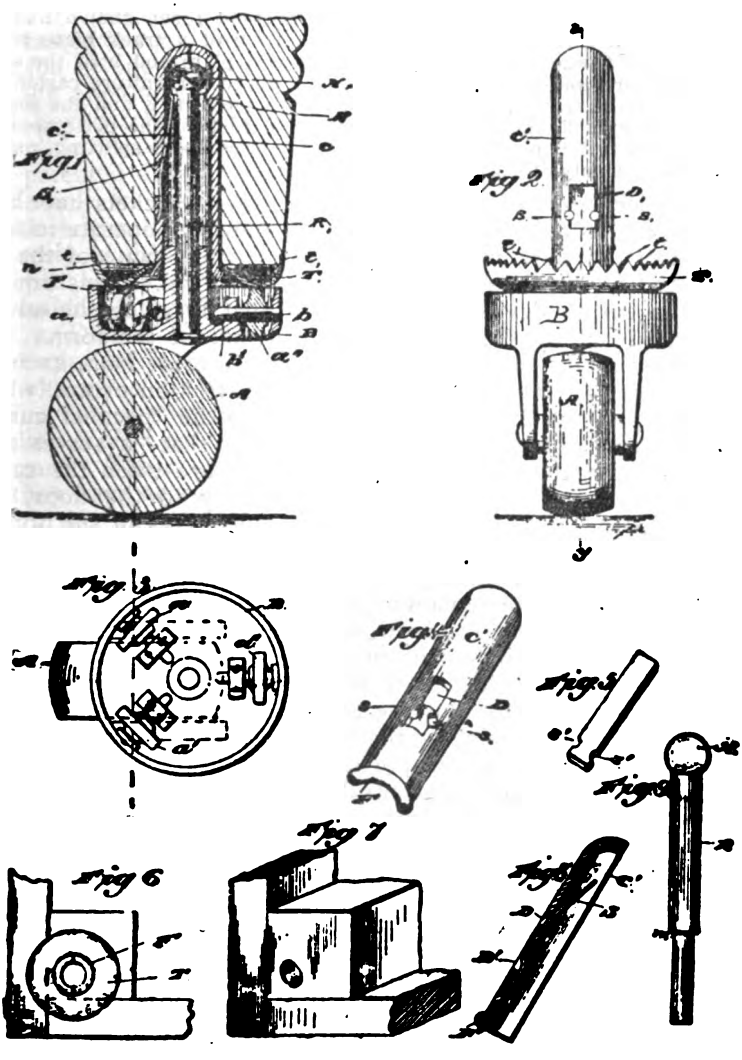
2. The Berkey & Fox patent also relates to furniture casters. The inventor had several objects in view, but, so far as material to this suit, the object was "to provide an improved track plate for the anti-friction wheels, which plate serves also as a furniture protector," and "to secure the track plate to the furniture without the use of screws or nails." The only question here involved relates to the alleged infringement of this "track plate" of the patent. This track plate and its uses are thus described by the inventor as follows:

"The track plate, T, may be cast in the form shown or cut from sheet metal and then formed up. In the latter case it would not have the shoulder shown at n in the Fig. 1. The teeth on the outer and upper edge attach the plate to the wood, prevent the latter from splitting, and also insist in holding the plate and socket together in position on the furniture. The socket,

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c, c', has a flange, F, on its lower end, which, when the socket is driven into position, combines with the teeth to hold the track plate firmly against the wood. This track plate is especially valuable when used on furniture requiring a caster block, as a portion of the teeth engage the frame of the furniture and the remainder engage the block, holding it securely in place. When used with the common caster, without the anti-friction wheels, the track plate is still of service in assisting to hold the socket more firmly in the wood, and in preventing the latter from splitting. On account of the peculiarly curved form of the track plate, as shown, it serves as a shoe, permitting the easy sliding of the furniture when the caster is temporarily removed, preventing the flange, F, from catching on the floor, and avoiding the necessity of chamfering the edges of the bottom of the leg."

We insert, for the better understanding, Figs. 1, 2, and 4 from the drawing:



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Fig. 1 is a vertical sectional view of the caster when inserted, taken on the line X—Y of Fig. 2. Fig. 2 is a front view of the caster, track plate, and socket attached together and removed from the furniture. The track plate in question is shown at T in both figures, and no point in either figure is here involved which is shown below T. Fig. 4 is a perspective view of one part of the socket showing the flange, F, referred to in the claims involved here. There are six claims in the patent. Those here involved are 3, 4, 5, and 6, which are as follows:

"(3) In a furniture caster, the combination of a socket having a flange and a track plate with its central portion sufficiently depressed to receive the entire flange above the lowest surface of the plate when in position, substantially as and for the purpose described. (4) In a furniture caster, a track plate having the outer portion of its lower surface of the annular convex form, and the central portion of the depressed form, shown and described. (5) In a furniture caster, the combination of a track plate and a socket having a flange adapted to engage the said plate and hold the same onto the furniture, substantially as described. (6) In a furniture caster, the combination of the track plate, T, provided with teeth, t, t, and the socket, c, c', provided with flange, F, the flange adapted to hold the plate securely against the wood, and the teeth to prevent the wood from splitting, and to hold both more firmly, substantially as described."

Many earlier patents for caster track plates and sockets have been put in evidence as anticipations. They undoubtedly operate to limit the claims of the Berkey & Fox device to a track plate of the peculiar curved form of the one described and shown. Thus limited, none of the earlier devices present either that form or the advantages pointed out by the patentees as a result of the form. The principle function of the track plate in question aside from its function as a track for the wheels of a caster, anti-friction or not, which the inventor pointed out and claims as due to the "peculiar curved form of the track plate, as shown," is the fact that "it serves as a shoe," permitting the easy sliding of the furniture when the caster is temporarily removed, thus preventing injury to the floor, and also avoiding the necessity for chamfering the edges of the bottom of the leg. Another advantage claimed is that it is valuable when used on a caster block, "as a portion of the teeth engage the frame of the furniture and the remainder engage the block, holding it securely in place." Though narrow, we think the patent sustainable.

The question of infringement presents peculiar difficulties. The defendants below made their track plate in two parts instead of one; in other words, they have cut the track plate of the patent in two equal halves. But when in use the two constitute the track plate of the patent "having the outer portion of its lower surface of the annular convex form, and the central portion of the depressed form shown and described" in the drawings and specifications of the patent. If these halves were intended to perform separately some new function, or, when united, were adapted to some useful purpose not attainable by the track plate when made integral, the change might avoid infringement. But this is not the case. Again, the track plate and socket of the infringing device, instead of being separate structures, are made in one piece, and the dividing line between what would otherwise be the flange of the socket must be arbitrarily located. By thus uniting the track plate and the socket

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it is claimed that infringement is avoided, inasmuch as the infringing device omits the flange, F, of the patent. By thus making in one piece the two parts of the patented device, no material change in form or function has been produced. The track plate itself constitutes a flange for the socket, so far as it was the function of the track plate to prevent the socket from being driven too far into the receptacle prepared for it in the leg of the furniture. By making the socket and track plate integral, the latter is held in attachment to the socket, an attachment maintained in the device of the patent by means of the flange of the socket. Neither the division of the track plate nor the uniting of the socket and track plate into one piece operate, when in use, to vary the "peculiar curved form" of the track plate of the patent, and the functions dependent on this form are precisely the shoe functions of the infringing device when the caster is removed. We are impressed with the belief that this division of one part and uniting of two others has been done solely for the purpose of escaping infringement. Narrow as the Berkey and Fox patent is, we cannot ignore the fact that, if such merely colorable modifications are to be sanctioned, the very essence of the patented device will have been appropriated. It is not broadly patentable to make in one part, without change of function, an article originally made in two or more mechanically attached. The converse of this is equally true. Infringement cannot ordinarily be escaped by merely cutting in two a device made in one piece, or by making integral an article formerly made in two. Bundy Mfg. Co. v. Detroit Time-Register Co., 36 C. C. A. 375, 94 Fed. 524. To escape infringement some special facts must appear to show that the change is not merely colorable.

The decree sustaining the validity of claims 3, 4, 5, and 6 of the Berkey & Fox patent, and finding that they have been infringed, is affirmed. The costs of this appeal and of the court below, so far as they have accrued, will be divided. The cause will be remanded for further proceedings in accord with opinion.

WEST INDIA & P. S. S. CO., Limited, v. WEIBEL.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,070.

SHIPPING—INJURY OF WORKMAN—LIABILITY OF SHIP.

The owners of a ship are liable for an injury to a carpenter, employed by a firm which had been hired to make repairs or changes in the interior of the ship to fit it for cargo, and who was sent on board to work during the night, and fell through a hatchway in a dark and unusual place, which had been negligently left open, without notification or warning to those who were doing the work.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This case was commenced in the circuit court on a petition, among other things, showing as follows: "Petitioner shows that he is a carpenter by trade, and was, at the date first mentioned below, employed as such by the firm of William J. Hannon & Co., a commercial firm doing business in the city of New Orleans, to do certain work on the steamship Nicaraguan, be-

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longing to the West India & Pacific Steamship Company, Limited, a corporation organized under the laws of a foreign country, and having its domicile and residence in said foreign country (which said country your petitioner is informed, and so believes and charges, is the kingdom of Great Britain). Petitioner further shows that on or about the 1st day of May, 1900, between the hours of 12 o'clock midnight and 4 o'clock a. m., he was directed by the said William J. Hannon & Co., by their employés and foreman, under whose orders your petitioner was working, to go aboard said steamship, and, with others employed with him, to do certain carpenter work in the interior of said ship, which work was the work your petitioner was employed to do. Petitioner further shows that while he was at work in the interior of said ship it was the duty of said West India & Pacific Steamship Company, Limited, to provide sufficient light to enable him to do said work, and to have the hatches of said ship in that part where he was at work securely closed. Petitioner shows that said West India & Pacific Steamship Company, Limited, failed and neglected to do either of said things; that although there was a good electric plant aboard said ship, and that same had been running in the early part of the night, that same was shut down (although same was in good working order) before he was sent aboard said ship and put to work therein, and that the only light furnished him in the dark interior of said ship was a tallow candle. Petitioner further shows that the hatches on said ship were not closed, but were left open and uncovered, although same were not in use, especially what are known as the 'bread hatches,' which are situated in the side of the decks of the steamship Nicaraguan, which is a most unusual place for a hatch to be situated; all of which open hatches and absence of light your petitioner shows was due to the fault, laches, and negligence of the said West India & Pacific Steamship Company, Limited, its servants, officers, employés, and agents, whose duty it was to provide a safe place in which your petitioner could work, and sufficient light to enable him to move about in the interior of said ship, as his said work might require. But your petitioner shows that the said West India & Pacific Steamship Company, Limited, its officers, servants, agents, and employés, required and compelled your petitioner to work in the interior of said ship without taking reasonable and necessary precautions for his safety by closing said hatches, and providing proper and sufficient lights, as it was their duty to do, although said steamship company, its officers, agents, employés, and servants, knew that your petitioner was working in said ship. Petitioner further shows that at the said time he was a minor, under the age of twenty-one years, and that he has only lately attained his majority. Petitioner further shows that about the hour of four o'clock a.m., while working in the interior of said ship, and in the absence of proper and sufficient light, your petitioner, without fault or negligence on his part, fell through one of said open 'bread hatches' in the side of the deck of said ship, into the hold of said ship, a distance of about twenty-two feet, falling upon the iron bottom and sides of said ship. Petitioner shows that by said fall he was greatly injured, bruised, and damaged, his collar bone was broken, his right arm was broken, his person badly bruised, injured, and broken in sundry places, and he suffered concussion of the brain."

The answer of defendant shows, among other things, as follows: "That it denies all and singular the allegations therein contained, except such as may be hereinafter specially admitted. Further answering, this respondent admits that its steamship Nicaraguan was in the port of New Orleans on the 30th day of April, 1900; that this respondent had a contract with W. J. Hannon & Co. to fit said steamship Nicaraguan for grain; that under and by virtue of said contract said W. J. Hannon & Co. performed certain work in the hold of said steamship Nicaraguan; that the plaintiff herein was one of the employés of said W. J. Hannon & Co., and that he received certain injuries, of the extent of which respondent has no knowledge, while in the employ of W. J. Hannon & Co.; but this respondent avers that it is in no way or manner or in any amount liable to the plaintiff herein by reason thereof, there being no privity of contract existing between this respondent and plaintiff, and there being no obligation arising ex delicto or by reason of any act or negligence on its part in favor of plaintiff. Further answering,

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this respondent avers that if plaintiff was injured, as alleged in his petition, it was due to no fault or negligence on its part, and, if due to the fault of negligence of any one other than the plaintiff himself, it was due to the fault and negligence of W. J. Hannon & Co., his employers, with whose conduct of the work of fitting said steamship Nicaraguan for grain this respondent in no wise controlled or interfered, and at whose disposal were all the necessary and proper facilities for lighting the said ship, and otherwise protecting all persons employed or coming on board from injury and damage; said steamship Nicaraguan being, at the date of said accident, fitted with a complete electric lighting plant, together with all usual and necessary appurtenances for fully protecting all persons employed or coming on board said steamship, and said steamship actually burning at the time of said accident all lights usual and necessary for lighting said steamship."

By a bill of exceptions it appears that: "A jury having been impaneled, and the pleadings having been read to the jury, Mr. Gilmore, on behalf of the defendant, objected to all testimony or evidence on behalf of the plaintiff in this case, on the ground that the only cause of action that the plaintiff has is against Wm. J. Hannon & Co., there being no privity of contract between the plaintiff and the defendant, and there being no obligation arising from the defendant to the plaintiff ex delicto. This objection being overruled, counsel for the defendant then and there duly excepted, and hereby tender this, their bill of exceptions, to the court to sign and seal, and the court does hereby sign and seal the same."

J. P. Baldwin, for plaintiff in error.

John C. Wickliffe, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The only error insisted upon in this court is in admitting evidence over objections in support of the facts alleged in the petition. The question, as presented, is the same as if, in the court below, the defendant had filed an exception of no cause of action. The petition shows that, having business aboard the defendant steamship, the petitioner was there injured by falling through a hatch, in a dark place, which hatch the owners had negligently left open, without giving sufficient notice thereof, and charges that the owners had neglected their duty to provide a safe place for petitioner to work in said ship, and had not taken reasonable and necessary precautions for safety. It is well settled that the owners of a ship are liable for injuries to persons not notified nor warned, and who are lawfully aboard the ship, when such injuries are caused by, or directly result through, negligence in the construction of the ship, the lack of safe appliances, or from the failure to take reasonable precautions for the safety of such persons, and we are clear that the petition in this case avers facts which show prima facie that the defendant was liable for the injuries suffered by the petitioner. The case is argued as though the petition showed the case of a ship fully turned over to a contracting stevedore for the purpose of loading or preparing, with notice of defects in dangerous places, in which case it has been held that the owners are not liable to the employés of the contractor for damages arising from the open condition of hatches or other defects. For the declaration of the rule, see The Auchenarden (D. C.) 100 Fed. 895. That, however, is not the case here, but rather such a case as this court found in Burrell v. Fleming (decided at the last term) 47 C. C. A. 598, 109 Fed. 489, where the owners were held liable for injuries to a stevedore's em-

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ployé falling through an uncovered hatch, because sufficient notice of the ship's condition was not given. The ruling complained of was correct. The record shows a case in which interest should be allowed from the date of the verdict.

The judgment of the circuit court is amended so as to allow legal interest from rendition of the verdict, and as so amended is affirmed. All costs to be paid by the plaintiff in error.

UNITED STATES v. MORAN et al.

(Circuit Court, S. D. New York. December 28, 1901.)

NAVIGABLE WATERS—DUMPING OF REFUSE MATTER—INDICTMENT—SUFFICIENCY.

An indictment based on Act June 29, 1888 (25 Stat. 209), as amended by Act Aug. 17, 1894 (28 Stat. 360), charged that M., being the owner, and R., being the master, of a steamer, "did unlawfully dump," and "aid and abet in the dumping" of, refuse matter "into the tidal waters of the harbor of New York, and the waters adjacent thereto"; the place being "at the Southern district of New York, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court." Act March 3, 1899, prohibited the discharge of refuse into any navigable waters of the United States, etc. Section 16 declared that any master, pilot, or engineer, etc., who should knowingly engage in towing any vessel loaded with refuse matter to any point of deposit in any harbor or navigable water elsewhere than in certain prescribed limits, should be guilty of a violation of the act. *Held*, that the indictment charged an offense within the act of 1899, as well as within the act on which it was based, and therefore that the court would not consider whether the earlier acts were repealed by the act of 1899.

In Admiralty.

Henry L. Burnett, U. S. Atty., and William S. Ball, Asst. U. S. Atty.

Kellogg & Rose (Abram J. Rose, of counsel), for defendants.

THOMAS, District Judge. Moran, the owner, and Riley, the master, of a steam tug, are indicted for dumping a scow containing mud at a prohibited place, hereafter mentioned, in violation of a permit issued by the supervisor of the harbor of New York to the steam tug, on the application of Riley, in the name and by the authority of Moran. The indictment is based on the act of congress of June 29, 1888 (25 Stat. 209), as amended by the act of August 17, 1894 (28 Stat. 360). Upon demurrer to the indictment, it is urged, inter alia, that said act was repealed by the act of congress of March 3, 1899 (30 Stat. 1121), in which case Moran, owner, at least, would not be indictable under any facts stated in the indictment. The indictment, after charging the relation of Moran and Riley severally toward the tug as owner and master, the obtaining of the permit from the war department, and that the steamer and scow "were then and there subject to the terms, conditions, and requirements of the said permit and its indorsements," all of which are set out as appearing in and on the permit, further charges that:

"On the said 10th day of May in the year of our Lord 1901, at the Southern district of New York, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court, the said

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Michael Moran, being then and there the owner of the said steamer, M. Moran, and the said Frank S. Riley being then and there the master of the same, the said steamer being engaged in towing the said scow or dumper number 15X, as aforesaid, did unlawfully dump, discharge, and deposit, and aid and abet in the dumping, discharging, and depositing, into the tidal waters of the harbor of New York, and the waters adjacent thereto, from and out of said scow or dumper, of which the said Michaele Scotto was then and there the master and in charge as aforesaid, the said mud; and the place where the said mud was so dumped, discharged, and deposited as aforesaid was at a place prohibited by lawful authority, and was not at the dumping, discharging, and depositing place named and specified in the said permit and the indorsements thereon, but deviated therefrom."

It will be observed that the indictment alleges that Moran and Riley "did unlawfully dump, discharge, and deposit, and aid and abet in the dumping," and that the place of such wrongful act was "at the Southern district of New York, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court," and that the discharge was "into the tidal waters of the harbor of New York, and the waters adjacent thereto." This charge would fall within the earlier act, and would also fall within the act of 1899, prohibiting such discharge "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." Section 16 of the act of 1899 also provides:

"And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel, who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 13 of this act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the secretary of war, * * * shall be deemed guilty of a violation of this act, and shall upon conviction be punished as hereinbefore provided in this section."

Therefore, whatever act governs, the allegations of the indictment are sufficient as regards the question of jurisdiction. The court is unwilling to pass upon facts not before it. The indictment is sufficiently specific, and the demurrer should be overruled, with leave to plead over.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. CHUBB et al.[1]

(Circuit Court of Appeals Second Circuit. November 22, 1901.)

No. 80.

1. ADMIRALTY—PLEADING—WAIVER OF MISJOINDER.
Where no exceptions are taken to a libel in which separate claims for salvage and towage services against different defendants are joined, objection to the misjoinder is waived.

2. SALVAGE—SUIT FOR COMPENSATION—DECREE AS BETWEEN DEFENDANTS.
The pleadings and proofs in an action to recover for salvage services, in which judgment was rendered against an insurer which had contracted for the services, *held* not to authorize the court to decree the payment of such judgment by the company which owned the salved vessel, also a party defendant, on the ground that in another proceeding by it for limitation of liability it had been permitted to retain a sum deducted from the appraised value of the vessel to pay the claim of the salvors.

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[1] Republished from 111 Fed. 1008.

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8. ADMIRALTY—SALVAGE AWARD—INTEREST.
Where a libelant made greatly exaggerated and unwarranted claims for salvage services and towage, he will not be allowed interest on the amount awarded.[2]

Appeal from the District Court of the United States for the Southern District of New York.

This is a libel for salvage services in raising the passenger steamboat Catskill, which had been sunk in collision in the North river, and for towing her ashore.

The following opinions were delivered in the court below by BROWN, District Judge:

In the decision previously announced I held that Chubb & Son were not bound to pay for raising and towing the Catskill at ordinary contract rates per day's work, but only in proportion to the value of the results of the salvage operations; and in this view I apportioned the amount to be paid by the Catskill Company at $200, and by Chubb & Son, insurers, at $500, making $700 for the whole salvage service.

The salvage service was, however, a lien upon the vessel or her proceeds. The vessel was sold under a subsequent libel in New Jersey, and bought in by a third person, in reality, as it appears from the statements of counsel, for the benefit of the Catskill Company. The Catskill Company received the proceeds, which after deducting for the repairs upon the vessel prior to the sale, netted about $734, which the Catskill Company still holds. That company, moreover, in limited liability proceedings begun in this court and still pending, procured an appraisement of the vessel, and gave testimony by its president before the commissioner on appraisement, showing that the fair value of the salvage service, which would be a lien upon the vessel or its proceeds, would exceed the entire proceeds derived from the sale of the vessel in New Jersey; and upon this testimony the report of the commissioner was made allowing this salvage service as a deduction from the value of the wreck, which was therefore considered as nothing, and he reported 85 cents as the only proceeds, which represented so much unpaid "freight pending."

Chubb & Son upon the payment of the sum of $500, under the decree in this cause for salvage services, would by subrogation have a right to be indemnified to that amount out of the proceeds of the vessel in the hands of the Catskill Company for which allowance was made as a deduction in its favor in the limited liability proceeding. As all parties are before the court in both proceedings, and both are pending, the proper disposition of the whole matter would be, in recognition of this whole relation, as in the case of The Eleanora, 17 Blatchf. 104, 105, Fed. Cas. No. 4,335, to direct that both the sums of $500 and $200 be paid by the Catskill Company as a charge against the net proceeds in their hands, received from the sale of the Catskill and referred to in the limited liability proceedings. The small sum remaining would probably not more than pay the costs due the Catskill in the limited liability proceedings, and no further accounting for those proceeds would, therefore, be necessary in that proceeding; it being conceded in the brief for the petitioners therein, upon the report of the commissioner on appraisement, that unless the proceeds of the sale of the vessel were thus applied, they must be brought into court by further order.

A decree may be settled on notice in accordance herewith.

Settlement of the Decree.

(November 29, 1899.)

The decree previously directed is for the best interest of every party concerned, and one competent for the court to make. The technical objections raised seem to me mistaken.

1. The libel was filed to recover compensation for services of a salvage

[2] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

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character, and for nothing else. The claim being based upon an alleged contract, founded on the defendants' request, and the suit being in personam, it was proper to state the case in the introduction to the libel as either a "cause of salvage," or as a "cause of contract." Neither form is necessarily exclusive of the other, or very material.

2. After the exceptions to the original libel, the statement of separate claims against the different defendants in the amended libel, was of course technically objectionable; but no exception was taken to the amended libel and objection to it was waived, and for the convenience of all, the trial proceeded upon the amended libel by consent.

3. The objection that the facts stated in the last opinion were not before the court, is a mistake. All the matters there referred to were either proved, or had been repeatedly stated by counsel in the three or four preceding hearings of the case, as facts in the cause, commented on and submitted to the court as admitted facts. The record in the limited liability proceedings of the Catskill, had been three times presented for the inspection of the court, upon as many different arguments, and was minutely examined. The sale under the New Jersey libel, appears from the evidence in the stenographer's notes; and the sum of about $734 was stated and acquiesced in without contradiction, as the net result. All the facts presented and submitted to the court as a part of the case, belong to the "record" when made up. That these matters do not all appear in the stenographer's notes is of no importance. A case may be, and occasionally is, dismissed upon the opening of counsel alone, when there is no other record of the hearing than the statements of counsel.

4. The record in the limited liability proceedings of the Catskill Company, showed that the company in the appraisement of the vessel retained moneys on account of the very services for which the libelants seek a recovery in this suit. Had not that company been allowed to retain those moneys in order to meet this claim, it must have been paid into court. The Catskill Company having thus procured an allowance to them of the $734 as a deduction from the amount to be paid into court on the appraisement of the vessel on account of this very claim, is estopped from asserting that they hold these moneys on any other account, except such allowance by way of costs as might be awarded to the company out of it. The residue of those moneys thus became in fact the primary fund for the payment of the claim in suit. The simplest equity, therefore, requires that the Catskill Company, a codefendant holding the fund primarily applicable to pay this claim, should be decreed to apply it thereto, before Chubb & Son are personally called on to pay it, though the latter remain liable for it if not collected from the Catskill Company. "All the processes and modes, both of practice and decision," in the admiralty courts, says Lowell, J., "are equitable." Richmond v. Copper Co., 2 Low. 315, 316, Fed. Cas. No. 11,800. Such a decision is in strictest accord with the ordinary practice in admiralty to recognize the equitable rights of codefendants. It is the same in principle as the usual form of decree in collision causes, where the damages are divided between two codefendants. In such cases each is individually liable for the whole amount. Yet the right of each defendant to have the other primarily charged with the payment of one-half of the damages for the protection of the former, if collectible, is an absolute right; and a decree that does not recognize and protect that right, is erroneous. The Alabama and The Gamecock, 92 U. S. 695, 23 L. Ed. 763. See The Sailor Prince, 1 Ben. 461, Fed. Cas. No. 12,219. And as the Catskill Company defendant holds the money reserved on account of this claim, which it is estopped to deny, the defendant must be primarily charged with payment.

Besides this evident equity, other circumstances require that the court should make this decree; namely, that if not made, the net proceeds remaining in the hands of the Catskill Company would immediately become a source of three independent claims, viz.: (1) The claim of Chubb & Son by subrogation for their payment on this decree; (2) the claim of the Sea Insurance Company by reason of its payment in full of a valued policy on the Catskill; and (3) the St. Johns' claimants for one-half the amount paid by the St. Johns on Miller's claim against the two vessels. Each of these claims would involve no small amount of litigation, trouble and expense.

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This should be avoided by the application of those moneys where they belong, and in payment of the salvage services; and this disposition seems to me to be in the manifest interest of all the parties alike.

5. The objection that the decree gives the whole value of the wreck as compensation for those services, is only apparent and not real. The question of the precise value of the wreck did not arise. There is no doubt from the circumstances proved and admitted, that the value of the wreck was much greater than the net proceeds. I excluded evidence on this point, however, as unnecessary and likely to involve a protracted examination with no useful result, inasmuch as the libelant, as a constructive party, was bound by the result of the sale in admiralty (evidently procured by the Catskill Company for its own benefit) as much as if the sale had been upon the libelant's own demand. Thus the libelant, not being entitled, as I found, to compensation on a quantum meruit, or pay by day's work, was estopped from claiming more than the net proceeds of the sale; while the Catskill Company by its proceedings on the appraisement in limited liability, in which its president had testified that the salvage services were worth from $2,000 to $3,000, and having been allowed to retain all the net proceeds on account of those services, was equally estopped from claiming those services to be less. Further proof on values was, therefore, unnecessary.

6. No error or mistake as to the facts being suggested, the decree should be as formerly indicated.

James E. Carpenter, for appellant Merritt & Chapman Derrick & Wrecking Co.

Robt. D. Benedict, for appellant Catskill & N. Y. Steamboat Co.

Joseph Larocque, Jr., for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. From the testimony in the case we are satisfied that the services of the libelant in and about the raising of the wreck of the Catskill were rendered upon an agreement with Chubb & Son that they should be compensated for as salvage services only in proportion to value of remnants salved. We see no reason, upon the testimony, to question the propriety of the amount found by the court ($500). Under the pleadings, and upon the proofs, we think the district court erred in decreeing for this sum against the steamboat company. The decree should have been against Chubb & Son. If they are entitled to recover over against the company by reason of its improperly retaining proceeds of sale, they may do so by proper proceedings. We find upon the evidence in the record that the only services rendered by the libelants for the Catskill & New York Steamboat Company or for its benefit were the towage services rendered at its request after the vessel had been raised. We find no competent evidence in the record as to the value of these services, aside from the admission in the answer of the company that they were worth $100. Although separate controversies against different parties were joined in the same libel, there was no objection, and the cause was tried as though the joinder were proper. The only decree authorized by the evidence was a decree against Chubb & Son for $500, and against the steamboat company for $100. In view of the exaggerated claims made by the libelant, no interest should be allowed as against either respondent.

Decree is reversed and cause remanded, with instructions to decree in conformity with this opinion.

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CITY TRUST, SAFE DEPOSIT & SURETY CO. v. GLENCOVE GRANITE CO.

(Circuit Court of Appeals, Third Circuit. January 24, 1902.)

No. 15.

AFFIDAVIT OF DEFENSE—SUFFICIENCY—FORMER JUDGMENT.

Affidavit of defense, in action against T., as surety of C., on a bond conditioned to pay any judgment that plaintiff might recover against C. on a lien claim, is sufficient to present a prima facie defense, and prevent a summary judgment, where it alleges that plaintiff sued T. and C. in a New York court to recover such sum as might be determined to be due plaintiff from them under the bond; that said action was proceeded with fully and on its merits, and that it was there adjudicated that plaintiff could recover nothing against T.; and a judgment of the New York court is set out, finding for plaintiff against C., but finding that plaintiff was a foreign corporation, and had failed to prove that it had procured the certificate required to entitle it to do business in and sue in the state, and, as against T., dismissing the complaint.

Dallas, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Lincoln L. Eyre, for plaintiff in error.

Horace L. Cheyney and Laroy S. Gove, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This writ of error is brought for the reversal of a judgment entered against the defendant below (the plaintiff in error) for want of a sufficient affidavit of defense. The Glencove Granite Company, a corporation of the state of Maine, on February 25, 1901, brought an action in the court below against the City Trust, Safe Deposit & Surety Company, a corporation of the state of Pennsylvania, upon a bond given to the plaintiff by Patrick Costello, as principal, and the defendant company, as surety, whereby the obligors jointly and severally undertook to pay to the Glencove Granite Company the amount of any judgment, not exceeding $8,279, which might be recovered in an action upon the claim or demand specified in a certain notice of lien filed by the plaintiff against moneys due Costello from the city of New York under a specified street-paving contract; and the plaintiff's statement of claim in this suit averred that the plaintiff brought an action in the supreme court of the state of New York, in the county of New York, to foreclose said lien, against said Patrick Costello, and that therein a judgment or decree was entered in favor of the plaintiff against Costello in the sum of $5,860.31, together with the sum of $402.22 costs,—in all, the sum of $6,266.53. The defendant company filed an affidavit of defense, which averred that on or about May 5, 1899, the plaintiff, the Glencove Granite Company, brought suit against Patrick Costello and the City Trust, Safe Deposit & Surety Company in the supreme court of the county of New York, in the state of New York, to recover such moneys as might be in said suit determined to be due said Glencove Granite Company by

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said Patrick Costello and said the City Trust, Safe Deposit & Surety Company by virtue of the terms and provisions of their bond sued upon in the present action; that the defendant company was served with process in said former suit, and entered an appearance in that action, and that the same "was duly proceeded with, fully and upon the merits thereof, for the same cause of action as now here and again sued upon, and between the same parties, with the addition of said Patrick Costello and the city of New York"; that after issue joined, in accordance with the practice and law of the state of New York, and by consent of all the parties, the case was tried upon all questions of fact and law before one of the justices of said supreme court without a jury; and that, in pursuance of the decision rendered in that proceeding, "a judgment was rendered by said court, and duly filed, in favor of the said the City Trust, Safe Deposit & Surety Company, and against the Glencove Granite Company, whereby it was adjudicated that the said Glencove Granite Company could not recover anything whatsoever against the City Trust, Safe Deposit & Surety Company, with a further order or judgment against said plaintiff for the payment of costs." And the affidavit of defense averred that said judgment "now stands unappealed from and unreversed, and as a final judgment in said cause." A rule for judgment for want of a sufficient affidavit of defense having been taken, the defendant company, "with leave of, and in pursuance of, the order of the court," filed a supplemental affidavit of defense, and, as part thereof, attached thereto a full and true copy of the judgment entered by the supreme court of the state of New York, referred to in the original affidavit of defense. Referring to this copy, we find that the judgment recites that the "issues in this action to foreclose a municipal lien against the defendant Patrick Costello, as contractor, and the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, as surety therefor," came on for trial before the Honorable Charles H. Truax, one of the justices of the court, who made and filed his decision, "wherein and whereby he found and decided that the plaintiff was, and still is, a foreign corporation organized under the laws of the state of Maine, and that the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia was, and still is, a foreign corporation organized under the laws of the state of Pennsylvania, and lawfully transacting business in the state of New York; that, as against the defendant the said City Trust, Safe Deposit & Surety Company of Philadelphia, the plaintiff, the Glencove Granite Company, had failed to prove that it had procured from the secretary of state the certificate required by section 15 of the general corporation law, for the purpose of authorizing the said plaintiff to do business in, and sue in the courts of, the state of New York, as a foreign corporation; that the plaintiff cannot recover in this action against the bond of the said defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, given to discharge the plaintiff's lien herein, and that the complaint of said plaintiff, as against said defendant, be dismissed, with costs to said defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, against said plaintiff"; and then, after further recitals of findings by

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said justice as to the paving contract between Patrick Costello and the city of New York, the work done, and amount due thereunder, the furnishing of materials for the work to Costello by the plaintiff, the filing of the plaintiff's notice of lien, and the giving by Costello, as principal, and the City Trust, Safe Deposit & Surety Company, as surety, of the bond aforesaid, whereby the plaintiff's lien was discharged, the judgment proceeds thus:

"Now, on reading and filing the summons, complaint, answers of the defendants, Patrick Costello and the City Trust, Safe Deposit & Surety Company of Philadelphia, the decision of Mr. Justice Truax, and on motion of Frederick J. Swift, Esq., attorney for the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, it is ordered and adjudged that the complaint of the plaintiff herein, the Glencove Granite Company, as against the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, be dismissed, and that the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia recover of, and have judgment against, the plaintiff, the Glencove Granite Company, for its costs, amounting to the sum of $89.10. And it is further ordered, adjudged, and decreed that the plaintiff, the Glencove Granite Company, recover of, and have judgment against, the defendant Patrick Costello for the sum of $5,860.31, together with the sum of $406.22, costs adjusted as aforesaid, amounting in all to the sum of $6,266.53."

Evidently this judgment against Costello is the same judgment briefly recited in the plaintiff's statement of claim, and which recital is an essential part of the statement. It thus appears that in the same action in which the plaintiff company recovered its judgment against Costello, upon which it relies to make out its case here, the plaintiff proceeded against the present defendant company to charge it upon the bond here sued on, and it was there decided that the plaintiff could not recover thereon, and judgment was rendered dismissing the plaintiff's complaint as against this defendant. We do not have before us the whole record in the former action, but the original affidavit of defense here averred that that action "was duly proceeded with, fully and upon the merits thereof, for the same cause of action as now here and again sued on," and that it was there "adjudicated that the Glencove Granite Company could not recover anything whatsoever against the said the City Trust, Safe Deposit & Surety Company"; and those averments, we think, are consistent with the terms of the judgment brought upon this record by the supplemental affidavit of defense. The controlling question, then, is whether the original and supplemental affidavits of defense were sufficient to prevent a summary judgment against the defendant company, which deprived it of the opportunity of proving the facts alleged. Upon this question our opinion is with the plaintiff in error. We think that the averments of the defendant's affidavits, taken in connection with the New York judgment itself, presented a good prima facie defense to the plaintiff's statement of claim. Extrinsic evidence, not inconsistent with the record, nor impugning its verity, is admissible to show what matters were involved in a former action, and to apply the judgment and give effect to the adjudication actually made. Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755; Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204; Wilson's Ex'r v. Deen, 121 U. S. 525, 7 Sup. Ct. 1004, 30 L. Ed. 980. But, independently of the averments

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of the affidavits of defense, the judgment in the former action, upon its face, discloses enough to prevent a summary judgment, without trial, against the defendant in the present suit. The finding that the plaintiff, a foreign corporation, had failed to show that it had procured the certificate required by law to authorize it to do business in the state of New York, undoubtedly was a finding responsive to an issue tendered by the pleadings, as between the Glencove Granite Company and the City Trust, Safe Deposit & Surety Company. W. P. Fuller & Co. v. Schrenk, 58 App. Div. 222, 225, 68 N. Y. Supp. 781. Moreover, that finding went to the merits of the case. It related to a substantial matter. It sustained a defense which involved the rights of the parties. It went to the plaintiff's right of action. McCanna & Frazer Co. v. Citizens' Trust & Surety Co., 24 C. C. A. 11, 76 Fed. 420, 39 U. S. App. (third circuit) 332; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759. Now, the situation is this: The judgment against Costello is an essential part of the plaintiff's case against the surety in the bond in suit. Yet the record showing that judgment also shows a judgment in favor of the surety, and a finding and decision adverse to the plaintiff's right of action. We think, therefore, that, as the case now stands, there appears at least a prima facie defense. The apparent obstacle to a recovery may be open to explanation, and thus put out of the way. Again, if the statutory inhibition against doing business operates only on the remedy, and may be lifted if the delinquent corporation is able to procure out of time the issuance by the secretary of state of the required certificate (Neuchatel Asphalte Co. v. City of New York, 155 N. Y. 373, 377, 49 N. E. 1043), it may be competent for the plaintiff to show here that it obtained such a certificate since the former trial, or even before. Upon these questions we intimate no opinion. We hold simply that the affidavits of defense sufficiently met the plaintiff's statement of claim, and that the same should have gone to trial.

The judgment for want of a sufficient affidavit of defense is reversed, and the cause is remanded to the circuit court for further proceedings.

DALLAS, Circuit Judge (dissenting). Affidavits of defense are exacted for the purpose of avoiding the expense, vexation, and delay of trial in any case in which the defendant cannot, upon oath or affirmation, deny some material allegation of the plaintiff, or himself allege any fact or state of facts which, if established to the satisfaction of a jury, would, as matter of law, support a verdict in his favor. If none be filed during the lawfully prescribed period, the plaintiff becomes entitled to a judgment as of course, but, if an affidavit be interposed which he avers to be insufficient to preclude an immediate adjudication in his favor, an issue resembling that which arises upon a demurrer to a plea is presented, and that issue is for decision upon the facts alleged, and upon them only. But an affidavit of defense differs materially from a plea. In a plea all things may be pleaded according to the pleader's conception of their legal effect, subject to the consequence that a mistake in stating their legal effect,

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if apparent upon the face of the pleading, is fatal on demurrer, and, if not apparent, is fatal in evidence (Gould, Pl. c. 3, §§ 174, 176); whereas in an affidavit of defense the facts themselves must be presented, in order that the court may determine whether, if found by a jury, their legal effect would or would not be to establish a valid defense. Where the Pennsylvania system of practice is not pursued, a plea may, by bare averment, however baseless, coerce a formal trial; but where, as in this jurisdiction, that practice is followed, an affidavit that merely avers a defense, without disclosing the fundamental facts which constitute it, will not, in any case, suffice to postpone a final decision. This distinction has, I think, been generally recognized, and upon its observance, as I believe, is dependent the attainment of the object which the provision for affidavits of defense was intended to accomplish. Therefore affidavits of this sort should state facts, not conclusions; and these, though they need not be set forth with technical exactness, should be made to appear with at least reasonable clearness and certainty. Equivocal statements will not be beneficially interpreted, nor any avoidable ambiguity be aided by intendment. McBrier v. Marshall, 126 Pa. 396, 17 Atl. 647; Erie City v. Brady, 127 Pa. 175, 17 Atl. 885; Bank v. Stadelman, 153 Pa. 637, 26 Atl. 201; Comly v. Bryan, 5 Whart. 265; Bardsley v. Delp, 88 Pa. 420; Peck v. Jones, 70 Pa. 84; Consumers' Gas Co. v. American Electric Const. Co., 1 C. C. A. 663, 50 Fed. 778; Reed v. Raymond (C. C.) 37 Fed. 186.

The affidavit which was first filed in the present case did not meet these authoritatively established requirements. It did not state that the New York judgment was rendered upon the merits, but only that "said action * * * was duly proceeded with, fully and upon the merits"; and though it did state that, by consent, the case was tried before one of the justices upon all questions of fact, as well as of law, without a jury, this, I think, must be understood as meaning nothing more than that the parties agreed to waive a jury. It cannot be taken to mean that it was stipulated that the justice should decide the case upon its merits, and not otherwise; and that he actually did so decide it is nowhere suggested, unless by very dubious inference, although nothing could have been easier than to have distinctly and directly averred that he did, and to have annexed a copy of the record, so that the court might determine whether or not that averment could be verified. Consumers' Gas Co. v. American Electric Const. Co., 1 C. C. A. 664, 50 Fed. 778. But instead of adopting this ingenuous, and therefore proper, mode of stating this defense, resort was had to the "uncandid and evasive" presentment of what are really "conclusions of law, carefully stated so as to appear to be facts." Erie City v. Brady, supra. The court below, however, did not at once enter judgment, but ordered the filing of a supplemental affidavit of defense; and the defendant availed itself of the privilege thus accorded, by filing, "with the leave of, and in pursuance of the order of, the court," an additional affidavit, which, though called "supplemental," was substantially and in effect a substituted one. This second affidavit reasserts the entry of a judgment in the proceeding to which reference had been made in the first one, but it

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further declares, with respect to that judgment, "that a full, true, and correct copy is hereto attached, and to be taken as a part of this supplemental affidavit of defense." To what, then, was the court to look for enlightenment in endeavoring to determine what the supreme court of New York had actually adjudicated? Surely, as it seems to me, to this full, true, and correct copy, and to it exclusively; for, apart from it, there was nothing before the court but the simulated and unavailing averment that the action had been proceeded with upon the merits. Now, what does the copy which the defendant relied on disclose? It recites that testimony had been presented by the plaintiff, the Glencove Granite Company; that the defendants, Patrick Costello and the City Trust, Safe Deposit & Surety Company of Philadelphia, had separately moved for a dismissal of said complaint as against each of the defendants; that said testimony and the arguments on said motions to dismiss had been heard and considered by the justice, and that he had found and decided that the plaintiff, the Glencove Granite Company, was a foreign corporation, and that it had failed to prove, as against the City Trust, Safe Deposit & Surety Company of Philadelphia, that it (the Glencove Company) had procured the certificate required by the law of New York for the purpose of authorizing it to do business in, and to sue in the courts of, that state, and "that the plaintiff cannot recover in this action against the bond of the said defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, given to discharge the plaintiff's lien herein, and that the complaint of said plaintiff as against said defendant be dismissed, with costs to said defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, against said plaintiff." Not until after the disposition then about to be made of the case as against the defendant last named had been thus indicated were the intrinsic grounds of action at all adverted to, but immediately thereafter they were recited as prefatory to the conclusion "that the plaintiff was entitled to judgment against the defendant Patrick Costello." Then followed the judgment, in these words:

"Now, on reading and filing the summons, complaint, answers of the defendants, Patrick Costello and the City Trust, Safe Deposit & Surety Company of Philadelphia, the decision of Mr. Justice Truax, and on motion of Frederick J. Swift, Esq., attorney for the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, it is ordered and adjudged that the complaint of the plaintiff herein, the Glencove Granite Company, as against the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, be dismissed, and that the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia recover of, and have judgment against, the plaintiff, the Glencove Granite Company, for its costs, amounting to the sum of $89.10. And it is further ordered, adjudged, and decreed that the plaintiff, the Glencove Granite Company, recover of, and have judgment against, the defendant Patrick Costello for the sum of $5,860.31, together with the sum of $406.22, costs adjusted as aforesaid, amounting in all to the sum of $6,268.53."

Nothing, as I view it, could be clearer than the showing of this record. Each of the defendants had separately moved to dismiss. As to one of them—the City Trust, Safe Deposit & Surety Company—that motion was allowed, upon the ground that, as to it, the plaintiff had failed to prove that it was authorized to sue in a court

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of New York; and upon that ground solely, for the purpose of the enactment under which the decision was made "was not to avoid contracts," and, notwithstanding the terms of the first clause of the section in question, its only effect, as a whole, is to prohibit a corporation from maintaining an action in that state until it shall have procured the prescribed certificate. Neuchatel Asphalte Co. v. City of New York, 155 N. Y. 373, 49 N. E. 1043; W. P. Fuller & Co. v. Schrenk, 58 App. Div. 225, 68 N. Y. Supp. 781. But as to the other of the defendants, Patrick Costello, the motion to dismiss (for some reason which does not appear, and which is not material) was manifestly disallowed; for, as against him, a judgment for the sum demanded was awarded. As to him, therefore, there certainly was an adjudication upon the merits; but it is, I think, equally apparent that as to his co-defendant they were not decided at all, and, a fortiori, not in a different and seemingly inconsistent way. I conclude that the case was fully determined against Costello, but that, as to the trust company, the court, in pursuance of the incapacitating statute to which it referred, simply declined to take cognizance of it. Its order was not decisive of the issue, but was made, as appears to be the practice (W. P. Fuller & Co. v. Schrenk, supra), in response to an interlocutory motion. If the circuit court had not before it the whole record in the former case, it is because the defendant saw fit to produce but a part of it; and, as I have already said, I cannot agree that that part exhibited a judgment upon the merits, or that the facts requisite to support a plea of res judicata were in any manner made to appear. I do not doubt that either by the entire record, or by evidence dehors the record, but consistent with it, it may be shown what matters were actually adjudicated in a former action; but in these affidavits we have no statement of, nor proposal to prove in either way, any fact whatever concerning the nature or scope of the judgment to which they relate, but merely the gratuitous assertion that in character and amplitude it is something quite different from what on its face it purports to be. For averments such as this I can find no legal justification nor shadow of excuse. Their toleration is not essential to the conservation of any genuine right, and its tendency, I fear, will be to impair the long-established usefulness of the affidavit of defense law in promoting the speedy and economical administration of justice.

I am of opinion that the judgment of the circuit court should be affirmed.

SUTHERLAND-INNES CO., Limited, v. AMERICAN WIRED HOOP CO.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1901.)

No. 1,574.

ACTIONS—SUBSTITUTED SERVICE OF SUMMONS—PERSONAL JUDGMENT.

A Wisconsin corporation recovered a money judgment in the circuit court of the United States, in Minnesota, against a Canadian corporation. About the same time the latter company obtained a money judgment against the former in a state court in Wisconsin, which it sought to set off by petition in federal court. The Wisconsin corporation had

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no office or officer in that state, and service of the summons in the action against it was made on its president, at his home in Minnesota. It did not appear in the action, and judgment by default was entered. An order authorizing such service of the summons was issued on an affidavit alleging that a suit by attachment had been brought, and lands of the Wisconsin company attached in that state, and that its officers were nonresidents of that state. Rev. St. Wis. 1898, § 2637, provides that actions against corporations shall be commenced in the same manner as personal actions against natural persons, and that the summons against a domestic private corporation shall be served by delivering a copy to the president or certain other officer or managing agent, or as provided in section 1775b, which provides that within 10 days after each election of officers a domestic private corporation shall file with the register of deeds of the county in which its articles of incorporation are recorded a list of its officers on whom service may be made, and, if it fails to do so, service on it may be made by delivering copy of process to such register, and that such service shall have the same effect as personal service. Section 2639 provides that service on persons in certain specified cases may be made without the state or by publication, and may be so made on a corporation when the proper officers on whom to make service do not exist or cannot be found. Section 2731 authorizes attachment when all proper officers of such a corporation on whom to serve the summons are nonresidents of the state. *Held*, that the substituted service, provided by section 2639, did not authorize the rendition of a personal judgment against the Wisconsin corporation, but only a judgment good against the property attached in that action; hence the petition to set off was properly denied.[1]

In Error to the Circuit Court of the United States for the District of Minnesota.

This case arises on the following facts: The American Wired Hoop Company, a corporation of Wisconsin, the defendant in error, on February 1, 1900, recovered a judgment against the Sutherland-Innes Company, Limited, a Canadian corporation, the plaintiff in error, for the sum of $1,122, in the circuit court of the United States for the district of Minnesota. On January 5, 1900, the Canadian corporation last named recovered a judgment against the Wisconsin corporation above named in the circuit court of Douglas county, state of Wisconsin, for the sum of $2,438.60. At the time the action was instituted in which the last-mentioned judgment was recovered the Wisconsin corporation against which it was rendered, although a domestic corporation, had no officers or agents residing in Wisconsin, where the action was brought. Service was accordingly obtained by delivering to the president of the Wisconsin corporation at his home in St. Paul, in the state of Minnesota, a copy of the summons and complaint. No answer was filed or appearance entered, but at the return term the Wisconsin court rendered a judgment by default for the sum heretofore stated against the Wisconsin corporation. Thereupon the Canadian corporation filed a motion in the circuit court of the United States for the district of Minnesota to obtain an order that the one judgment be set off against the other so as to cancel the judgment against it and to discharge the judgment against the Wisconsin corporation pro tanto. Such order was denied by the circuit court on February 27, 1901, on the sole ground that the Wisconsin court did not, by virtue of the service aforesaid, acquire jurisdiction to render a personal or general judgment against the Wisconsin corporation, and that as a general judgment it was a nullity. To reverse this decision the Canadian company sued out the present writ of error.

Alfred H. Bright, for plaintiff in error.
Morris P. Brewer, for defendant in error.

[1] Service of process on foreign corporations, see note to Eldred v. Palace Car Co., 45 C. C. A. 8.

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Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Both of the parties litigant, by their counsel, agree apparently that it was unnecessary for the Sutherland-Innes Company, the plaintiff below, to have filed an original bill to enforce the right of set-off which it asserted, and that the right in question, if it exists, can be enforced in the manner attempted; that is to say, by a motion or petition filed in the lower court in the case wherein one of the judgments involved was recovered. Accepting that as a sound view concerning the question of practice, we proceed to inquire whether the judgment which was rendered by the circuit court of Douglas county, Wis., hereafter referred to as the Wisconsin court, was obtained on such service of process as would support a personal or general judgment against the American Wired Hoop Company, since it is further conceded that unless it was a valid general judgment no right of set-off exists.

The service on which the judgment of the Wisconsin court was founded was, as above stated, made in the state of Minnesota by the delivery of a copy of the summons and complaint to the president of the Wisconsin corporation. The order authorizing such a service was obtained on an affidavit which alleged, in substance, that a suit by attachment had been brought against the Wisconsin company by the Canadian company; that lands belonging to the former company, located in Douglas county, Wis., had been attached; and that the proper officers of the attached corporation, on whom service of legal process might be made, were nonresidents of the state of Wisconsin, and could not be found therein. There can be no doubt, therefore, and no controversy arises on that point, that the service was sufficient to enable the Wisconsin court to render a special judgment subjecting the lands that were within its jurisdiction, and had been attached, to the payment of the plaintiff's demand after it had been established. It is a very different question, however, whether the judgment that was rendered on this service was valid and binding as a general judgment in personam against the Wisconsin company. The plaintiff in error maintains the affirmative of this issue, while the defendant in error supports the negative.

Chapter 120 of the Revised Statutes of Wisconsin for the year 1898 (Sanborn and Berryman's Annotations) deals with the subject of commencing civil actions and the mode of serving civil process. Beginning with section 2629, it first provides how natural persons may be served, and then provides, by section 2637 of the same chapter, for service upon corporations of various kinds. That section declares that:

"Actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and the accompanying complaint or notice aforesaid shall be served and such service held of the same effect as personal service on a natural person by delivering a

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copy thereof as follows: (1) If the action be against a county, to the county clerk. (2) If against a town, to the chairman of the town or the town clerk. * * * (10) If against any other corporation organized under the laws of this state, to the president or other such chief officer, vice-president, secretary, cashier, treasurer, director or managing agent thereof, or in the manner provided in section 1775b in the cases therein provided for."

The American Wired Hoop Company was a corporation of the class referred to in the tenth subdivision, last quoted, of section 2637. Section 2639 of the same chapter (that is to say, chapter 120) is entitled "Service by Publication, Etc.," and is as follows:

"Sec. 2639. Service of the summons may be made without the state or by publication upon a defendant against whom a cause of action appears to exist, or who appears to be a necessary or proper party to an action relating to real estate, on obtaining an order therefor as provided in the next following section, in either of the following cases: (1) When such defendant is a non-resident of this state or his residence is unknown, or is a foreign corporation, and the defendant has property within the state, or the cause of action arose therein, and the court has jurisdiction of the subject of the action, whether the action be founded on contract or tort. (2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors or avoid the service of a summons, or keeps himself concealed therein with the like intent. (3) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. (4) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real estate, and the defendant is a proper party thereto. (5) When the action is for a divorce. (6) When the action is against any private corporation organized under the laws of the state and the proper officers on whom to make service do not exist or cannot be found. (7) When the subject of the action is real or personal property in this state and one or more of the defendants are unknown and have or claim a lien or interest, actual or contingent, therein, and the relief demanded consists wholly or partially in excluding such defendant or defendants from any lien or interest therein."

Chapter 124, Rev. St. Wis. 1898, deals with the subject of actions by attachment. Section 2731 of the latter chapter provides in what cases writs of attachment may be issued. It will suffice to say of this section that it permits the issuance of a writ of attachment when the plaintiff files an affidavit to the effect—First, "that the defendant has absconded or is about to abscond from this state, or is concealed therein, to the injury of his creditors, or keeps himself concealed therein with intent to avoid the service of a summons"; second, "that the defendant has assigned, conveyed, disposed of or concealed, or is about to assign, convey, dispose of or conceal his property or any part thereof, with intent to defraud his creditors"; third, "that the defendant has removed or is about to remove any of his property out of this state with intent to defraud his creditors"; fourth, "that the defendant fraudulently contracted the debt or incurred the obligations respecting which the action is brought"; fifth, "that the defendant is not a resident of this state"; and, sixth, "that the defendant is a foreign corporation; or if created under the laws of this state that all proper officers thereof on whom to serve the summons do not exist, are nonresidents of the state or cannot be found."

Section 1775b of the Wisconsin Revised Statutes, to which refer-

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ence is made in subdivision 10 of section 2637 provides in substance, that every private corporation organized under the laws of Wisconsin shall, on or prior to October 1, 1898, and thereafter, within 10 days after each election of officers, file with the register of deeds of the county where its articles of incorporation were recorded a list of its officers on whom service may be made, as provided in subdivision 10 of section 2637, and that in all cases when a corporation fails to file such a list service may be had upon it by delivering to such register of deeds true copies of such legal process as one desires to serve. The section also declares that such service shall have the same effect as if it had been served personally upon any one of the officers designated in subdivision 10 of section 2637. Laws Wis. 1899, c. 46, pp. 61, 62.

The question arising on the foregoing statutes is, in the first instance, one of legislative intent, the question being: Did the lawmaker, by subdivision 6, § 2639, Rev. St. 1898, intend to authorize the rendition of a general judgment against a domestic corporation on service had by publication or outside the state, or merely to empower the courts of the state to enforce any right, claim, or demand which might be preferred against property located within the state in which a domestic corporation was interested whose officers could not be found within the state? Although the question is not wholly free from doubt, we incline to the latter view, and so decide.

Since the decision in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, it has not been the habit of the legislatures of the various states to authorize the rendition of general judgments against natural or artificial persons, on substituted service, such as service by publication or service made outside of the state; while it has been a common practice on the part of such bodies to make provision by substituted service for the due enforcement of attachment liens and all other rights and claims against property located within the state, when there are persons or corporations having, or appearing to have, an interest in the property who cannot be personally served. When resort is had to substituted service, there is always more or less danger that a judgment may be rendered without actual notice to the defendant, and, in the absence of a clear manifestation of a contrary purpose, we think it always ought to be presumed, when a judgment on substituted service is authorized, that it was the intent of the lawmaker that such a judgment should bind the absent defendant to such extent only as might be necessary to enable the courts of the state to effectually enforce rights, liens, or claims which might at any time be asserted against property within their jurisdiction.

The Wisconsin statute makes no distinction at first between natural persons and artificial persons as respects the method of service. The service upon each is required to be personal by the delivery of a copy of the summons and complaint to the defendant, such delivery, in the case of an ordinary private corporation, to be made to the president or other chief officer. Section 2637, subd. 10. That provision of the statute on which the plaintiff in error

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relies as justifying a different mode of service for the purpose of obtaining a general judgment is found in the section concerning service by publication or substituted service, and a glance at the various subdivisions of that section shows that in every instance where substituted service is permitted, except in subdivision 6, it is allowed for the express purpose of enabling a plaintiff to enforce some right against property, either because it has been attached or is cumbered with a lien, or because the title is clouded with some adverse claim which the plaintiff desires to have removed. The provision allowing service by publication in cases of divorce belongs to the same category, such actions being in the nature of proceedings in rem to dissolve the marital relation and determine the status of the parties. In framing section 2639, it is manifest, therefore, that the legislature had in mind a class of proceedings that are quasi in rem,—the very class of actions in which it is usual to make provision for bringing in persons by constructive service who are beyond the jurisdiction of the court, merely for the purpose of binding their interest as respects the res.

Furthermore, it will be observed that there is almost an exact correspondence between the various subdivisions of section 2639 and the subdivisions of section 2731 relative to attachments. The cases wherein substituted service is allowed are such cases as were liable to arise under the attachment statute. It is made one of the grounds of attachment (vide section 2731, subdiv. 6) that the defendant is a corporation created under the laws of the state, and "that all proper officers thereof on whom to serve summons do not exist, are nonresidents of the state or cannot be found"; from which a very strong inference arises that when, by subdivision 6 of section 2639, the legislature authorized a corporation to be brought in by publication if "the proper officers on whom to make service do not exist or cannot be found," it intended to provide a method of service where a writ of attachment was sued out under subdivision 6 of section 2731 against the property of a corporation.

It is further noticeable that section 1775b, which provides a species of constructive service under certain conditions therein mentioned, expressly declares that such service, when resorted to, shall be as effectual as personal service upon one of the officers specified in subdivision 10 of section 2637, whereas subdivision 6 of section 2639 contains no equivalent declaration as to the effect of the service. In view of this circumstance, it may be fairly inferred that the latter species of constructive service was intended to have no greater force or effect than the service provided for in the other subdivisions of section 2639; and, as respects service had under the other subdivisions of that section, it is plain, we think, that such service was only intended to lay the foundation for a special judgment, binding the absent defendant, not generally, but only as respects property within the state that had been attached, or as respects which some other relief was sought by the plaintiff. Being of the opinion, therefore, that subdivision 6 of section 2639 was not intended to authorize the rendition of a general judgment against a corporation whose officers could not be found within the state, it

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becomes unnecessary to determine the further question, which has been argued at length, whether, if such was the legislative purpose, the act would be valid. The legislature, in our judgment, did not intend to authorize the rendition of a general judgment against a defendant corporation unless it appeared and submitted itself to the jurisdiction of the court. As the Wisconsin corporation in the present instance did not thus appear, but suffered a default, the judgment rendered against it was only effective to bind the attached property, and is not good as a general judgment. This, as we understand, was the view entertained by the trial court, and, being of the same opinion, the judgment below is accordingly affirmed.

In re WELLING.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 809.

1. BANKRUPTCY—ASSETS—SEMITONTINE POLICY.

Bankrupt Act, § 70a (30 Stat. c. 541), provides that a trustee in bankruptcy shall be vested with the title of the bankrupt to (subdivision 5) property which he could by any means have transferred, or which could have been sold under process against him, provided that where any bankrupt has any insurance policy which has a "cash surrender value," payable to himself, he may pay such surrender value to the trustee, and retain the policy free from creditors. A semi-tontine policy on a bankrupt's life contracted to pay insured's wife $10,000 on his death, and, further, that if three annual premiums had been paid, and default was afterwards made, a proportionate paid-up policy should be issued in favor of the wife. The provisions indorsed on the policy, and made a part thereof, recited that at the end of the tontine period insured should have certain options, one of which was to receive in cash the policy's accumulated reserve, and also the surplus apportioned to it. *Held*, that though the policy had no "cash surrender value," within the meaning of the proviso, it had an actual value, which constituted a right of property in the bankrupt, and which could have been transferred by him, and therefore passed to the trustee.

2. SAME—DISPOSITION OF POLICY BY TRUSTEE.

As the trustee takes the policy subject to the duty of continuing it in force by the payment of premiums until the completion of the tontine period, and subject to the contingency of the bankrupt's death before that time, in which event he would fail to realize anything,—the policy being payable to the bankrupt's wife,—either the actual value of the policy at the adjudication in bankruptcy should be determined, and the bankrupt permitted to pay to the trustee the proportion coming to him at the time stated, and to receive a conveyance from the trustee of all claims thereto, or the trustee should be directed to sell the bankrupt's interest in the policy at the date of the adjudication in bankruptcy for the benefit of his creditors.

Grosscup, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Northern District of Illinois.

On the 13th day of April, 1900, David Welling, a citizen and resident of the state of Illinois, was by the court below adjudged a bankrupt, and on the 20th of that month filed schedules of his property. On May 11th the Chicago Title & Trust Company was appointed trustee of the bankrupt. In the schedule of assets the bankrupt did not include a certain policy of life

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insurance, dated March 16, 1892, issued by the Equitable Assurance Society of the United States (being numbered 336,460), for the sum of $10,000, upon the life of the bankrupt. On the 22d of October the trustee filed its petition setting forth the facts above stated, and praying that the bankrupt be required to appear and be examined concerning the policy, and to show cause why he should not surrender the policy to the trustee according to the bankrupt act, that the surrender value thereof may become an asset for distribution to his creditors, and that Welling may not be discharged of his debts under his petition to that end theretofore filed, until such examination be had. The answer of the bankrupt denied that the policy in question was an asset of his estate; admitted that it had a cash surrender value, but that such cash surrender value is the property of Anna B. Welling, his wife; denied the right of the trustee to the possession of the policy, or to obtain its surrender value; and alleged that the assurance company was under no legal right and was not legally bound to pay to the bankrupt any sum of money as a cash surrender value of the policy, that the amount offered by the company as hereinafter stated was offered only in a spirit of accommodation, and that the company would not under any circumstances pay the surrender value without the concurrence of his wife. The matter was referred to a referee, and there was produced before him a communication from the actuary of the company under date of July 21, 1900, offering, upon return with proper release of the policy on November 27, 1900, or within six months thereafter (if premiums be paid to that date, and the premium due on that date be not paid), to pay in cash $2,926, or a paid-up policy for $7,000; the offer not to be binding after the expiration of the six months named. The offer also required the release to be signed by Mrs. Welling. By the contract of insurance in question the assurance society, in consideration of the payment of $250 semiannually on May 27th and November 27th of each year for 20 years, promises to pay to Anna B. Welling, the wife of the bankrupt, for her sole use if living, and if not living to the surviving children of David Welling, or their guardian for their use, or, if there be no such children surviving, then to the executors, administrators, or assigns of the bankrupt, the sum of $10,000 within 60 days after satisfactory proofs of the death of the bankrupt. The policy contains a further provision that if premiums upon the policy for not less than three complete years of assurance shall have been duly received by the society, and the policy should thereafter become void in consequence of default in the payment of a subsequent premium, the society will issue in lieu of such policy a new paid up policy, without participation in profits, in favor of Anna B. Welling, if living, and, if not living, to the surviving children of David Welling, or their guardian for their use, or, if there be no such children surviving, then to the executors, administrators, or assigns of David Welling, for as many twentieth parts of the original amount assured as there shall have been complete annual payments received in cash by the society at the date when default shall first be made, provided that the policy shall be surrendered, duly receipted, within six months of the date of default in payment of premiums as mentioned. The provisions indorsed upon the policy are made part thereof as fully as if they were recited at length therein. There is indorsed upon the policy the following: "(1) That the policy is issued under the semitontine plan, the particulars of which are as follows: (2) That the tontine dividend period for this policy shall be completed on the twenty-seventh day of November in the year nineteen hundred and six. (3) That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its tontine dividend period as aforesaid, and unless this policy shall be then in force. (4) That all surplus or profits derived from such policies on the semitontine plan as shall not be in force at the date of the completion of their respective tontine dividend periods shall be apportioned among such policies as shall complete their tontine dividend periods. (5) That upon the completion of the tontine dividend period on Nov. 27th, 1906, provided this policy shall not have been terminated previously by lapse or death, the said David Welling shall have the option either—First, to withdraw in cash this policy's entire share of the assets (i. e., the accumulated reserve, which shall be six thousand eight

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hundred and fourteen $^{50}/_{100}$ dollars), and in addition thereto the surplus apportioned by this society to this policy; secondly, to convert the same into a paid-up policy for an equivalent amount, provided, always, that, if the amount of said paid-up policy shall exceed the original amount of the assurance, a satisfactory certificate of good health from one of the society's medical examiners shall be required; thirdly, to withdraw in cash the share of the accumulated surplus apportioned by said society to this policy, and continue the policy in force on the ordinary plan; or, fourthly, to continue the assurance for the original amount, and apply the entire tontine dividend to the purchase of an annuity; the amount derived from such annuity, together with annual dividend on this policy, shall be paid in cash to said David Welling or assigns." The policy does not provide for its surrender by the assured, or for payment of its surrender value. The referee reported that the policy had no cash surrender value payable to the bankrupt under its terms, did not belong to the class of policies referred to in section 70 of the bankruptcy act, and the petition of the trustee should be dismissed. The court on June 4, 1901, overruled the exceptions to the report, and decreed that the report stand approved, from which decree this appeal is taken.

George Sawin, for appellant.
Philip S. Brown, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

In the case with which we have to deal, the law of the state of the domicile of the bankrupt does not exempt policies of insurance from judicial pursuit by creditors. The questions, therefore, are sharply presented, whether the insurance in question is property which, under the bankruptcy act, passes to the trustee, and whether the case comes within the proviso of section 70a of the act (30 Stat. c. 541). The solution of these questions requires us to ascertain the real nature of this contract. The policy is a semitontine policy; upon its face, an ordinary life policy, the premiums payable in 20 years, and the amount stated to be paid upon the death of the bankrupt to his wife, Anna B. Welling, if she be living; otherwise to his surviving children, if any; otherwise to his legal representatives or assigns. It also provides for the right after payment of premiums for three years, and upon default thereafter in the payment of a subsequent premium, to a paid-up policy, without participation in profits, in favor of the wife, if living; if not living, to the surviving children; and, if none such, to the personal representatives or assigns of David Welling,—for as many twentieth parts of the original amount assured as there have been complete annual premiums received. If these provisions constituted in full the contract, we could not doubt that the bankrupt has no pecuniary interest in the policy which would pass to his trustee, because in no case would there be payable to him in his lifetime any sum of money whatever upon the contract. There are, however, superimposed upon this contract certain conditions which qualify its effect and restrict the rights of the wife. These conditions declare that upon the completion of the tontine dividend period, November 27, 1906, the policy not having then been terminated by lapse or death, the bankrupt, not his wife, should have one of the four specified options, one of which is to receive in cash the

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policy's accumulated reserve, stated to be $6,814.50, and also the surplus apportioned by the society to the policy. It is clear that the entire interest of the wife in this policy, and her right to receive any sum of money thereon, is contingent upon the death of her husband before the completion of the tontine period, subject, perhaps, to her right before that time to receive in lieu of the policy a paid-up policy upon her husband's life, payable to herself, for as many twentieth parts of the sum assured as there have been annual dividends paid. It is likewise clear that this is also a contract between the assurance society and the bankrupt that on the 27th day of November, 1906, if he then survive, the society will pay him, if he so elect, a certain sum of money, or, should he so elect, will issue certain insurance to him, as stated in the condition. We cannot doubt that the bankrupt, from the moment the policy was issued, had a pecuniary interest in it, and a right to receive money upon it at the stated time, contingent only upon his surviving the tontine period; that the wife's interest is contingent upon her husband's death within the tontine period; and that her interest lapses at the completion of the tontine period, unless there had been substituted for the policy a new paid-up policy in the event and upon the terms stated. The proviso of section 70a declares that:

"When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated and continue to hold, own, and carry such policy, free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

We are of opinion (and therein we concur with the court below and with the referee) that this policy does not fall within the proviso. The term "cash surrender value," therein employed, has a defined and legal meaning, namely, the cash value—ascertainable by known rules—of a contract of insurance abandoned and given up for cancellation to the insurer by the owner, having contract right to do so. The "surrender" of the proviso is not the subject of negotiation or agreement, but of right. The proviso does not include those policies where the right to surrender is not given by the contract. In the present case, failing provision in the policy to that end, surrender could only be legally accomplished through agreement with the company by the joint action of Welling and his wife. There exists no right in the wife or in the bankrupt, or in both jointly, to surrender. It could only be done by the joint action of the two by agreement with the assurance society. If provision for surrender were incorporated in the contract, it would not be within the power of the bankrupt to surrender the policy, and thereby cut off the interest of his wife therein. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370. She has a distinct interest in the policy, which does not pass to the trustee in bankruptcy. Atkins v. Society, 132 Mass. 395, 402. We cannot concur in the suggestion to the contrary in Re Steele (D. C.) 98 Fed. 78, 80. Nor could the bankruptcy court rightfully compel such surrender and cancellation of the pol-

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icy by the bankrupt, he agreeing thereto in concurrence with the company; for that might be to deprive the wife of her interest. And likewise it would not be within the power of the wife to surrender the policy, and thereby deprive the husband of his right at the end of the tontine period to receive the stipulated amount. Surrender can only be accomplished through agreement with the company by the joint action of husband and wife. Besides, if we concede that this policy has a "cash surrender value," within the meaning of the proviso, that value was not "payable to himself," for both the bankrupt and his wife had an interest therein. We are not advised by the record, nor are we otherwise informed, that there is any known rule by which surrender value—assuming such to exist—could be equitably apportioned between the bankrupt and his wife, or by which it could be ascertained what proportion thereof was "payable to himself," within the meaning of the proviso. From the report in Re Diack (D. C.) 100 Fed. 770, the referee would seem to have reached an apportionment in such case, but the basis of his calculation is not apparent. We are therefore clearly of opinion that the policy in question does not fall within the provisions of the proviso.

But it does not follow, as was assumed by the court below and by the referee, that, because the policy does not fall within the terms of the proviso, the bankrupt has not property therein which passes to his trustee. By the terms of the policy he was entitled to receive at the end of the tontine period the cash payment stipulated in the contract. That is a vested contract right, contingent only upon his surviving the tontine period. The right is valuable, increasing in value with each successive payment of premium. The policy, technically, had not a "surrender value," within the meaning of the proviso; but it had an actual value, and that valuable right was right of property existing in the bankrupt. It is the plain provision of the bankruptcy law that all the estate of the bankrupt shall, by operation of law, be vested in the trustee, save such as is specifically excepted by the provisions of the bankruptcy law, or by the law of the domicile of the bankrupt. The language of the provision is comprehensive. Subdivision 5 of section 70a declares that there shall be thus vested in the trustee "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Then follows the proviso which we have considered. It is clear that this proviso merely defines a certain class of insurance which may be excepted and exempted, by the action of the bankrupt and upon the conditions stated, from the general property which by the law is vested in the trustee. In other words, the proviso is in the nature of a privilege to the debtor to retain such specified insurance upon yielding to the trustee the cash surrender value of the policy at the time of adjudication. All other property of the bankrupt, including all insurance owned by him, which does not fall within the provisions of the proviso, passes to the trustee. The statute cannot legitimately be construed to mean that a policy does not vest in the trustee except it have a cash surrender value, and that such may be rescued by the bankrupt upon

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the terms stated. The meaning of the provision is clear,—that all the property of the bankrupt except that specified in the proviso, shall be vested in the trustee, and that also shall pass unless the bankrupt avail himself of the privilege granted him by the law. The contract in question gives to the bankrupt the right to receive at a certain date a specified sum of money, contingent upon his surviving to that date. This is a vested right of property existing in the bankrupt, which passes to the trustee. It is a property right which he could have transferred, and it falls within the comprehensive language of the section which vests title in the trustee. 2 May, Ins. § 459d; Porter v. Porter, 2 Willson, Civ. Cas. Ct. App. § 434; Cameron v. Fay, 55 Tex. 58; Levy v. Van Hagen, 69 Ala. 17; Tompkins v. Levy, 87 Ala. 263, 6 South. 346, 13 Am. St. Rep. 31; Boyden v. Insurance Co., 153 Mass. 544, 27 N. E. 669; Tennes v. Insurance Co., 26 Minn. 271, 3 N. W. 346; Talcott v. Field, 34 Neb. 611, 52 N. W. 400, 33 Am. St. Rep. 662; Evers v. Association, 59 Mo. 429. In the last case it was ruled that there was no joint interest in the policy during the continuance of the life of the insured; that while he lived he had the sole and absolute interest, with a bare contingency resulting to the other party, that, "had he survived to the designated time when the payment of the policies was to inure to him personally, he, and he alone, would have reaped their fruits, and no other one was jointly interested with him"; and that the interest of the beneficiary did not take effect until the insured's interest ceased by death. It does not appear that the policy in that case contained a provision like the one here, providing for a paid-up policy to the beneficiary named in case of default in the payment of premium after three annual premiums had been paid. This provision, even if the doctrine of the Missouri case can be upheld to its full extent, would, as we think, give to the wife a present right and interest in the policy, to receive upon the conditions stated a paid-up policy upon the life of her husband,—a right however, which she could not exercise without his consent, since that would be to deprive him of his right to receive the amount specified at the conclusion of the tontine period.

The case of Ex parte Dever, 18 Q. B. Div. 660, is not in conflict with our conclusion. The policy there was like to the one here, except that the right of option at the conclusion of the tontine period was vested in the wife, and not the husband. The right of the husband to receive anything under that policy rested in the possibility of the wife, at the end of the tontine period, exercising her option to receive a specified sum of money, which, it was argued, under the marital laws of England, would pass to the husband. Whether it would so pass was not determined; but the court ruled that the husband had no property right in the policy which passed to the trustee, because it was something that could only accrue in the exercise of the wife's option on the double contingency which had not happened at the time he obtained his discharge. The court said:

"It was the mere hope of a hope that something might come to him by reason of his surviving the ten years, and of his wife's exercising her option in that particular manner, and it was a mere spes, and there was nothing which could vest in the trustee in bankruptcy."

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In re Slingluff (D. C.) 106 Fed. 154, 3 Nat. Bankr. News, 254, 5 Am. Bankr. R. 76, was a case upon an endowment policy, where the specified amount was payable to the bankrupt at the date stated, if he survived, and, if he should die within the period, then to the wife or her legal representatives. Judge Morris in that case delivered an able and exhaustive opinion, covering the whole ground here considered, and reaching the conclusion to which we are compelled.

It remains to consider how this matter should be dealt with by the court below. The trustee takes the policy as of the date of the adjudication in bankruptcy, and subject to all its burdens. He takes it subject to the duty of continuing it in force by the payment of semiannual premiums until the completion of the tontine period. That will involve a large outlay of money, which may prove burdensome to the estate. He also takes the policy subject to the contingency of the death of the bankrupt before the completion of the tontine period, and, if that contingency should happen, he will fail to realize anything, and possibly the bankrupt's estate might lose the amount disbursed in payment of premiums. There would seem to be two modes of practically and equitably solving the problem. One is to ascertain, if it be possible, the actual value of the policy at the date of the adjudication in bankruptcy, and the equitable apportionment of that value among the respective interests in the policy, and then, in analogy to the declared policy of the law as stated in the proviso, to permit the bankrupt, if he so desire, to pay to the trustee that proportion of the actual value which would be coming to him at the time stated and upon the plan suggested, and that the trustee thereupon convey all claim to the policy to the bankrupt. The other plan is to direct a sale by the trustee of the interest of the bankrupt in the policy at the date of the adjudication in bankruptcy. These views are suggested to the court below for its consideration in the equitable disposition of the matter under the rules which we have declared, and because the record furnishes no data from which specific directions may be given.

GROSSCUP, Circuit Judge (dissenting). I concur in the opinion that the policy does not fall within the provisions of section 70a relating to a cash surrender value; but am forced to dissent from that portion of the opinion which holds that in virtue of the condition of the policy relating to David Welling's right of election upon the completion of the tontine dividend period, November 27, 1906, Mrs. Welling's vested interest will cease, and Welling's right become a property which could have been transferred April 13, 1901, the date of adjudication, or which might have been levied upon and sold under judicial process against him.

The policy, on its face, contracts to pay Anna B. Welling, if living, or, if not living, the surviving children, the sum of ten thousand dollars within sixty days after satisfactory proofs of death of David Welling, subject, however, to the condition, among others, that upon the completion of the tontine period, November 27, 1906, (the policy not having been terminated previously by lapse or death) David

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Welling should have the option: (a) to withdraw in cash the policy's entire share of the assets; (b) to convert such share into a paid-up policy for an equivalent amount; (c) to continue the policy in force on the ordinary plan, withdrawing the accumulated surplus in cash, or, (d) to continue the policy for the original amount, applying the tontine dividend to the purchase of an annuity for the benefit of David Welling.

Now, the law holds, that in a policy of insurance taken out by a husband on his life, making a reasonable provision for the family after his death, without intent to hinder, delay or defraud creditors, the interest of the wife vests from the moment the policy is issued, and remains vested until the policy matures, unless there is a clear provision to the contrary. The policy under consideration contains no clear contrary provision. The right of Welling to take out, at a given period, the value of the policy in cash, connected as it is with the other alternative, that the policy may continue in force on the ordinary plan, is not in itself a divestment of Anna B. Welling's interest. The alternative—the continuance of the policy in force on the ordinary plan—is a continuance of her vested interest as it was previously. The effect of the contract, taken as a whole, is that the insurance company promises to pay Anna B. Welling, or the surviving children, upon the death of David Welling, the sum of ten thousand dollars, unless on November 27, 1906, David Welling shall have elected to withdraw in cash the policy's entire share of the assets. In such a contract, the interest of Anna B. Welling, though subject at the option of David B. Welling (to be exercised November 27, 1906) to termination, is not, in fact, terminated or divested until the option has been exercised.

Assuming then, that Anna B. Welling has a vested interest in the policy, not terminable November 27, 1906, unless David B. Welling elects to take out in cash the policy's share of the assets, it is clear to me that such right of election is one not transferable, or subject to levy upon judicial process. If the subject matter of the option were a mere future interest or expectancy, disconnected from obligations to, or with the interests of, another, there might be little doubt of its assignability. But that is not its nature or substance. The subject matter of the option is a policy of life insurance—the provision a husband makes for his wife and family in the event of his death. Presumably, the wife has contributed her share toward obtaining the premiums that have enabled the husband to carry along the policy; presumably, too, any other provision for her or the family has been affected by the fact that a life insurance provision is in existence. If disposed of, such a policy, unlike other property, brings no equivalent—once let go it can in many cases never be replaced. An option so intimately interwoven with the wife's interest, and with the obligations due to her from her husband, cannot be exercised against her interests, except in exact accordance with the substantial terms in which the option is formulated and put in force.

One of those terms is that it shall be exercised November 27, 1906. Time, here, so far as Mrs. Welling is concerned, is of the

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essence of the option. The interest of the wife, and the sense of obligation of the husband, may be different on that day from that of any day preceding or following. It is, in my judgment, the wife's right that the election—affecting as it does her vital interests—shall be exercised only in view of the considerations that may influence the husband at that time; neither those before nor those after.

Another term of the option is that the election shall be by the husband himself. No one else can stand in his place, or exercise the option under the circumstances and sense of obligation that will influence him. It is the wife's right to have the husband's judgment, not that of a stranger—the judgment of the man who presumably has an interest in her future, not that of a man whose interest in this respect is in conflict with hers. I am of the opinion that a fair interpretation of the spirit of the policy would disallow the exercise of the option of Welling until the day for its exercise had arrived, and would then disallow its exercise, unless it be by the judgment of Welling himself. Such an interpretation, of course, forbids the view that the option is transferable in advance—in this case six years in advance—or was subject to levy by creditors.

The decree is reversed and the cause remanded to the court below with direction to proceed therein in accordance with the views expressed in this opinion.

DE GIGNAC et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1902.)

No. 801.

1. POST OFFICE—MAILING PROHIBITED MATTER—SUFFICIENCY OF INDICTMENT.
An indictment under Rev. St. § 3893, as amended by 1 Supp. Rev. St. 621, charging the defendant with having deposited in a post office for mailing a letter or circular giving information where and of whom might be obtained obscene, lewd, and lascivious pictures, is sufficient if it specifies the place where and of whom the letter or circular gave information, and alleges the character of the information, leaving further disclosures to the evidence. It is not necessary to aver ownership or possession of the objectionable matter, nor that the information was given to one who inquired for or desired it, nor to describe the pictures about which information was given, further than to state their character.

2. SAME—ELEMENTS OF OFFENSE.
It is not necessary, to constitute the offense of mailing a letter or circular giving information where obscene, lewd, and lascivious pictures or publications may be obtained, under Rev. St. § 3893, as amended by 1 Supp. Rev. St. 621, that the writing mailed should describe the objectionable matter or state its character. It is sufficient if the writing, although unobjectionable on its face, in fact gives information where matter of the character specified in the statute can be obtained, and the indictment need not plead all the words constituting the information with the particularity required in cases of libel or forgery.

3. SAME—INDICTMENT CONSIDERED.
An indictment under Rev. St. § 3893, as amended by 1 Supp. Rev. St. 621, charged the defendants with having deposited for mailing a cir-

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cular, and, after setting out the circular in hæc verba, averred: "Which said circular then and there was a circular which gave information, as they, the said * * *, then and there well knew, where and of whom might be obtained certain obscene, lewd, and lascivious photographic pictures, in the said circular called 'views'; that is to say, information that the said pictures might be obtained of * * * at * * *." *Held*, that such indictment was sufficient, although the circular set out was merely an advertisement of a machine for exhibiting "views," and of different sets of views for exhibition therein; the character of the pictures not being described.

In Error to the District Court of the United States for the Northern District of Illinois.

The indictment in this case is based upon section 3893 of the Revised Statutes of the United States, as amended by the act of September 26, 1888 (1 Supp. Rev. St. 621), and embraces two counts. A demurrer to the indictment having been overruled, the defendants entered their pleas of guilty to both counts. A motion in arrest of judgment was overruled, and exception duly taken. The defendants were thereupon sentenced each to pay a fine of $1,000, and to be imprisoned in the Illinois State Penitentiary at Joliet at hard labor for three years; the said sentence of imprisonment to be satisfied by each serving one year in the county jail of Cook county. Motion to vacate and set aside judgment was then made and overruled. The ruling of the court in passing sentence, in denying the motion in arrest of judgment, and in denying the motion to vacate judgment is assigned for error, and the sufficiency of the indictment is the sole question presented here for consideration.

Section 3893 of the Revised Statutes, as amended, reads as follows:

"Sec. 3893. Every obscene, lewd or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of or of aiding in the circulation or disposition of the same, shall, for each and every offense be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

The indictment is as follows:

"The grand jurors for the United States of America, inquiring for the Northern division of the Northern district of Illinois, upon their oaths present that Anthony L. De Gignac and Herbert S. Mills, late of the city of Chicago, in the said division and district, on the thirteenth day of December, in the year of our Lord nineteen hundred, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States there, for mailing and delivery, a certain envelope, to wit, an envelope which then and there bore two uncanceled, United States two-cent postage stamps and the following return card direction and address; that is to say: 'Return in 5 days to Mills Novelty Co., Chicago, U. S. A. Peter Lemington, Esq., 2261 Arapohold, Room 12, Denver, Colo.,'—and contained a certain printed circular, to wit, a printed circular of the tenor which here follows; that is to say:

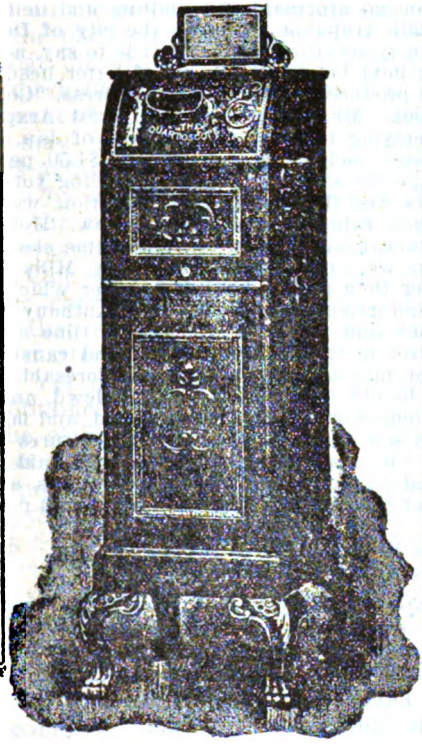
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The Quartoscope

$50.00 **Our New Picture Machine** $50.00

The Views are arranged in sets of twelve stereoscoptic views, with four sets to each machine. One set of twelve pictures can be seen for a nickel : : : :

Other Sets supplied on application at lowest prices : : : : : : :



Over 50,000 subjects to select from : : : : : : :

We Quote the machine ready for operation which includes batteries, electric lamps and four sets or 48 pictures : : : : : :

MANUFACTURED AND FOR SALE ONLY BY THE

Mills Novelty Co.

11 to 23 So. Jefferson Street CHICAGO, ILL.

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—Which said circular then and there was a circular which gave information, as they, the said Anthony L. De Gignac and Herbert S. Mills, then and there well knew, where and of whom might be obtained certain obscene, lewd, and lascivious photographic pictures, in the said circular called 'Views'; that is to say, information that the said pictures might be obtained of the Mills Novelty Co., at Nos. 11 to 23 South Jefferson street, in the said city of Chicago,—against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

"(2) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Anthony L. De Gignac and Herbert S. Mills, on the tenth day of January, in the year of our Lord nineteen hundred and one, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States at Chicago aforesaid, for mailing and delivery to one Peter Simington, at No. 2261 Arapahoe street, in the city of Denver, in the state of Colorado, a certain typewritten letter; that is to say, a letter of the tenor following, beginning next below the engraved letter head thereof, which it is impossible to here produce, to wit: 'Cable Address, "Coln." 'Phone, Monroe, 47. Jan. 10, 1901. Mr. Peter Simington, 2261 Arapahoe St., Denver, Colo.—Dear Sir: Replying to your valued favor of Jan. 4th, will say that the price of our views such as you desire are $1.50 per dozen. We also allow you to exchange the same for others, providing you have not retained them over thirty days, and they are in good condition, we allowing you two-thirds of their original value in exchange for new. Hoping to be favored with your valued order, assuring you that the same shall have our prompt and careful attention, we remain, yours very truly, Mills Novelty Co. A. H. C.,'—which said letter then and there was a letter which gave information to the said Peter Simington, as they, the said Anthony L. De Gignac and Herbert S. Mills, then and there, to wit, at the time and place of so depositing the said letter in the said post office, and causing the same to be deposited therein, for mailing and delivery as aforesaid, well knew, where and of whom might be obtained certain obscene, lewd, and lascivious photographic pictures of nude women, too obscene, lewd, and lascivious to be here described; that is to say, information that such pictures might be obtained of the Mills Novelty Co., then doing business in the said city of Chicago,—against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

Wm. S. Forrest, for plaintiff in error.

S. H. Bethea, for the United States.

Before JENKINS and GROSSCUP, Circuit Judges, and HUMPHREY, District Judge.

HUMPHREY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The contention on behalf of plaintiffs in error is that the indictment does not aver that the writing therein set forth gave the prohibited information directly or indirectly; that it contains no averment that obscene, lewd, and lascivious photographic pictures or views were in fact at Nos. 11 to 23 Jefferson street, in the city of Chicago, or were in the possession or under the control of the Mills Novelty Company. Counsel contend that an indictment drawn under this section for mailing prohibited matter, or for mailing a writing giving information where such matter may be obtained, is subject to the rule of pleading applicable to indictments for slander, libel, forgery, etc.; that the case at bar is strictly analogous to an indictment for criminal libel; that therefore, in order to make

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a good indictment, the writing itself must upon its face purport to be what is prohibited, or, failing in that, the indictment must contain explanatory allegations, averments, or writings showing that the writing itself, interpreted by such explanations, does not contain what is prohibited.

This contention cannot be sustained. The primary object of this federal enactment (section 3893, Rev. St. U. S.) is to protect the mails from corrupt communications. The incidental purpose of the law is to protect the public morals. The law has been construed by the supreme court. It is not necessary, in an indictment under this section, that all the words constituting the information should be pleaded with the particularity used in cases for libel and forgery. It is sufficient that the character of the information be described, leaving further disclosures to the introduction of evidence. The offense here denounced is the giving of information by mail where obscene matter may be obtained. Any communication by mail which does this is actionable. The gist of the offense is the giving of the information by mail. It is not necessary to aver ownership or possession of the obscene matter. Neither is it necessary to aver that the information was given to one who inquired for or desired the same. One very common purpose of those who violate this statute is the corruption of the young and the innocent. It is not necessary that the writing complained of should in terms describe obscene matter. The writing may be innocent and harmless on its face. Yet if it in fact give information where obscene matter may be obtained, and the explanatory averment so states, it cannot save the plaintiffs in error harmless because the obscene matter in question is described by the indefinite term of "views."

On the exact question arising here the cases of U. S. v. Grimm (C. C.) 45 Fed. 558, Id. (D. C.) 50 Fed. 528, and Grimm v. U. S., 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, are in point. These cases have been much relied upon by counsel on both sides. The indictment here is sufficient under the authority of either of the Grimm Cases. In the first Grimm Case, the main objection to the indictment, and the one on which it was held insufficient for uncertainty, was that it did not contain any averment, either in the writing itself or by way of explanation, as to the place where the objectionable matter could be obtained. The indictment failed to aver that the writing complained of conveyed the information denounced by the statute. The indictment here is specific on this point. It avers that the writing complained of did contain information where such denounced photographs could be obtained, viz.: "Information that the said pictures might be obtained at Nos. 11 to 23 South Jefferson street, in said city of Chicago." In the second Grimm Case, opinion by Mr. Justice Brewer, it is said at page 608, 156 U. S., page 471, 15 Sup. Ct., and page 551, 39 L. Ed.:

"It is insisted that the possession of obscene, lewd, or lascivious pictures constitutes no offense under the statute. That is undoubtedly true, and no conviction was sought for the mere possession of such pictures. The gravamen of the complaint is that the defendant wrongfully used the mails for transmitting information to others of the place where such pictures could be obtained, and the allegation of possession is merely the statement of a

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fact tending to interpret the letter which he wrote and placed in the post office. It is said that the letter is not in itself obscene, lewd, or lascivious. This also may be conceded. But, however innocent on its face it may appear, if it conveyed, and was intended to convey, information in respect to the place or person where, or of whom, such objectionable matters could be obtained, it is within the statute. * * * On the contrary, it is sufficient to allege its character and leave further disclosures to the introduction of evidence. It may well be that the sender of such a letter has no single picture or other obscene publication or print in his mind, but, simply knowing where matter of an obscene character can be obtained, uses the mails to give information to others. It is unnecessary that unlawful intent as to any particular picture be charged or proved. It is enough that in a certain place there could be obtained pictures of that character, either already made and for sale or distribution, or from some one willing to make them, and that the defendant, aware of this, used the mails to convey to others the like knowledge."

Measured by this standard the indictment is sufficient. It avers, after setting out the circular in hæc verba:

"Which said circular then and there was a circular which gave information, as they, the said Anthony L. De Gignac and Herbert S. Mills, then and there well knew, where and of whom might be obtained certain obscene, lewd, and lascivious photographic pictures, in the said circular called 'Views'; that is to say, information that the said pictures might be obtained of the Mills Novelty Company, at Nos. 11 to 23 South Jefferson street, in the said city of Chicago,—against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

It very properly left further disclosures to the introduction of evidence.

The judgment of the district court is affirmed.

HUTCHINSON v. LE ROY.

In re HUTCHINSON, Petitioner.

(Circuit Court of Appeals, First Circuit. January 8, 1902.)

Nos. 386, 390.

1. BANKRUPTCY—PROCEDURE ON REVIEW.
   The decision of a court of bankruptcy on a petition claiming ownership of funds in the hands of a bankrupt's trustee, where the facts are undisputed, may be reviewed by a petition for revision, under Bankr. Act 1898, § 24b, and not by appeal under that act.[1]

2. SAME—PROCEEDS OF PLEDGE—RECOVERY FROM TRUSTEE OF PLEDGEE.
   A pledgee of a certificate of stock repledged it to a bank, without the knowledge of his pledgor, to secure a debt of his own. He afterwards made a general assignment, and still later was adjudged a bankrupt. The bank sold the securities, and, after its claim was paid, had a sum remaining exceeding the proceeds of such certificate, which it paid over to the assignee, who had been previously notified by the original pledgor of his right to the certificate, subject to payment of his own debt, which he had duly tendered. The assignee had funds in his hands exceeding the proceeds of such certificate at all times until he turned the same over to the trustee in bankruptcy, who thereafter

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[1] Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

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also had at all times funds in excess of such amount. *Held*, that the original pledgor had the equitable right to follow the fund received by the bank in excess of its debt through the hands of the assignee and into those of the trustee, and to recover from the latter the proceeds of his stock, less the amount of his indebtedness to the bankrupt.

3. SAME—LACHES.
The original pledgor, having no knowledge that his stock had been repledged by the bankrupt until after he had filed his claim as a preferred creditor of the bankrupt estate, cannot be said to have waived any rights, or to have been guilty of laches which would preclude him from thereafter asserting the same against the fund in the hands of the trustee.

4. SAME—COSTS.
In re Dickson (C. C. A.) 111 Fed. 726, affirmed as to costs.

Appeal from, and Petition for Revision of Proceedings in, the District Court for the District of Massachusetts.

For opinion below, see 108 Fed. 212.

Addison C. Burnham and Albert S. Hutchinson (Freedom Hutchinson, on the brief), for appellant.

Roland Gray (Ropes, Gray & Gorham, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. These two proceedings were brought to revise the decree of the district court for the district of Massachusetts, sitting in bankruptcy, directing a payment to Le Roy by the trustee in bankruptcy of $6,490.29. As occurred in Re County of Worcester, 42 C. C. A. 637, 102 Fed. 808, and in Re Fisher, 43 C. C. A. 381, 103 Fed. 860, 51 L. R. A. 292, and in Re Dickson (C. C. A.) 111 Fed. 726, the moving party in this court, who is the trustee in bankruptcy, being uncertain as to the nature of his remedy, both appealed, which constitutes the case of Hutchinson v. Le Roy, and filed a revisory petition, which constitutes that of Hutchinson, petitioner. There can be no doubt that the latter proceeding is the correct one, and the appeal must be dismissed for want of jurisdiction.

The proceeding commenced by Le Roy filing a proof of debt, claiming this $6,490.29, but closing the proof with the following, "Deponent claims to be entitled as a preferred creditor." What Le Roy thus sought to accomplish could not be accomplished in that form, as the claim which he intended to maintain was not a preferred debt, under the bankruptcy act of 1898. Subsequently Le Roy obtained leave to amend as follows:

"And now comes the claimant, Stuyvesant Le Roy, and moves to amend his proof of claim heretofore filed by substituting therefor the following:

" 'The trustee appointed in the above-entitled bankruptcy proceeding received $6,490.29, belonging to this claimant, and forming no part of the estate of the bankrupts. Wherefore this claimant prays that the trustee may be ordered to pay to him said sum, less the amount of the dividend which has already been paid to him.

" 'This application is made without prejudice to the claimant's right to share as a general creditor for said amount of $6,490.29, in the event of the denial of this prayer for full payment.' "

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The amendment having been allowed, what was originally intended as a proof of a preferred claim was converted into a summary petition for the payment to Le Roy of a specific amount from the funds in the possession of the trustee. The district court clearly had jurisdiction over this petition, and granted it. Le Roy claimed the proceeds of 65 shares of American Sugar Refining Company stock, sold as hereinafter stated; the amount realized on the sale being $8,320. According to well-established rules, a court winding up insolvent estates must take cognizance of all equitable set-offs, no matter how they may arise. Bankr. Act 1898, § 68; Carr v. Hamilton, 129 U. S. 252, 256, 9 Sup. Ct. 295, 32 L. Ed. 669; Scott v. Armstrong, 146 U. S. 499, 507, 13 Sup. Ct. 148, 36 L. Ed. 1059; Auten v. Bank, 174 U. S. 125, 148, 19 Sup. Ct. 638, 43 L. Ed. 920. It is sufficient that on the adjustment of all accounts between Le Roy and the bankrupts, including the matter of the 65 shares of American Sugar Refining Company stock, there was a balance due the former of $6,490.29.

Le Roy had pledged to the bankrupts before their failure the 65 shares of American Sugar Refining Company stock. Afterwards, at a date not given, the bankrupts borrowed of the Beacon Trust Company $100,000, pledging it a long list of securities, including with the rest the American Sugar Refining Company stock, and a small amount of other stocks belonging to other persons, without their consent, and without the consent or knowledge of Le Roy. Next, on December 27, 1899, the bankrupts made an assignment for the benefit of their creditors to one George C. Dickson. On the next day, or the day after, Le Roy called at the office of the bankrupts, and offered to pay the balance due from him on the delivery to him of the American Sugar Refining Company stock; but he was advised that nothing could be done, because the assets of the concern had been transferred to Mr. Dickson. Not knowing that his stock had been pledged to the Beacon Trust Company, Le Roy, forthwith after his interview with the bankrupts, informed Mr. Dickson that it belonged to him, and that it and its proceeds should be kept separate from the general assets of the insolvents. Between December 28, 1899, and January 2, 1900,—the details of the dates not being given, nor important,—the Beacon Trust Company sold all the securities pledged to it, with some exceptions not necessary to consider, but including Le Roy's, realizing on the sale $111,340.75. The dates show that, both at the time of the assignment and of the claim made by Le Roy on Dickson, his stock was still intact in its hands. The trust company paid from the proceeds of the sale the amount of its loan, and delivered to Mr. Dickson a cash surplus of $11,340.75 and the unsold securities. The stock belonging to Le Roy was, as already said, sold for $8,320, and the other stocks belonging to other persons were sold for $3,200. As the net amount of Le Roy's claim is the sum already named, $6,490.29, all the reclamations which could be made by all the owners of all the stocks so pledged were less than the amount thus turned over.

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The petition on which the adjudication of bankruptcy was made was subsequently filed, at a date not given in the record, and Hutchinson was duly appointed trustee. Meanwhile Mr. Dickson made some disbursements and realized some other funds, but at all times he had in his hands as assignee at least $11,340.75 in cash, and he turned over to the trustee $30,783.62. The trustee always has had, as trustee, cash in excess of $11,340.75, not required for any special purpose connected with the estate of the bankrupts, or with the proceedings in reference to the bankruptcy. From the time Mr. Dickson received the money from the Beacon Trust Company until the amendment was made which converted Le Roy's proof into a summary petition, there always was in the hands of Mr. Dickson and the trustee a sum which could have been applied to satisfying Le Roy's claim, without affecting any interests, except the amount of dividends to be paid the general creditors, who could prove their claims either under the assignment or in bankruptcy.

The record not showing that Le Roy knew what disposition had been made by the bankrupts of his American Sugar Refining Company stock, or, indeed, that he knew that they had made any disposition of it, we are not to hold that it was in his power to take any further action to protect his rights. Therefore we are to hold that he has not been guilty of any laches which could prejudice him. We might hold that the claim which Le Roy made on Dickson placed sufficiently on Dickson the duty of ascertaining whether any of the stock in the hands of the Beacon Trust Company belonged to Le Roy. But Dickson, as assignee of the insolvents, was not a purchaser for value, and therefore it is of no consequence whether he was advised of this fact. It is also well settled that the trustee, as well as the assignee, took only the equities of the bankrupt. Stewart v. Platt, 101 U. S. 731, 738, 25 L. Ed. 816; Bank v. Yardley, 165 U. S. 634, 653, 17 Sup. Ct. 439, 41 L. Ed. 855. Therefore it follows that the trustee can set up no right against Le Roy which Dickson, as assignee, could not have done.

For the purpose of determining Le Roy's equities, it is not necessary to go back of the condition of things when the securities came into the hands of the Beacon Trust Company. Of course, the circumstantial facts concerning every transaction of this nature differ from those of every other, and it is not always for the trustee in bankruptcy to determine for himself whether such differences involve anything of substance. Nevertheless an examination of the record impresses us that this case must be determined in favor of Le Roy, on simple rules, and on recognized and well-established equitable principles.

There can be no doubt that, before the securities were sold by the Beacon Trust Company, Le Roy had a legal right to pay to it its loan, and take up all of them, for the purpose of protecting his interest in his own stock. It is said, however, that, in case the Beacon Trust Company had refused to accept payment or to surrender the stock, his only remedy would have been by an action at common law. Although this proposition, if sustained, could not affect the equities of this case, nevertheless it is not correct. If the

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Beacon Trust Company had refused to surrender, Le Roy, being a stranger to the transaction between it and the bankrupts, could have maintained a bill of redemption. Story, Eq. Jur. (13th Ed.) § 1032. However, Le Roy had other equities, in all respects the same as those of a surety, including the rights of marshaling and subrogation, and also the right to avail himself of the law of application of payments in such manner as would be most to his advantage. These principles are so thoroughly settled that no citation of authorities is necessary in reference to them; but the two rights first named are well explained by Lord Hatherley in Ex parte Alston, 4 Ch. App. 168, and by Lord Justice Cotton in Ex parte Salting, 25 Ch. Div. 148, 152.

It is quite probable, also, that on a showing that the Beacon Trust Company could have repaid itself, certainly and immediately, on a sale of the securities belonging to the bankrupts, Le Roy could, on its refusal to sell, have brought a bill, in the nature of a bill for marshaling the assets, requiring it to sell them, and thus relieve his own stock. It is not necessary, however, to determine this, because he was clearly entitled to the specific equities which we have pointed out, and which are uniformly recognized and protected by the chancery courts. These equities adhered, of course, to the surplus, equally whether the sale was made by the Beacon Trust Company, or its loan was paid by Le Roy, or a sale was effected by a chancery court on a bill for that purpose.

As, according to equitable principles, these equities attached to the fund, it followed it, of course, wherever it could be found, until it should reach the hands of an innocent purchaser for value. The proposition of the trustee in bankruptcy that it cannot be determined out of what portion of the proceeds the loan of the Beacon Trust Company was paid, and that therefore it cannot be said that Le Roy had any lien on the specific surplus remaining after payment of the loan, is one nowhere recognized. It is also met by the well-known rule of appropriation of payments, to the effect that, where the parties themselves have made no specific direction, the law appropriates in such way as to protect the just rights of all. Moreover, the proposition is strictly met by Ex parte Alston, ubi supra, where it appears that the pledgees, situated like the Beacon Trust Company, applied to the payment of their debt the specific proceeds of property pledged without authority, as was Le Roy's stock in the case at bar; yet the court gave the owner of what was thus improperly pledged a lien on the remaining securities in the hands of the pledgees for the value of his property. An examination of the English cases doubted and overruled will show that Ex parte Alston has never been questioned. It was expressly recognized as authority by the court of appeal in Ex parte Salting, ubi supra.

Story, Eq. Jur. (13th Ed.) §§ 1255–1258, reaches, in these respects, every case where property has been wrongfully misapplied, without any limitation as to the relations between the owner and the person who misapplied it. In section 1258 it is said:

"Wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property,

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if its identity can be traced, it will be held in its new form liable to the rights of the original owner or cestui que trust."

In a note to this section it is said that this rule applies a fortiori if the property has been rightfully sold by an agent or trustee; but the text is stated so broadly that it reaches proceeds wrongfully misapplied, no matter by whom, and without regard to whether or not the misapplication is by a person standing in a confidential relation. The same rule is thus stated, in a summary form, in May v. Le Claire, 11 Wall. 217, 235, 20 L. Ed. 50, 54:

"At law in many cases if property be tortiously taken or converted, the tort feasor may be used in trespass or trover, or the injured party may waive the tort and sue in assumpsit. In the latter case the same results follow as if there had been an implied contract." "In the same class of cases, where the converted property has assumed altered forms by successive investments, the owner may follow it as far as he can trace it, and sue at law for the substituted property, or he may hold the wrongdoer liable for appropriate damages." "There are kindred principles in equity jurisprudence, whence, indeed, these rules of the common law seem to have been derived."

The efficiency of the rules of the chancery courts, by virtue of which Le Roy seeks to impress the surplus in the hands of the Beacon Trust Company with equities in his behalf, is peculiarly illustrated by an extensive class of authorities, of which the opinion of Mr. Chief Justice Gray in Bank v. Barry, 125 Mass. 20, is a noteworthy one. There the money in question was taken by a clerk of the bank, yet not in his capacity as clerk. It was stolen. A part of it was delivered by him to one Barry, who was a stranger to the bank, and who with it purchased land, taking the title in the name of his mother; and Mr. Chief Justice Gray, delivering the opinion in behalf of the court, said that equity would charge the land with a trust in favor of the bank for the money received by Barry, it appearing that he knew that it was stolen. Thus, although the money was stolen in the form of currency or coin, and although it had gone through two hands, equity so earmarked it as to follow it into the real estate in question.

Notwithstanding the proposition of the trustee that, if Le Roy had undertaken to proceed against the Beacon Trust Company on a supposed refusal by it to recognize his rights, his remedy would have been only at law, yet, clearly, he would have had one in equity. This follows not only from the special rule we first stated, but also from the fact that his rights are equitable, as we have already shown, and are based on the principle stated in what we have quoted from May v. Le Claire, 11 Wall. 217, 235, 20 L. Ed. 50, 54. It has often occurred, in the history of the law, that a right is first recognized in equity, and a remedy therefor first given by the chancery courts, and that afterwards the common law recognizes the right, and gives a remedy according to its own rules. This, however, does not ordinarily oust the original equitable jurisdiction in chancery with reference thereto, especially where, as in the class of cases to which the topic we are duscussing relates, the equitable principles are of a somewhat complicated nature, and not fully enforceable by the common law. Therefore, while quite likely, under the modern

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rules of the common-law courts, Le Roy, in case of the refusal of the Beacon Trust Company to recognize his rights, might have brought an action for money had and received against the corporation, yet his relief in equity was not barred.

Neither is there involved here any of the questions raised in Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565. The statement there made that a creditor who holds collateral is in no sense a trustee went beyond the case. Hennequin v. Clews related merely to the construction of certain provisions of the bankruptcy act then under consideration, with reference to what classes of debts were not covered by a discharge; and the decision, together with others of the supreme court in the same line, strictly limited those provisions to debts created by actual fraud, as distinguished from constructive fraud, and to those contracted in a fiduciary character, in a technical sense. They expressly held that commission merchants and factors failing to account for the proceeds of property committed to them for sale were relieved by the discharge, although it cannot be questioned that such merchants and factors occupy, in one sense, a fiduciary relation. Indeed, it was so expressly stated in Bank v. Gillespie, 137 U. S. 411, 419, 11 Sup. Ct. 118, 34 L. Ed. 724, where it was also held that Hennequin v. Clews and other decisions of that class are not in point on the question involved at bar. Bank v. Gillespie related to certain funds deposited with the bank by a factor under such circumstances that the bank must have known that they were the proceeds of the property of the factor's principal. The proceeding was in equity, in behalf of the principal, and the court granted him relief, and put the case, at pages 419 and 420, 137 U. S., pages 121, 122, 11 Sup. Ct., and pages 727, 728, 34 L. Ed., on the simple propositions that the bank, when it received the funds, knew that they belonged equitably to him, and that justice forbade its applying the moneys in payment of a debt due from the factor to itself, and demanded that the bank should account for the sums so received and appropriated. Indeed, excepting the fact that the funds had not gone beyond the hands of their first recipient, Bank v. Gillespie covers every substantial proposition involved in this appeal. That exception is met by what we have already cited from May v. Le Claire, ubi supra, and by the approval by the supreme court of a decision cited in Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co., 104 U. S. 54, 69, 26 L. Ed. 693, each to the effect that equity will follow the fund through any number of transactions, and preserve it for the owner, so long as it can be identified. It is true that in the case last named the particular sum in question arose out of a fiduciary relation; but the rule as declared, whether by the supreme court, especially in May v. Le Claire, or by the great multitude of authorities which have had occasion to deal with it, is without any reference to any such limitation.

The trustee on this appeal undertakes to define the conditions on which he claims that the Le Roy petition must be allowed, if at all, and gives him but three opportunities: First, on the theory that he is a preferred creditor; second, the theory of a trust, and the following of trust property; and, third, the theory of marshaling.

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So far as the first and third are concerned, we have said all that need be said.

The protection of trusts and the following of trust properties have given rise to a class of cases in which the rules which govern this appeal have been pushed farther than we have any occasion to push them here. The leading authority in this direction is In re Hallett's Estate, 13 Ch. Div. 696, which relates to the misapplication of funds which were strictly trust assets. The result of this line of cases is, perhaps, well stated by a citation by the supreme court in Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co. (already referred to), at page 67, 104 U. S., page 699, 26 L. Ed., to the effect that, if a man mixes a trust fund with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own. This reverses the rule of presumption which we have applied in the present case, where Le Roy has taken the burden, and has shown specifically that there was in the hands of the Beacon Trust Company, to which his equitable lien applied, a fund not needed to discharge its debt, and which, on the equitable rules of marshaling, and the common-law rules as to the application of payments, remained his specific assets. It is true that this summary statement cited by the supreme court was not intended by it, nor is it represented by us, as covering the entire range and effect of In re Hallett's Estate; but it is nevertheless true that, as the development of that decision, the chancery courts may have afforded more ample protection to funds strictly trust assets than is involved in the principles which solve the case at bar.

There is another class of cases, where an implied fraud is involved, which is equally as far-reaching, though in another direction, as In re Hallett's Estate. We refer to those of the class of Railway Co. v. Johnston, 133 U. S. 566, 576, 10 Sup. Ct. 390, 33 L. Ed. 683, where it is held that funds which had been received on deposit by a bank which had become hopelessly insolvent, so known to its officers, may be followed in equity.

The case at bar, however, is solved by the simple rule that where the property of any person has been, without his consent, and sometimes even with his consent, converted into money, the money may be followed in equity so far as it is possible to earmark it, provided the rights of innocent strangers who have given value are not prejudiced. This rule is so strongly fortified by the plainest principles of equity jurisprudence, and has been so constantly and uniformly applied for so many years, that the difficulty in drawing out the views herein stated comes less from the apprehension of it, and the certainty that it applies to the case at bar, than from the force and earnestness with which the various distinctions sought to be made by the trustee, and the line of reasoning by which he attempts to make them practically available, has been urged upon us.

No formal motion has been made to dismiss the appeal for lack of jurisdiction, and therefore no costs should be allowed thereon. In re Dickson (C. C. A.) 111 Fed. 726.

In No. 386, Hutchinson v. Le Roy, the appeal is dismissed, without costs to either party.

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In No. 390, Hutchinson, Trustee, Petitioner, the decree of the district court is affirmed, with interest; the costs on the petition are awarded to the respondent, Le Roy; and the district court is directed to give effect to this decree, both as to debt and costs.

In re NEELY.

(Circuit Court of Appeals, Second Circuit. January 7, 1902.)

No. 46.

1. BANKRUPTCY—REPLEVIN—JUDGMENT AGAINST TRUSTEE — DAMAGES FOR DETENTION—PRORATING—ACT OF BANKRUPT.
   Plaintiff sold books to N., and on October 17, 1899, brought replevin in a state court to recover possession for false representations as to solvency. Part of the books were in storage, and under the state statute possession could not be given plaintiff except by consent or order of court after proof of title. Four days later, N. was adjudged bankrupt, and the suit restrained by the federal court. His trustees qualified November 15th, but took no steps to defend until the court, on plaintiff's petition, in March, 1900, authorized them to do so, and vacated the restraining order. It being apparent that the cause could not be reached for trial until autumn, plaintiff offered to refer the cause, or to sell the books for the benefit of the action, if the trustees would permit their removal; but both offers were declined. The case came on for trial February 11, 1901, and plaintiff recovered judgment for possession, with $1,080 damages for detention, and $647 costs. *Held* error for the federal court to enjoin the judgment and direct the damages to be treated as a claim against the bankrupt and prorated with other claims, while permitting the costs to be paid in full, the detention not being the bankrupt's act except for four days, but the act of his trustees, and plaintiff being, therefore, entitled to payment in full.

2. SAME—WANT OF ACTUAL POSSESSION—EFFECT.
   The fact that the trustees never had actual possession of the books was not ground for prorating the damages, it being their action and that of the federal court which prevented plaintiff from getting possession.

3. SAME—REFUSAL BY PLAINTIFF TO TRY TITLE BEFORE REFEREE IN BANKRUPTCY—EFFECT.
   The fact that plaintiff refused to try title before the referee in bankruptcy was not ground for prorating the damages, there being no reason why plaintiff should consent to such proceeding.

4. SAME—REFUSAL TO GIVE ADDITIONAL REPLEVIN BOND—EFFECT.
   The fact that plaintiff declined to give an additional replevin bond to the trustees as a condition precedent to putting the books on the market for the benefit of the action was not ground for prorating the damages, the law not requiring any additional bond.

5. SAME—VALUE OF PROPERTY—EFFECT.
   The fact that the books were of considerable value, and the case such as to justify the trustees in requiring plaintiff to prove title, was not ground for prorating the damages.

Petition to Review an Order of the District Court of the United States for the Southern District of New York.

This is a petition to review an order enjoining petitioner from issuing execution on a judgment entered in the supreme court of the state of New York March 13, 1901, against the trustees in bankruptcy of F. Tennyson Neely.

See 108 Fed. 371.

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Henry W. Taft, for petitioner.
Duncan Edwards, for trustees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. On October 17, 1899, the Syndicate Publishing Company, a Pennsylvania corporation, brought an action of replevin in the supreme court of the state of New York against Neely to recover possession of 2,000 sets of a book called the "Encyclopædia Dictionary," upon the ground that they had been obtained on credit by false and fraudulent statements made by the defendant concerning his financial condition, and that upon discovering such facts the plaintiff had rescinded the credit and sale. The summons, complaint, affidavit, and requisition on replevin, including a bond in the sum of $13,000, were placed in the hands of the sheriff. That officer took into his own possession from Neely's actual possession 272 sets. There were 1,300 sets on deposit with a storage warehouse company, which the sheriff also levied on by serving a notice under the state act of 1895 (chapter 633). By the terms of that act, goods thus levied on could not be removed from the warehouse except by consent or by the order of the court after proof of title. Four days after such levy, and on October 21, 1899, Neely filed his petition, and was adjudged a bankrupt. On October 23, 1899, the district judge made an ex parte order restraining the prosecution of the action of replevin and various other actions pending against the bankrupt, and enjoining the sheriff from in any manner interfering with the property in question, which order was duly served on the plaintiff's attorneys and on the sheriff. On November 15, 1899, trustees of the bankrupt's estate were appointed and qualified. They took no steps to intervene or defend the suit until after the plaintiff in such suit had petitioned the court to direct them to do something, when an order was made March 20, 1900, authorizing them to intervene and defend if so advised, and thereupon vacating the order restraining the prosecution of the replevin suit. The trustees did intervene, and served an answer to the complaint in such suit denying all of its allegations and challenging the validity of the levy in replevin. At the same time they served a separate notice demanding the return of all goods replevied, or for the sum of $8,000 damages for their detention. The restraining order being vacated, petitioner's counsel placed the cause on the calendar, and took the necessary steps to secure a preference on the trial calendar (pursuant to state statute). When it was apparent that the cause could not be reached for trial before autumn, petitioner made an offer to refer the cause, which was declined, and also offered, if defendants would consent to an order under the warehouse act, to take the goods and place them on the market for the benefit of the action. This also was declined. The replevin suit came on for trial in the state court February 11, 1901. The plaintiff's right to recover was vigorously disputed by the attorney for the trustees, but a verdict was rendered in plaintiff's favor awarding plaintiff possession of 1,572 sets of books, valued at $7,948.50; also $1,080 damages for detention thereof (being the

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amount of storage thereon from October 17, 1899, to the time of trial, $450, with interest at the rate of 6 per cent. per annum, amounting to $630, and to $1,080 in all), besides $647.31 costs and disbursements; amounting in all to $1,727.31. The district court thereupon enjoined the plaintiff in that suit from enforcing this judgment against the trustees. It directed that the costs—$647.31—should be paid in full, but as to the $1,080 directed that it should be treated as a claim against the bankrupt, and paid pro rata with the claims of other creditors.

Why the costs should be paid in full if the damages were to be prorated is not apparent. There is no logical difference between the two items. The various reasons suggested in the opinion and in brief and argument here for making such disposition of the case do not seem to us persuasive. It is said that the detention was the act of the bankrupt. This is inaccurate. For a period of four days from October 17th to October 21st he was responsible for their detention. Had he admitted the rightfulness of plaintiff's claim, the state court could have disposed of the cause so that the warehouse company would have delivered the books to the true owner. After Neely became a bankrupt, however, he could no longer control the situation. Nothing that he could do would release the books. His creditors, represented by trustees, and protected and controlled by the district court, were the only ones who could, by ceasing further to oppose a just claim, put a stop to the running up of a bill for expenses. It is said the trustees never had possession of the goods, and never detained them. Whether they had actual possession is immaterial. Their action and the action of the district court prevented the owner from getting them when he was entitled to them.

It is said that the plaintiff in the replevin suit refused to consent to become a party to some proceeding before a referee in bankruptcy to try the title. We know no reason why it should. It had brought a proper action in a proper court, which had jurisdiction, to which action the trustees, with the assent of the district judge, had been made parties, and in which all the issues could be fully determined. It is also said that plaintiff declined to give an additional bond to the trustees as a condition precedent to their consent to a delivery of the books to be put on the market for the benefit of the action. But no law required them to give any other bond than the one in replevin.

It is said that the property claimed was of considerable value, and the case was such as to justify the trustees in requiring the plaintiff in the replevin suit to show title. This is a perfectly good argument in support of the proposition that, as between the bankrupt's creditors and the trustees, the latter are entitled to charge the estate for any expenses they have incurred in the litigation, without being surcharged for any items on the theory that they were improvident. But it is difficult to see how it can be supposed to support the proposition that the individual who all along had good title to the property should be required to contribute to the expenses of the estate in conducting a litigation in which that individual was successful. And there would be such a contribution, if

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the damages sustained by reason of a delay caused by the trustees' defense of the suit were not paid wholly by them, but were left to be borne in part by the successful party.

Reference is made to Norton v. Switzer, 93 U. S. 355, 23 L. Ed. 903, but in that case the judgment was on a claim against the bankrupt himself. Here no part of the $1,080 represents any claim against the bankrupt (except the proportionate part for four days' detention). It is an amount awarded to reimburse the owner of the property for expenses which the conduct of the trustees has caused him to incur.

It is no doubt true that out of the 472 days during which the books were detained (October 17, 1899, to February 11, 1901) 4 days' detention was attributable to the bankrupt; but the case seems one for the application of the maxim "De minimis non curat lex," especially in view of the litigation which the petitioner has had to persist in since it established its title to the property.

Because we have discussed and disposed of this cause on the merits, it is not to be assumed that we have decided all the propositions of law which it presents in favor of the respondents, nor that we are prepared to hold that, when a suit is pending against a bankrupt in a state court of competent jurisdiction, and, with the assent of the bankruptcy court, the trustees intervene, and are made parties in his place, and thereafter contest the suit to final judgment adverse to themselves in the state court, the bankruptcy court may thereafter enjoin execution, open the judgment, and alter the verdict.

The order of the district court is reversed, and the trustees ordered to pay the $1,080, with interest.

GRAY v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 58.

CUSTOMS DUTIES—ADDITIONAL DUTIES — UNDERVALUATION — CONSTRUCTION OF ACT 1897.

Tariff Act 1897, § 32, provides that, if the appraised value of any imported article subject to an ad valorem duty shall exceed the declared value in the entry, there shall be levied and collected an additional duty, proportionate to the excess, but not exceeding 50 per cent. of the appraised value; and by a proviso it is declared that if the appraised value shall exceed the declared value by more than 50 per cent., except when arising from a manifest clerical error, the entry shall be held presumptively fraudulent, and the collector shall seize the goods and proceed as in case of forfeiture. *Held*, that the fact that a case is within the terms of the proviso, and that the government has proceeded thereunder for the forfeiture of the goods, does not relieve the importer from liability for the duties imposed by the previous portion of the section.

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against Herbert W. Gray to recover additional customs duties. From a judgment in favor of the United States (107 Fed. 104), defendant appeals. Affirmed.

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This cause comes here upon a writ of error to review a judgment of the district court, Southern district of New York, in favor of the United States against the plaintiff in error, who was defendant below. 107 Fed. 104. In January and February, 1898, the defendant made three importations from a foreign country of certain sheet music, and entered the same for duty at the New York custom house. The appraiser advanced the value of the goods 100 per cent. The United States thereupon began an action in personam, under section 7 of the customs administrative act, as amended by section 32 of the tariff act of July 24, 1897, to recover the value of these importations. That action was subsequently discontinued by the government. The entries were liquidated, and regular duties paid on the corrected valuation. The collector assessed an additional duty of 50 per cent. of the value of the merchandise, under section 7 of the act above referred to. To recover such additional duty, this action was brought. The case was tried upon an agreed statement of facts, in which it was stipulated that the defendant acted in perfect good faith in entering the music at the lower valuation, and did not know or believe the merchandise to be undervalued, and had no intent to defraud the United States. Judgment was rendered in favor of the United States for the additional duty.

W. Wickham Smith, for plaintiff in error.
Arthur M. King, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

LACOMBE, Circuit Judge (after stating the facts). The statute under consideration is section 7 of the customs administrative act of June 10, 1890, as amended by section 32 of the tariff act of July 24, 1897. It reads as follows:

"That the owner, consignee, or agent of any imported merchandise which has been actually purchased may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition in the entry to the cost or value given in the invoice or pro forma invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value, or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector, within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise subject to an ad valorem duty or a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected and paid in addition to the duties imposed by law on such merchandise an additional duty of one per centum of the total appraised value thereof, for each one per centum that such appraised value exceeds the value declared in the entry, but the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. Such additional duties shall not be construed to be penal, and shall not be remitted nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise or on any other account, nor shall they be subject to the benefit of drawback: provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such mer-

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chandise, and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof, in the case or package containing the particular article or articles in each invoice which are undervalued. Provided, further, that all additional duties, penalties or forfeitures applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a pro forma invoice or statement in the form of an invoice, and no forfeiture or disability of any kind, incurred under the provisions of this section, shall be remitted or mitigated by the secretary of the treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

This section was before this court in the case of U. S. v. 1,621 Pounds of Fur Clippings, 45 C. C. A. 263, 106 Fed. 161, and was construed in view of the very question here raised. The argument in this case has been practically but a reargument of that case, which, indeed, was itself reargued soon after its decision. We there held that "under this statute the additional duties are payable, except in cases arising from a manifest clerical error, irrespective of any question of fraudulent undervaluation on the part of the importer." The plaintiff in error contends that the meaning of the section is that the additional duty of 1 per centum for every 1 per centum of undervaluation applies only to undervaluations of 50 per centum or less; that where the undervaluation exceeds 50 per centum, in lieu of assessing any additional duty at all, the collector shall proceed to forfeit the goods, and if he fail of success, because the importer may satisfy the jury that the undervaluation was without fraudulent intent, nothing at all—neither forfeiture nor additional duty—can be collected by the government by reason of the undervaluation. In other words, he asks to have the section construed as if the clause, "the additional duties * * * shall be limited to 50 per centum of the appraised value," read, "additional duties shall not be imposed where the appraised value exceeds the entered value by more than 50 per centum." In support of his contention, defendant refers to U. S. v. 67 Packages of Dry Goods, 17 How. 85, 15 L. Ed. 54. All that was held in that case is that provisions for forfeiture for undervaluation contained in the tariff act of March 2, 1799, were not repealed by the tariff act of July 30, 1846, which provided for an additional duty when undervaluation exceeded 10 per centum. At the close of the opinion in that case there is the statement that, "if this additional duty has been levied upon the goods by the government, it cannot forfeit them"; but such statement is wholly obiter, not called forth by anything in the case, and is supported by no suggestion of any reason for adopting such construction. The defendant, as a reason for such construction, contends that it is not to be supposed that congress intended to inaugurate a system of cumulative punishments; the customs officers having, prior to the amendment now under consideration, always elected to take one course or the other. And he points out that it would be a great hardship for an importer

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who had established his good faith in a forfeiture trial to have to pay an additional duty nevertheless. It seems to us, as it did when the question was before us in the Fur Clippings Case, that the simple answer to all these arguments is that the statute is not one whose phraseology requires construction. Neither in its words, its phraseology, nor its general structure does it present anything dubious, uncertain, ambiguous, or obscure. It provides for an appraisement by government officers, and for an additional duty of 1 per centum of the total appraised value for each 1 per centum of undervaluation. It limits such additional duties to the particular article or articles in each invoice that are so undervalued, and to 50 per centum of the appraised value of such articles (under some earlier statutes the additional duty increased with the undervaluation indefinitely, and might run up to 2,000 or 3,000 per centum). Perfect good faith, or entire absence of any intent to defraud, is no defense to the exaction of this additional duty. With no language in any wise suggestive of an alternative, the same section provides for seizure and proceedings to forfeit when the undervaluation exceeds 50 per centum,—a proceeding which may be defeated by showing good faith; and, if forfeiture is made out, it shall apply to the whole of the merchandise in the case or package containing the particular article or articles in each invoice which are undervalued. This may be a harsh system for the honest importer, but its amendment should be sought in congress, not in the courts. It is, no doubt, true that, under the section as it reads, an innocent importer who has undervalued his goods 90 per centum may have to stand the burden of a trial of the forfeiture action, and, prevailing in that, nevertheless have to yield up 50 per centum of their value as additional duty; but that state of affairs is not so extraordinary that the courts are to assume that congress intended something different from what it said, and are to construe unambiguous language contrary to its plain meaning. It may be noted that, under the construction for which plaintiff contends, an innocent importer who undervalued his goods 90 per centum would pay no additional duty at all (and establishing his innocence would avoid forfeiture), while the equally innocent importer who unfortunately had undervalued his goods only 49 per centum would have to pay 49 per centum of additional duty. This would seem to be quite as unjust as the system of which defendant complains. Certainly it would be more unfair as between both classes of innocent importers. We see no reason to modify the opinion expressed in the Fur Clippings Case.

The judgment of the district court is affirmed.

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BALDWIN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 59.

CUSTOMS DUTIES — UNDERVALUATION — CONSIGNEE — LIABILITY OF CUSTOMS BROKERS.

Customs Administrative Act June, 1890, § 1, provides that merchandise imported in the United States shall, for the purpose of the act, be deemed the property of the one to whom it is consigned, but that the holder of any bill of lading consigned to order, and indorsed by the consignor, shall be deemed the consignee thereof. *Held*, that where merchandise is consigned to customs brokers for another, who is the owner, the brokers, having presented the invoice, made the entry, and received the goods, are liable for additional duties assessed because of undervaluation.

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against Austin P. Baldwin and others to recover customs duties. From a judgment for the United States (107 Fed. 104), defendant brings error.

The action was brought to recover $285.58, balance of regular duties, and $706 as additional duties, under the provisions of section 7 of the customs administrative act, as amended by section 32 of the tariff act of 1897. Plaintiffs in error are partners engaged in business as forwarding agents and custom-house brokers in the city of New York. The merchandise in question consisted of a case of dressed furs, and, upon the bill of lading accompanying the same, the said merchandise was stated to be consigned to the defendants for one Frank Norris. Norris was the owner in fact of the merchandise, and defendants had no interest therein, except to perform their duties as agents and licensed custom-house brokers. They entered the goods with the collector, making the declaration prescribed for consignees, importers, or agents, pursuant to the customs administrative act of June, 1890, stating the value at $190, and specifying the said Frank Norris as the ultimate consignee and owner of such merchandise, and at the time of making such entry paid to the collector $38 on account of duties. The goods were duly appraised at $1,412. Forfeiture proceedings were instituted. No person appeared, intervened, or made claim. The goods were decreed forfeited, and were sold, and proceeds covered into the treasury. Action was brought in this court, as above stated, to recover regular duties, and also additional duties for undervaluation; recovery for such additional duties being asked only up to one-half the valuation, viz., $706. Plaintiff had judgment for the full amount.

Arthur M. King, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. Most of the questions raised on this appeal are the same as those decided in Gray v. U. S., 113 Fed. 213, the opinion in which is handed down herewith. Defendants contend that they are not liable as consignees, that they were merely forwarding agents and brokers, and that the consignee to whom the government must look for regular or additional duties is the "ultimate consignee" only.

The first section of the customs administrative act reads as follows:

"That all merchandise imported into the United States shall, for the purpose of this act, be deemed and held to be the property of the person to

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whom the merchandise may be consigned; but the holder of any bill of lading consigned to order and indorsed by the consignor shall be deemed the consignee thereof," etc.

The government is not called upon to hunt up any ultimate consignee, when there is a primary consignee to whom the goods are sent, and who himself presents the invoice, makes the entry, receives the bill of lading, and gets the goods; thus being himself their "importer." Knox v. Devens, 5 Mason, 482, Fed. Cas. No. 7,905. In U. S. v. Bevan, Crabbe, 324, Fed. Cas. No. 14,588, referred to in defendants' brief, apparently there had been no consignment to the persons sued.

The judgment of the district court is affirmed.

DODGE v. DICKSON MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 4.

1. SALES—MANUFACTURED ARTICLES—IMPLIED WARRANTY.
   Where a vendee has ordered an article of a manufacturer for a particular purpose, and has had the opportunity of inspecting it during the manufacture, and relies on his own judgment, there is no implied warranty against latent defects.

2. SAME—ACCEPTANCE—WAIVER OF DEFECTS—EVIDENCE.
   A contract for the manufacture of a motor required the purchaser to furnish an inspector to pass on all workmanship, with power to reject such as should not conform to the agreement, and to signify acceptance before removal from the factory. Such purchaser, while claiming a failure to complete the contract in the time limited, and after his inspector had complained of defects in the construction and refused to accept the motor, accepted it in its condition, in order to get possession. The manufacturer subsequently sued for the contract price, and for extra work outside the contract. *Held*, that it was proper to exclude evidence as to the character of the tests made at the factory, for the purpose of showing their incompleteness, and, as to tests made after delivery, to show that alleged defects were such as not to be discernible until the motor was used, since the purchaser, by acceptance, waived the right to insist on a further test.

3. SAME—ACTION FOR PRICE—PRIMA FACIE CASE.
   The contract price for the construction of a motor was not to exceed $4,000; and the manufacturer, in an action for the price and for extra work, showed that, after the motor was shipped, it sent the purchaser bills aggregating more than $4,000, and for extra work, and that the purchaser, having received and retained them, subsequently inclosed a statement of independent counter charges, which admitted the items for $4,000, and $388.68 for extras. *Held* sufficient to make a prima facie case for the aggregate of such items, since the claim by the purchaser that he was entitled to items in his claim did not affect his admission of the correctness of the manufacturer's charges.

In Error to the Circuit Court of the United States for the Southern District of New York.

Waldo G. Morse, for plaintiff in error.

Hamilton Wallis, for defendant in error.

Before WALLACE, Circuit Judge, and TOWNSEND, District Judge.

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TOWNSEND, District Judge. This cause came here upon appeal from a judgment of the circuit court, Southern district of New York, entered upon a verdict in favor of the defendant in error, which was plaintiff below. The action was brought upon a contract to recover for machinery manufactured by plaintiff, and for extra work, labor, and materials outside of said contract. The defendant set up by counterclaim charges for materials furnished, and for expenses and damages by reason of imperfect work and failure to complete the contract within the time specified. The proposal contained in the following letter was accepted by defendant, and states the contract between the parties:

"New York, Feb. 15th, 1898.

"Arthur P. Dodge, Esq., 27 William Street, New York City—Dear Sir: We will build for you one of your class C, double truck, 8"x12" cylinder, motor cars, according to your plans, patterns, and specifications.

"I. We will furnish all labor and material, excepting as provided in paragraph II. below, at actual cost to us, plus 35% for superintendence, fixed charges, etc.; material furnished by us to be weighed as received by us from the manufacturers, or from our own forge and foundry. We will furnish you promptly with time cards showing the amount of work done by our workmen as the work progresses on the motor, as well as bills for all materials purchased by us, together with the weight of the same.

"II. We would not make the car body or furnishings, but would prefer to have you furnish material and build the same, to be delivered to us at our factory; and we will do whatever work is necessary to be done in connection with the completion of the motor car. You are at liberty to furnish the steel castings and condenser.

"III. We will agree to push the work of constructing the motor as fast as consistent with the furnishing of satisfactory materials and workmanship, and we estimate that we can complete it within two months from receipt of the necessary drawings and patterns. We will agree to complete the construction of the motor in accordance with drawings, specifications, and patterns, materials or parts, furnished us by you, within that time, provided no changes are made therein by you, or per your instructions, and that we are not delayed by failure on your part to furnish same to us as required for getting out the work, and also provided we are not delayed by strikes of workmen, or other causes beyond our control.

"IV. The payment for this motor to be as follows: On the above basis, and the total amount not to exceed four thousand (4,000) dollars for the completed motor, exclusive of the car body and furnishings; the same to be paid in full within three months after the acceptance of the completed motor; such acceptance to be based on your approval of materials and workmanship, as per drawings, specifications, and patterns, parts or materials, furnished by you, and to be given by you to us within ten days after the completion of the motor by us in accordance with such drawings, patterns, specifications, parts, and materials, and before the motor is removed from our works; this payment to be guarantied to us by the Metropolitan Trust Company of the City of New York, or otherwise satisfactorily secured.

"V. In view of the special nature of the work, we should require that you have an inspector at our works during the construction of the motor, who shall be competent and authorized by you to pass upon all materials and workmanship as the work progresses, and he shall have the right to reject all such as shall not be in accordance with this agreement.

"Awaiting your early acceptance, we are,

"Very truly yours, The Dickson Mfg. Co.

"Per ———."

In accordance with the provisions of this contract, the defendant sent Hodges, one of its employés, to plaintiff's factory; and he

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remained there during the whole progress of the work, inspecting the materials and workmanship. The correspondence between the parties shows that he was a representative of defendant, such as was provided for in said contract. During this time he made frequent complaints to plaintiff, alleging unreasonable delays in the progress of the work, and imperfect materials and defective workmanship. After the working parts of the machine had been put together, it was connected with steam power and tested in the presence of Hodges and another representative of defendant. Plaintiff then presented to Hodges a paper stating that he (Hodges) accepted the work and approved the bill, and plaintiff refused to ship the machine until Hodges should sign said paper. Hodges declined to sign it, stating that the work was poor, and the bills were not in a condition to be approved. Plaintiff then wrote defendant as follows:

"New York, May 31st, 1898.

"Arthur P. Dodge, Esq., Lords Court Building, New York—Dear Sir: Your representative at Scranton refused to-day to accept the motor car which we have built for you, and also said he was not in a position to approve the bills therefor. Of course, as it is a part of our agreement that we have such acceptance and approval before shipment of car from our works, we are holding it.

"Yours truly, The Dickson Mfg. Co.,
"Per H. J. Davis."

Plaintiff replied as follows:

"June 1st, 1898.

"Dickson Mfg. Co., 40 Wall Street, New York City—Gentlemen: Your letter of 31st ult. just received, and I note that you say that my 'representative at Scranton refused to-day to accept the motor car which we have built for you,' etc. Mr. Hodges, my representative, writes me this morning that you refused to allow the car to be shipped after it was loaded, unless he would not only accept and approve all of the work and material, but would approve of your bill for the same, which account has not yet been presented or even made out, and which could not be approved, certainly, before presentation. There is nothing in our contract that requires the approval of your bills before you deliver to us the result of your work and material. All that we are required to do is to accept the work and material when ready to be delivered to me. Hence I hereby accept and approve of all the material and work as placed upon the car ready for shipment to Wilmington to-day, in accordance with our contract of February 15, 1898, and now request that you telegraph to have the car shipped to Wilmington at once. Whenever you have your account ready, together with the time cards, &c., I shall be very glad to receive the same, and will then consider the correctness of the account. Awaiting your prompt reply, I am,

"Very truly yours, Arthur P. Dodge."

The motor car was then shipped to Wilmington in accordance with said request.

Plaintiff further showed that it had supplied extra work and materials upon the order of said Hodges, and that on June 2d it rendered to defendant a bill for $4,000 for said motor, and for $936.59 for extra work.

On August 12, 1898, defendant sent a letter and statement to plaintiff, the material portions of which are as follows:

"August 12, 1898.

"Dickson Mfg. Co., 40 Wall Street, City—Gentlemen: The total for the 'completed motor,' exclusive of the car body and furnishings, it is agreed

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by the terms of your contract of February 15th, 1898, with me, is not to exceed $4,000. From this $4,000 should be deducted such bills as I have paid, which make up the cost of the 'completed motor.' * * * Inclosed find a statement showing what I make the balance due you to this date, viz., $1,377.31.

"Yours very truly, Arthur P. Dodge."

"Statement of Cost of Car No. 5.

1898.			
June 30. See Pusey & Jones Co.'s bill for labor and materials at Jackson & Sharp Co.	$ 64 67		
July 7. do do	25 42		
July 20. do do	17 68		
		$ 107 77	
July 26. See Jackson & Sharp's bill extra work		1,637 66	
Mar. 28. Paid Abendroth & Root Mfg. Co. for condenser		491 31	
Mar. 25. Paid Penn Steel Casting & Machry. Co. for castings used in the car		207 60	
April 9. Paid Crosby Steam Gauge & Valve Co.		6 00	
July 5. Paid C. C. Jerome Packing Co. for packing		40 00	
Dr. Dickson Mfg. Co.		$2,490 34	
Cr. Dickson Mfg. Co. as per contract		$4,000 00	
Cr. Dickson Mfg. Co. as per bill of extras April 1, 1898		388 68	
		$4,388 68	
Less Dr. Dickson Mfg. Co. as above		2,490 34	
		$1,898 34	
Less additional charges:			
Labor and attendance in moving motor from Babylon, L. I., to Chesterfield, Mich.	$111 54		
Say same amount of cost in returning motor to Babylon, L. I.	111 54		
Freight on motor from Babylon, L. I., to Chesterfield, Mich.	141 90		
Say same amount for returning motor	141 90		
Paid boiler inspector at Detroit, Mich.	5 00		
June 13. Additional charge for insurance on motor and boiler at New Baltimore, Mich.	9 15	521 03	
Amount due Dickson Mfg. Co.		$1,377 31"	

The court charged the jury that the plaintiff, on this evidence, had made out a prima facie case for $4,388.68; that defendant, by its inspection and acceptance, had waived its right to object to defective materials and workmanship, and to charge for putting said motor car in condition in which it would work properly.

The defendant relies upon the rule that in a contract by a manufacturer there is an implied warranty of good materials and skillful workmanship, and, where the manufacturer is notified that the article is to be manufactured for a particular purpose, there is an implied warranty against latent defects arising in the process of manufacture which would render it unfit for the purpose stated. But defendant has failed to note the exceptions that, where a known and described article is thus ordered for a particular pur-

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pose, there is no warranty that it shall answer the particular purposes intended by the buyer, where the manufacturer actually supplies the thing ordered (De Witt v. Berry, 134 U. S. 306, 313, 10 Sup. Ct. 536, 33 L. Ed. 896; Seitz v. Machine Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837), nor where the buyer relies on his own skill or judgment. The foundation of the doctrine of warranty is the responsibility of a vendor for deception. Hoe v. Sanborn, 21 N. Y. 559, 78 Am. Dec. 163. Hence, where a vendor is a manufacturer, and the vendee has ordered an article for a particular purpose, and has not had an opportunity of inspecting it during the manufacture, the vendor is presumed to have had knowledge of latent defects produced by the process of manufacture, and must be held liable therefor. Bridge Co. v. Hamilton, 110 U. S. 108, 114, 3 Sup. Ct. 537, 28 L. Ed. 86; Bierman v. Mills Co., 151 N. Y. 482, 490, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 635. But where the vendee has an opportunity of inspection, and relies on his own judgment, there is no presumption of deceit, and no warranty is implied. Cunningham v. Hall, 4 Allen, 273, 274.

The defendant contended that under the written contract, Exhibit A, it was entitled to demand a final test of the completed motor at plaintiff's works, in order to determine its fitness for the purpose desired, and that inasmuch as it was incomplete when it was shipped to Wilmington, Del., the defendant had the right to make said final test at Wilmington; that the acceptance of the motor at plaintiff's works was only an acceptance of such material and workmanship as was there capable of determination, but that there was an implied warranty against latent defects which survived such acceptance; and that the question of compliance with said warranty could only be determined by such final test at Wilmington. In support of this contention, the defendant, upon the trial, offered evidence of the character of the tests made at Scranton, for the purpose of showing that such tests were necessarily preliminary and incomplete, because, inter alia, the parts necessary to a complete motor car had not been assembled; and of the character of the tests made at Wilmington, in order to show that the alleged defects were such as not to be discoverable until the body of the car was mounted upon and connected with said machinery. The court excluded this evidence on the ground that defendant, by its letter of June 1st, had expressly accepted the motor in its then condition at Scranton, and had thereby waived its right to insist on a further test. On May 10th the defendant had written to the plaintiff as follows:

"I believe that, by the terms of our contract, we were to inspect and accept at your works in Scranton the work you are constructing for us, when you say it is ready therefor, if found correct. By reason of the great delays, and for other reasons, it seems to be desirable that we go to the additional expense of shipping such work, namely, the trucks, boilers, condensers, etc., from Scranton to the Jackson & Sharp Co., at Wilmington, Delaware, for erection. I wish to ask if you will be willing to so modify our contract as to permit of such testing and acceptance by us after they shall reach the shops of Messrs. Jackson & Sharp, instead of at your own works, as previously arranged."

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Plaintiff did not consent to this modification. Its only reply was contained in said letter of May 31st, where, after stating the refusal of the inspector to approve and accept, it says:

"Of course, as it is a part of our agreement that we have such acceptance and approval before shipment of car from our works, we are holding it."

Under the original agreement, defendant was to furnish his special inspector to pass upon all material and workmanship, with power to reject such as should not conform to said agreement; to build the car body and furnishings, and deliver the same to plaintiff at its factory, the plaintiff doing there whatsoever work might be necessary for the completion of the motor car; to pay after acceptance of the motor thus completed, such acceptance to be based on his approval of materials, workmanship, etc., according to the drawings, etc., furnished by defendant, and to be signified before the motor should be removed from plaintiff's works. Even if defendant, under his original agreement, might have claimed a further test, such right was waived by the subsequent acts and correspondence. Three months and a half after the making of the agreement, defendant, while claiming that plaintiff had failed to complete the contract within the time limited, and after his inspector had complained that there were serious visible defects in the construction of the motor, and after having learned from plaintiff that said inspector had refused to accept said motor, and after having failed to furnish the car body as agreed, the presence of which defendant admits was necessary to finally test the fitness of the motor, writes to plaintiff in response to its refusal to ship before acceptance as follows:

"All that we are required to do is to accept the work and material when ready to be delivered to me. Hence I hereby accept and approve of all the material and work as placed upon the car ready for shipment to Wilmington."

It cannot be said that plaintiff impliedly consented to a further test at some other factory, or that the alleged implied guaranty survived and was imported into the new contract. On the contrary, the correspondence shows that both parties understood the limitations of the original contract, and the effect of such modification. The defendant had the right to refuse to accept and approve said motor, provided it was not completed within the time limited, or because of defective workmanship and material. He might have had the right, if he had furnished the car body, to insist upon a final test of the completed motor car. He did none of these things, but elected to waive his rights, under conditions known to him, and to accept and approve what his inspector had refused to accept and approve, in order that he (the defendant) might obtain possession of the motor. There was no error in the exclusion of said evidence.

The defendant further contends that the court "erred in holding that there was sufficient proof of the value in the theory of the account stated." The facts in regard to this exception are as follows: The agreement provided that the total amount of payment for the motor should not exceed $4,000. The plaintiff claimed that the cost of the motor to it, plus the agreed manufacturer's profit, exceeded

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$4,000. Instead of showing the cost of labor and materials, it proved that, shortly after the motor was shipped to Wilmington, it sent to defendant bills for the motor aggregating more than $4,000, and for extra work aggregating $936.59, and that defendant, having received and retained them, made no response until August 12th, when he wrote plaintiff, inclosing a statement of independent counter charges made by him, which statement and letter credited and admitted the $4,000 item for car "as per contract," and $388.68 of plaintiff's bill for extras. Thereupon the court charged the jury that in these circumstances, and upon defendant's admission that the $4,000 limit had been exceeded by said bills, and the concession of the $388.68, the plaintiff had made out a prima facie case for $4,388.68. The defendant contends that "the whole statement or admission must be submitted,—both the favorable and unfavorable parts." The whole of said statement was admitted in evidence and submitted to the jury, except certain items for additional work to put the car in working condition, which were excluded on account of the acceptance by defendant already considered. The different parts of said account have no such connection that the admission of the amount due by defendant should entitle him to an allowance of the counter charges. The claim by defendant that he was entitled to the items therein in no way affects the admission of the correctness of plaintiff's charges.

The judgment is affirmed.

THE AUREOLE.

(Circuit Court of Appeals, Third Circuit. January 15, 1902.)

1. COLLISION—OVERTAKING VESSELS.
Evidence considered, and *held* to show that a collision between two steamships, one of which had overtaken and was passing the other in the Delaware river at a place where the water was shallow as compared with the draught of the vessels, was due to the fault of the overtaking vessel in passing too close to the other, so as to create a suction which caused the overtaken ship, which was the smaller of the two, and had slowed to half speed, to deviate from her course and draw against the other.

2. SAME.
Where an overtaking steamship is passing too close to another, so as to create danger of a collision, the latter is justified in slowing, or even in reversing, so as to shorten the time of passing, and such action cannot be charged as a fault by the overtaking vessel in case of collision.

3. SAME—CAUSE OF COLLISION—SUCTION.
The force called "suction," exerted by one vessel on another, due to the creation of currents by a moving vessel, and the effect of which is apparently greatest when a larger and faster vessel is passing another moving in the same direction in shallow water and a narrow channel, has been recognized in many cases by courts of admiralty; and a court is not justified in refusing to consider it as a cause in a case of collision between two steamships, one of which had overtaken and was passing the other in a river at a distance of not more than 75 to 100 feet, and where, under the evidence, it appears that the overtaken vessel, though with her helm hard a-port, suddenly sheered to port, and struck the other after the latter had nearly passed.

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Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

J. Parker Kirlin, for appellant.
Henry R. Edmunds, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a final decree in admiralty of the district court of the United States for the Eastern district of Pennsylvania (103 Fed. 699), made August 3, 1901, awarding to the libelant the sum of $21,986.05 for damages sustained by the steamship Willkommen in a collision with the steamship Aureole. The collision occurred on January 13, 1898, at about 2 p. m., in the Delaware river, between Pennsville and Newcastle. The Aureole is a British tank steamer, 345 feet long and 46 feet in the beam, and was outward bound with a cargo of crude oil in bulk, taken on at Marcus Hook, about 15 miles up the river from where the collision occurred. Her draught was 25 feet aft and 23½ feet forward. The Willkommen is a German steamer, 325 feet long, 41 feet in the beam, and was also outward bound with a cargo of like kind. Her draught was 24 feet 3 inches aft, and 22 feet 5 inches forward. Both ships were in charge of regularly licensed Delaware Bay pilots. Both ships had weighed anchor at about noon on January 13th, and proceeded down the river in charge of their pilots. The Willkommen, starting first, had proceeded about a mile on her voyage before the Aureole left her anchorage grounds at Marcus Hook. The Aureole is the faster of the two vessels, and overtook the Willkommen at deep-water point, about eight miles from Marcus Hook, but, owing to a tow of barges then in the channel, was unable to pass the Willkommen until both vessels had hauled up on the deep-water-point range; the Aureole following in the wake of the Willkommen on the last-named range for nearly a mile, when she hauled out to the eastward to pass the Willkommen on the latter's port side. On this reach of the river, it appears from the evidence, as well as from the chart of these waters, made an exhibit in the case, that there was ample room for vessels to pass each other. According to the testimony of the pilot for the Willkommen, he ran the deep-water-point ranges a little open to the eastward; that is to say, it put his ship a little to the eastward of the range line. No whistles were blown by the Aureole as a signal that she intended to pass, and no signals were given by the Willkommen. No point is made of this, however, as both the pilot and the captain and the other officers of the Willkommen observed the Aureole hauling off to pass, and understood that she was about to do so. About the time that the stem of the Aureole lapped the stern of the Willkommen, the captain of the Willkommen was aft on the lower deck of the ship. He testified that he watched the Aureole, and knew what she was about to do, and that he waved his handkerchief to her captain, receiving a similar salute in return; that he then immediately went upon the bridge, where, besides himself, were the pilot and the first and second officers, and a competent and experienced man at the wheel. All the direct evidence tends to show

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that all were attentive to their duties; the second officer standing near the man at the wheel to see that the orders of the pilot were properly carried out, the first officer standing near the telegraph signal to the engine room, and the pilot watching the course of the ship.

Upon the Aureole, the captain, pilot, and third officer were on the bridge, with a competent man at the wheel. All of them testified that they were attending to their duties and watching the ship. There is nothing in the testimony to convict the pilot or officers on either ship of unskillfulness or inattention, except the collision itself. The officers and men all testified strongly in favor of their own ships, respectively, and there is much variance in their testimony as to the facts and circumstances attending the collision. All the witnesses on the Aureole testify that, when she approached the Willkommen to pass, she was about 300 feet away, or about the ship's length away, and that while she was passing they continued at that distance apart on parallel courses, until the stern of the Aureole was about the bridge of the Willkommen, or between that and her fore rigging, when the latter ship suddenly sheered towards the Aureole, striking the Aureole with the bluff of her port bow, about 35 feet from her stern. The testimony, on the other hand, of those on board the Willkommen, as to the distance the ships were apart when the Aureole was passing, puts it, some at 150 feet; others, including the captain and pilot, at from 100 to 75 feet. The pilot of the Willkommen testifies (and there is no contradiction of his testimony) that before the Aureole's bow was opposite to the Willkommen's bridge he ordered the wheelsman to port the helm. He says he did this because he saw the Aureole was coming too close. When the Aureole's bow got abreast of his bridge, he says, he told the captain to slow the ship down to half speed, and that when her stern got somewhere about halfway between the Willkommen's fore rigging and the bridge he had the engine stopped; that he then asked the question if the wheel was a-port, and the chief officer replied that it was hard a-port; that he then went and looked himself, and found that it was so; and that the Aureole was at that time about 75 to 100 feet away. He also testifies that, when the Aureole's stern got forward of his bridge, her helm was either ported, or else the ship took a sheer towards him. The pilot of the Aureole, on the other hand, testifies that, when he got squared down on the deep-water-point range, he gave the wheelsman, as a point to steer by, the end of the jetty pier, a mile or two ahead, and which extended about three-quarters of a mile out from the eastern shore; that, when he came abreast of the Willkommen, the ships were about a ship's length apart, which would be something more than 300 feet; that the ships continued in parallel courses until the stern of the Aureole was ahead of the bridge of the Willkommen. He says that the first intimation he had of any danger was the captain's calling his attention to the Willkommen, and that when he looked she was taking a sheer over towards the Aureole; that she came at an angle of three or four points off the course on which she had been going. It may be noted here what the pilot of the Willkommen says in regard to the position of the pilot and captain, when their bridge was abreast

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or a little ahead of his, in accounting for the Aureole slanting across his bow:

"Q. What was the reason, do you suppose, of the Aureole attempting to cross your bow in this slanting way? A. The only reason that I can see, the pilot must have thought he was a little too far to the eastward. He had his wheel a-port and gave the man a mark ahead to steer at, I guess, and went on the port side of the bridge,—he and the captain both. Q. Did you see them on there? A. I could not see them. They were behind the wheel house. Q. If they had been on the starboard side of the bridge, would you have seen them? A. Yes, sir. Q. You saw everybody else, did you? A. I did not see anybody. Q. On the bridge? A. Not a soul, because the man at the wheel was in the wheel house, and the captain and pilot were on the port side of the bridge, right behind the wheel house. It was right in range of us, and I never saw them until we caught the suction. Then the pilot walked on the starboard side of the bridge first, and saw it right away; and that is when I suppose they must have starboarded the Aureole's wheel, because the captain came right across as fast as he could get there. The next I saw of him, he was aft of the pilot house, throwing his hands and hallooing. That was just before we struck. Q. Your idea, then, is that he was attempting to get back into deep water from the eastern side of the channel with the Aureole? A. No, sir; he had fully as good water as we had,—if anything, better, maybe. He wanted to get ahead of us, and hauled down on a line, and maybe thought he was a little further to the eastward than he wanted to be, I suppose; but, if the pilot and captain of the Aureole would have been on the starboard side of the ship's bridge when they got to our fore rigging, then they could have seen how close they were. Q. You are sure there was nobody on the starboard side of their bridge? A. No, sir; not when she got forward of our beam. Q. You mean there was not anybody there when you say, 'No, sir'? I asked you whether there was or was not anybody on the starboard side of the bridge? A. Not when she got forward of our beam. Q. Did you at any time see anybody on the starboard side of their bridge until after they got forward of your beam? A. Yes, sir; before they got up abeam of us they were on the starboard side of the bridge. Then when they got up abeam of us they walked on the port side of the bridge. Q. Then, when they got forward of the bridge, they were not there? A. No, sir. * * * Q. What is your theory of this collision? How do you say it occurred? A. The ships came too close, and we took her suction and drawed right together."

The testimony of the pilot of the Aureole, as well as that of the captain, seemed to confirm this statement, in so far that they were not in a position, when the stern of the Aureole had just passed the bridge of the Willkommen, to observe the latter vessel, by reason of the intervening pilot house of the Aureole. The pilot of the Aureole, as well as the wheelsman and officer on the bridge, testified that the Aureole was kept straight on her course, and did not go to starboard until she was struck by the Willkommen. The Willkommen struck a glancing blow upon the starboard quarter of the Aureole about 35 feet from the stern. The wind was blowing fresh from the northwest, which would be on the starboard bows of both ships, and the set of the flood tide was also somewhat against the starboard bows. The Willkommen and Aureole coming together in the manner described, the collision must have been caused either by the Aureole sheering to starboard at an angle that would take her across the Willkommen's bows (and the pilot and officers of the Willkommen testified that this did occur), or the Willkommen, from faulty steering or from some other cause, turned from her parallel course towards the Aureole. The pilot

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and officers of the Aureole emphatically deny that the former was the case, and say that they observed the Willkommen, after the stern of the Aureole had passed her bridge, sheering at an angle towards the Aureole. Nothing could be more emphatic and specific than the testimony of the pilot, wheelsman, and first and third officers of the Willkommen as to the correct steering of their ship. The third officer testified that he stood near the wheel for the purpose of watching the direction of the indicator,—to see that the wheelsman obeyed the orders of the pilot. The pilot says that he was steering on the ranges, having them open a little to the eastward, and had given the wheelsman a clump of trees on the western shore to steer by. These were evidently the trees spoken of by the wheelsman, and about which, in his imperfect command of English, there was some confusion when he spoke of them as on the eastern shore. As the river, shortly ahead of the ship, turns sharply to the southeast, which was the eastern bank might for the moment be mistaken by a man unacquainted with the locality.

Counsel for respondent dwell much upon the fact that the wheelsman of the Willkommen, under cross-examination, said that, some two minutes before the stem of the Aureole came opposite to the bridge of the Willkommen, he had a starboard helm of about an inch on the indicator. This was afterwards sufficiently explained by the testimony that, as a matter of common knowledge among seamen, in steering a ship upon a straight course the wheel is never at rest, and is constantly moved a little a-port or a-starboard, to meet and counteract the sheering of the ship one way or the other. At all events, the testimony is positive, and as specific as human testimony can be, that the ship was kept upon her course parallel with the deep-water-point ranges, until just before the collision. The pilot of the Willkommen then says that, with his wheel hard a-port, the ship slowed down, and, with the engine stopped, she took a sheer to port, which immediately brought her in contact with the Aureole, which had sheered slantingly across the bow of the Willkommen, and thus diminished the distance between the two ships. This sheer of the Willkommen the pilot accounts for by what he calls "suction"; that is, the Aureole, by passing the Willkommen at full speed through shallow water, with so little distance between them, produced a current which drew the Willkommen's bow towards the Aureole with such a force as to overcome the influence of the helm hard a-port. This theory of the pilot of the Willkommen in accounting for the collision seems to us to accord more nearly with the probabilites created by the testimony than any other. Whether the Aureole had sheered to starboard or not, it would seem that the testimony of the Willkommen's officers as to the distance between the two ships is supported by this theory; and the testimony of the pilot and captain of the Aureole, when they suddenly saw the Willkommen coming at an angle towards them, is thereby explained.

On the face of the direct testimony as to the steering of the Willkommen, it is impossible to believe that the collision was caused by any mistake in that respect. She was not steered into the

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Aureole. On the contrary, her helm was hard a-port. To say that the sheering of the Willkommen towards the Aureole was caused by suction does not necessarily contradict the testimony of the Aureole's officers as to the steering of that ship, although it makes necessary the inference that they were mistaken in their estimate of the distance between the two ships during the passing by the one of the other, and just before the collision. If the distance testified to by the captain, pilot, and other persons on board the Willkommen be correct,—that is, that it was not more than 75 or 100 feet, and latterly not more than 50 or 60 feet,—they were near enough to bring the smaller ship and slower ship, going at half speed, within the influence of any suction that might be created by the Aureole going at high speed through shallow water; and we think that it is established that such a thing is likely to occur under such circumstances.

It is claimed by the appellant that if the Willkommen had not slowed down, and afterwards stopped, but had kept at full speed on the course on which she was, the accident could not have happened; that by slowing down, and afterwards stopping the engines, she lost steerage way, and was beyond the control of her helm, against the set of the tide and wind. But the answer to this is that the Aureole was the overtaking ship, and, as such, had the burden placed upon her, by the laws and usages of navigation, of safely passing the slower ship; and, if she passed so close as to create a justifiable apprehension of peril on the part of those navigating the Willkommen, the latter ship would not be responsible for a mistaken judgment produced by such a situation. There is, however, nothing in the record to show that the slowing up of the Willkommen to half speed was an error, or transgressed the rules of navigation referred to. Under the circumstances, it seems to us, as it seemed to the pilot at the time, good judgment to slow up, so as to allow the Aureole the more quickly to pass; and the stopping of the engines just before the collision seems clearly justified by the situation in which the ships were. The pilot and captain of the Willkommen both say that it was necessary to slow and stop, in order to prevent a worse collision. Indeed, the judgment of the captain of the Aureole seems to have agreed in this respect with that of the pilot of the Willkommen, for the captain testifies to a conversation with Mr. Marshall, the pilot on the Willkommen, as follows:

"Q. What did you say? A. A very few words. Q. Tell us what they were. A. My words were these: 'Tom, why did you not slow that ship down when we were passing her?' He said: 'I did; I went half speed. I went slow. I stopped her, and I went back on her.' I said: 'How do you account for this collision?' 'Suction.' I said: 'Impossible!' I said no more."

Another fact which seems conclusive as to the distance between the two ships being much less than that testified to by those on board the Aureole is that, with the stern of the Aureole abreast the bridge of the Willkommen, or between that and the fore rigging, it would have been impossible for the Willkommen, going at half speed, to have overtaken the Aureole, going at full speed, so as to

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strike her an angling blow at a point 35 feet from the taffrail, if 300 feet or more had separated them. And to this effect is the testimony of the pilot of the Willkommen:

"Q. If your vessel's bow was opposite the bridge of the Aureole, and you were going full speed and the Aureole full speed, and you were 300 feet away from each other, would it have been possible for you to have touched her? A. We never would have caught her. Q. You could not have caught her, even if you had changed your helm to go that way? A. No, sir; because, even taking us going half speed, we were not going over four miles an hour, —between four and five,—and the Aureole was going ten. She was going just twice as fast. We never could have caught her at that distance apart."

The direct testimony of no witness contradicts this opinion of the pilot of the Willkommen.

An attempt was made by the respondent to throw doubt upon, if not to deny, the existence of such a force as suction when ships are passing each other at full speed. The engineer of the Aureole testified that he had passed ships in the Seine much closer than he had passed the Willkommen, without any danger, and never knew one of them to sheer. He did not say, however, whether he had passed them going in the same direction, nor did he speak as to the depth of the water. The captain says that they were not passing close enough for suction to have had any influence on the Willkommen if she had kept her proper course. His statement seems to recognize, however, the possibility of such a thing as suction. Pilot Maull, of the Aureole, says he never had any experience that would enable him to form an opinion as to whether there was any such influence between passing vessels as suction, although he admits that he has heard of such a thing. Taking as true the facts testified to as to the steering and management of the ships while the Aureole was passing the Willkommen, and the preponderating weight of the evidence that the ships were much nearer than 300 feet, some other force or influence than the steering must be resorted to, to account for the sheering of the Willkommen towards the Aureole. Pilot Maull says that this force or influence is what he calls "suction," produced by the passing of the Aureole at high speed through shallow water close enough to the Willkommen to produce the effect. That such a force can be created, under the circumstances which we think probably existed in this case, seems to have been generally, if not universally, recognized among those experienced in the navigation of ships in the shallow waters of rivers and bays, and has been accepted as sufficiently proved in a number of adjudicated cases. The strength of this force undoubtedly will differ according to the locality, and is largely affected by the depth of water and the width of the channel through which the ships are passing. It seems to be established that this power or influence called suction is much greater and more dangerous when one vessel is passing another going in the same direction than when they are going in opposite directions. The Alexander Folsom, 3 C. C. A. 165, 52 Fed. 403; The City of Cleveland (D. C.) 56 Fed. 729. In the latter case the court says:

"The suction of two vessels passing each other in different directions is not very powerful. It is too short to have any particular effect upon the

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action of the two vessels unless one is much larger than the other; whereas, if they are going in the same direction, and passing near each other, it has a more powerful effect to deflect the weaker vessel from her course."

The General William McCandless, 6 Ben. 223, 226, Fed. Cas. No. 5,321; The Mariel (D. C.) 32 Fed. 103.

The case of The City of Brockton (D. C.) 37 Fed. 897, is, on its facts, much like the present case. That was a case in which the Brockton, being the faster ship, was following the J. C. Hartt in the channel near Sandy Hook, and, overtaking her, attempted to pass her on the starboard side. The Brockton averred that she was passing at a safe distance, 250 feet away from the Hartt, but that, after her pilot house had passed the bow of the Hartt, the Hartt changed her course, which caused her bow to collide with the stern of the Brockton. The Hartt, on the other hand, averred that the Brockton was passing too close for safety, and several witnesses on board of her at the time testified that the ships were not more than 75 or 100 feet apart. The court thought this the more correct estimate of the distance between them. The court, after referring to the testimony of the sudden lurch or sheer by the Hartt towards the Brockton, says:

"Such language does not describe a change of course effected by the rudder, but points strongly to the presence of some other force outside of the Hartt, to which her change of course should be attributed. And such a force was present, namely, the force of currents created in the water by the powerful action of the Brockton's wheels driving so large a vessel through the water at high speed. Currents of water more or less strong are necessarily created by a vessel like the Brockton moving at high speed. They will differ according to the locality, and are largely affected, no doubt, by the depth of water. There is evidence that their power is increased when two vessels of about the same speed are passing each other. What the depth of water or the configuration of the bottom was at the place where the Brockton's wheels approached the bow of the Hartt is not proved. But the extent and power of the current actually created by the Brockton seems to me to be shown by what the Hartt did as the wheels of the Brockton neared her bow. * * * As it seems to me, therefore, the testimony given by the witnesses called in behalf of the Brockton warrants the conclusion that the change of course on the part of the Hartt testified to by Mr. Adams and Mr. Choate, and to which they attribute the collision, was not caused by the fault of the Hartt in porting her helm, as charged in the Brockton's pleadings, but was caused by the fault of the Brockton, charged in the Hartt's pleadings, namely, either by her sheering across the Hartt's bows, or 'that she did not come up to the starboard side of the Hartt at a sufficient distance from the Hartt to pass in safety.'"

This and the other cases above referred to, judicially recognizing the existence of the force called "suction," and its power, under favoring circumstances, to draw one vessel towards another, cannot be disregarded by this court in considering the denial on the part of the appellant that such a force can exist or be operative,—a denial for which there is no support, except in the testimony of the captain, pilot, and engineer of the Aureole that they had had no experience of such a force.

We are of opinion in this case that the sheering of the Willkommen towards the Aureole just before the collision was not caused by the steering of the Willkommen; for the evidence is clear that her helm was not a-starboard, except in the temporary adjustment

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thereof in steering a straight course, while the Aureole was passing, and was put hard a-port some time before the collision. Such being the case, we are of opinion, also, that the Aureole was passing the Willkommen close enough, under the circumstances of the depth of the water and the set of the tide and wind, to bring the latter vessel within the influence of a force or current known as "suction." In other words, that the Aureole failed in her duty, as the overtaking vessel, to pass the Willkommen at a safe distance. As such overtaking vessel, the burden was upon her to show that the collision was occasioned by no fault on her part, but by some fault or neglect of duty on the part of the Willkommen. Such fault on the part of the Willkommen, in her situation, must have been through so steering with a starboard helm as to turn the vessel from her straight and parallel course towards the Aureole. Of this there is no proof whatever, and to the contrary we have the positive testimony of those on board the Willkommen. As we have already said, we think the weight of the testimony establishes the fact that a suction was produced by the rapid passing of the Aureole too close to the Willkommen, in water that was shallow, when compared with her draught of 25 feet.

The decree of the court below is therefore affirmed.

VILLAGE OF KENT et al. v. UNITED STATES ex rel. DANA.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1902.)

No. 991.

1. VILLAGES—TAX TO PAY INTEREST ON INDEBTEDNESS—OHIO STATUTE.
Rev. St. Ohio, § 2683, provides that a village council "may levy taxes annually, * * * [subdivision 22] to pay interest on the public debt of the corporation and to provide a sinking fund therefor a sum sufficient to satisfy the interest as it accrues annually, to be applied to no other purpose." Subdivision 24 provides that "the council shall determine the amount to be levied for each of the purposes herein specified," and section 2689a limits the total levy to eight mills. *Held*, that the word "may," as used in section 2683, must be read "shall," so far as it relates to subdivision 22, and that the council had no discretion, as against a holder of valid bonds of the village, to refuse to levy the amount required to pay the annual interest thereon, not exceeding eight mills, nor to divert any part of such amount to other purposes, notwithstanding the fact that the remainder of the levy might be insufficient to pay the current municipal expenses of the village.

2. SAME—MANDAMUS TO COMPEL PAYMENT OF INTEREST—DEFENSES.
It is no defense to an action for a writ of mandamus to compel a village to apply so much of such levy as is necessary to pay a judgment recovered against it on interest coupons that such application would leave the village without sufficient funds for ordinary municipal purposes, in view of Rev. St. Ohio, § 2687, which authorizes the levy of an unlimited tax by the village for any authorized purpose by a vote of its electors at a special election which the council is empowered to call.[1]

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[1] Mandamus to enforce payment of judgment against municipality, see note to Holt Co. v. National Life Ins. Co., 25 C. C. A. 475.

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In Error to the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 107 Fed. 190.

This is an action in mandamus. It was brought in the circuit court in November, 1900, by the filing of a petition on the relation of Edward Dana against the village of Kent, Ohio, and its council, clerk, and treasurer. The petition alleged that Dana had recovered a judgment in the circuit court against the village of Kent on certain interest coupons maturing in 1896 and 1897, representing certain installments of interest on 25 bonds, of $1,000 each, issued by the village in 1892, and containing a recital that their purpose was to refund and extend the time of payment of certain general fund bonds theretofore issued, which, from its limits of taxation, the village could not pay at maturity. It appears that there was a sum of little less than $2,500 in the hands of the treasurer of the village, which had been levied for the purpose of paying the interest on the said bonds in each of the years 1892 to 1895, inclusive. An alternative writ of mandamus having been issued, the village, in its answer, set up that said sum of money was on hand, levied and collected as aforesaid, under the supposed authority of the act of April 17, 1891, of the legislature of Ohio, authorizing the village council of any village which at any federal census may have a population of not less than 3,309, nor greater than 3,320, to borrow money and issue bonds for the purpose of making certain improvements; that the village authorities, on discovering said act to be unconstitutional and invalid, had ceased to make any extra levies for the purpose of paying the interest thereon; that said fund was ready to be paid as the court might order. Said sum of little less than $2,500 was ordered to be paid over to the relator, and no controversy is now made about the same. As to making provision for the payment of such part of the judgment as might remain unsatisfied after applying the said fund, the answer alleged, in substance, that, aside from said interest fund, there are no funds in the treasury legally applicable to the payment of said judgment; that Kent is, and for more than 10 years last past has been, a village of the first class, limited by the law of Ohio to a maximum levy for village purposes of eight mills on the dollar; that no vote for increasing the same in accordance with the law has ever been had; that on or before the first Monday in June, 1900, the tax of eight mills was duly levied for that year, and its distribution provided for according to law among the several departments of the village in proportion to their needs, diversion thereof being forbidden by law; that the amount which would accrue therefrom in addition to all other financial resources of the village would fall short of the amount required for the proper maintenance and ordinary and current expenses necessary for carrying on the government of the village; that the revenue of the village arising from such eight-mill levy for the year 1901, the revenue of the village for 1900, and from any and every other source of revenue, will be insufficient to defray the ordinary, current, and necessary governmental expenses of said village for said period; and that no part of said revenues can be diverted for the payment of plaintiff's judgment without preventing the village from meeting its ordinary, current, and necessary governmental expenses. This answer was demurred to. The court sustained the demurrer, and, no further pleading being filed, a peremptory writ of mandamus was issued, requiring the payment to said Dana of said interest fund of little less than $2,500, and the issue of a further peremptory writ requiring the council, at the time of making the annual levy for 1901, to provide in said levy for such amount as would be necessary to pay the balance of the judgment, and to then and there provide for the distribution and appropriation of said tax to the payment of such balance, and to proceed without undue delay to cause said tax to be collected according to law, and the proceeds to be applied to the payment of the balance of said judgment. No objection or exception was taken to the application of said fund on hand. That part of the order relating to the levy and application of the tax for the year 1901, and requiring the payment of the proceeds of such levy on the balance of said judgment, was duly excepted to.

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W. E. Cushing, for plaintiffs in error.
H. H. Harris, for defendants in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The principles which shall control in determining the right of a creditor to have a mandamus against a municipal corporation for the purpose of requiring a tax for the payment of a judgment were fully discussed in a recent case before this court. City of Cleveland v. U. S. (decided at this term) 111 Fed. 341. The opinion of Judge Lurton in that case is so full and comprehensive that we are required to do little more now than to apply the principles therein enunciated to the facts of the case in hand. Judge Lurton said:

"It must, at the outset, be conceded that a mandamus cannot be awarded to compel the mayor and council of the plaintiff in error to levy any tax which they were not authorized to levy by the law of the state from which they derive their powers. The office of such a writ is not to create new duties, but to compel the discharge of those already imposed by the municipal law of the state. In other words, the power to levy the tax which the relator seeks to compel must exist in some legislation, or be plainly implied from some local statute or charter." Carrol Co. Sup'rs v. U. S., 18 Wall. 71, 77, 21 L. Ed. 771; U. S. v. Macon Co., 99 U. S. 582, 591, 25 L. Ed. 331.

Our first inquiry, therefore, is, do the statutes of Ohio confer upon the village of Kent power to levy a tax as the relator seeks to compel it to do for the satisfaction of his judgment? The Ohio statutes necessary to be considered in this connection are sections 2682–2684, 2689a, Rev. St. These sections are as follows:

"Sec. 2682. Rates of Taxation in Cities and Villages for General Purposes. The council of a city or village shall have power to levy, annually, for the general purposes of the corporation, such amount of taxes, on each dollar of valuation of taxable property in the corporation on the tax list, as may be determined upon by it, not exceeding the following rates: In a village, one-half of one mill. In a city of the first or second grade of the second class, one mill. In a city of the third grade, or third grade a, or fourth grade of the second class, two mills. In a city of the first grade of the first class, four and one-half mills. In a city of the second grade of the first class, two mills. In a city of the third grade of the first class, two mills.

"Sec. 2683. Levies for Special Purposes. In addition to the taxes specified in the last section, the council in each city and village may levy taxes, annually, for any improvement authorized by this title, and for the following purposes: (1) For the real estate and right of way for any improvement authorized by this title. (2) For sanitary and street cleaning purposes, and for street improvements and repairs. And in cities of the second grade of the first class, such part of the funds raised for any of these purposes as the council deems necessary shall, upon the recommendation of the board of improvements, be appropriated monthly for keeping in repair the paved streets of such cities. (3) For improving highways leading into the corporation. (4) For wharves and landings on navigable lakes and rivers, and keeping the same in repair. (5) For constructing levees and embankments, and keeping the same in repair. (6) For constructing and maintaining bridges. (7) For improving any water course passing through the corporation. (8) For the erection and maintenance of infirmaries, and support of

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the out-door poor. (9) For the erection and maintenance of workhouses. (10) For erecting, enlarging, or improving corporation prisons. (11) For the erection of houses of refuge and correction, and for the expense of maintaining and administering the same, above the receipts arising from the labor of persons confined therein, such sum as may be necessary to meet the same. (12) For the erection and repair of market houses, and for lighting, watching, and cleaning the same. (13) For erecting, enlarging and improving hospitals. (14) For erecting, enlarging, and improving halls and public offices. (15) For the erection of school buildings, and such rate as may be prescribed by law for schools and schoolhouse purposes. (16) For the erection of buildings required by the fire department, the construction of reservoirs, the purchase of steam or other fire engines, and other apparatus, and for keeping the same in repair, and for the support of the fire department. (17) For erecting, enlarging, and improving water works, and for supplying the corporation with water. (18) For erecting, enlarging, and improving gasworks, and for lighting the corporation. (19) For grounds for cemeteries and park purposes, inclosing, improving, embellishing, enlarging and keeping the same in repair. (20) For the construction and repair of sewers, drains, and ditches; and where the corporation is divided into sewer districts the levy shall be by such districts. (21) For the payment of the marshal and police authorized by this title. (22) To pay the interest on the public debt of the corporation and to provide a sinking fund therefor, a sum sufficient to satisfy the interest as it accrues annually, to be applied to no other purpose. (23) For the purpose of keeping and maintaining a free public library and reading room; but no tax shall be levied for this purpose unless a suitable lot and building therefor, supplied with library furniture and fixtures, shall first be donated or leased to, or rented by the corporation. (24) The council shall determine the amount to be levied for each of the purposes herein specified, and such part thereof must be placed on the tax list and collected annually, as it shall by ordinance prescribe.

"Sec. 2684. Construction of Limitations. The limitations contained in section twenty-six hundred and eighty-two shall not be construed to prohibit special assessments for improvements provided for by this title, nor the levy of a tax to raise means for the payment of the principal and interest of the debts of the corporation, nor of any tax authorized by law for special purposes."

Section 2689a contains a general provision as to villages of the first class in Ohio,—that the aggregate of all taxes levied or ordered by such village, including the levy for general purposes above the tax for county and state purposes, and excluding the tax for school and school-house purposes, shall not exceed in any one year eight mills.

The plain reading of this section of limitation, as well as the construction put upon it by the supreme court of Ohio, makes it applicable to all village taxes, general and special, and requires that they shall be kept within the limit of eight mills on each dollar of the value of the property as valued for taxation on the county tax list. State v. Humphrey, 25 Ohio St. 520; State v. Strader, 25 Ohio St. 527; Cummings v. Fitch, 40 Ohio St. 56; City of Cleveland v. Heisley, 41 Ohio St. 670. The relator in this case does not seek to require a levy exceeding eight mills for municipal purposes. The contention is that out of the tax levied and collected within this limitation an amount sufficient to pay the judgment of the relator for interest upon the bonds must first be paid. These bonds were issued under section 2701 of the Revised Statutes, authorizing the issue of bonds to extend the time of payment of indebtedness which, from its limits of taxation, the corporation is unable to pay at ma-

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turity. By the judgment rendered and affirmed in this court (Village of Kent v. Dana, 40 C. C. A. 281, 100 Fed. 56), the validity of the bonds is conclusively established, and the exact question is, is there power in the city council to pay these bonds out of the levy permitted by the statute, and are they required to exercise this power for the benefit of the creditor? In Ralls Co. Ct. v. U. S., 105 U. S. 733, 26 L. Ed. 1220, the supreme court said:

"It must be considered as settled in this court that, when authority is granted by the legislative branch of the government to a municipality or subdivision of a state to contract an extraordinary debt by the issue of negotiable securities, the power to levy a tax sufficient to meet at maturity the obligation to be incurred is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention."

In this case the claim is that not only is there authority which would be implied from the right to create the debt, but that express power is given in the sections quoted for this purpose. Section 2683 provides that in addition to the taxes specified in section 2682, limiting the taxation of cities and villages for general purposes, the council in each city and village may levy taxes annually for any improvement authorized by this title, and for the following purposes. After reciting a number of municipal purposes, subdivision 22 provides:

"To pay the interest on the public debt of the corporation and to provide a sinking fund therefor, a sum sufficient to satisfy the interest as it accrues annually, to be applied to no other purpose."

Subdivision 24 provides:

"The council shall determine the amount to be levied for each of the purposes herein specified, and such parts thereof must be placed on the tax list and collected annually, as it shall by ordinance prescribe."

Assuming that the subsequent general limitation of section 2689a applies to all municipal taxation, keeping the same within the limit of eight mills in villages of the first class, we find the legislature recognizing, under other sections of the law, such as section 2701, that a corporation may incur a debt, and empowering the council to levy a sum sufficient to satisfy the interest as it accrues annually, —not a part of the interest, nor such portion of the interest as the council may see fit to pay,—but here is direct authority to levy a sum sufficient to satisfy the interest; and it is made apparent that this sum, which must be equal to the interest due, is not to be apportioned among other municipal purposes, for we find the provision that this sum shall be applied to no other purpose. In other words, a distinct fund is here authorized to be raised sufficient to pay the interest on a public debt, not to be diverted or divided among other purposes, but, in terms, directed to be applied to this specific purpose. It is true that in subdivision 24 the council is authorized to determine the amount to be levied for each of the purposes specified in section 2683. These purposes are manifold, and the sums required may be more or less as the council may see fit to determine, as so much for highways, so much for bridges, so much for lighting, erection of schools, etc.; but in au-

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thorizing the levy to pay the interest no such discretion is required or permitted to be exercised, but the levy is to be of a sum sufficient to satisfy the interest as it accrues annually. We think it plain that the discretion vested in the council to determine the amount to be levied for each purpose does not apply to a purpose, such as the payment of interest, which is merely a matter of mathematical calculation, not required to be fixed by the exercise of discretion on the part of the council. It is true, this section does not say the village shall levy a tax for this purpose; and it is argued that this statute is merely an enabling one, to permit the council to levy as much for this purpose as they shall see fit. But it is well settled in statutory interpretation that the word "may" may be read "shall." In Rock Island Co. Sup'rs v. U. S., 4 Wall. 435, 18 L. Ed. 419, after a summary of the authorities on the subject, Mr. Justice Swayne says:

"The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language,—whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.' The line which separates this class of cases from those which involve the exercise of a discretion judicial in its nature, which courts cannot control, is too obvious to require remark. This case, clearly, does not fall within the latter category."

This language seems to us applicable to the statute under consideration. The power to levy this tax is given for the benefit of creditors, in this case, to meet a demand adjudicated to be right and proper after full trial. It imposes a duty upon the council, which, in our judgment, they are required to exercise so long as they are able to do so within the limit imposed by the law upon the amount of taxation for any given year. We therefore construe this section as though it read, "The council shall levy a sum sufficient to pay the interest on the public debt to be applied for no other purpose." We find nothing in the case cited by counsel for plaintiff in error (U. S. v. Thoman, 156 U. S. 358, 15 Sup. Ct. 378, 39 L. Ed. 450) that is in conflict with this view.

It is contended, however, by the learned counsel for plaintiff in error, that this interpretation results in depriving the village of the means of carrying on its ordinary governmental purposes for which the municipality was organized, and will result in depriving the village of the means of protecting property, keeping order, providing against pestilence, and performing other primary duties which devolve upon municipalities; and it is contended that the case under consideration should be ruled by the case of City of East St. Louis v. Zebley, 110 U. S. 321, 4 Sup. Ct. 21, 28 L. Ed. 162, and of Clay Co. v. U. S., 115 U. S. 616, 6 Sup. Ct. 199, 29 L. Ed. 482. Indeed, it is said, the answer in this case is drawn upon the au-

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thority of those cases. In City of East St. Louis v. Zebley a tax authorized for all purposes was limited to 1 per cent. per annum, and the city council were required to levy a tax of three mills on the dollar on each assessment for general purposes, and apply it to the interest and sinking fund on its bonded debt. The supreme court held that the use of the remaining seven-tenths was within the discretion of the municipal authorities, and the court could not control the disposition of it so as to deprive the municipality of the right to use the fund for general purposes of the municipality during any given year. In the case of Clay County v. U. S., 115 U. S. 616, 6 Sup. Ct. 199, 29 L. Ed. 482, the supreme court held that, where the state statute authorized a county to levy and collect a tax of six mills on the dollar for ordinary county revenue, mandamus would not lie to compel the county officers to set apart funds to pay the debt, where by the pleadings it was admitted that the amount of the tax for the current year was necessary for the ordinary current expenses of the county, and recognized the principle that where a tax was authorized within a certain limit for the ordinary county revenues, all of which were required for carrying on governmental purposes, the county authorities could not be compelled to apply part of such fund to the payment of a judgment held by a creditor against it. These cases and similar ones are to be distinguished from the case at bar, in that we have here direct authority in the statute requiring the levy of a tax to pay the interest on the bonded debt. It is not sought to absorb taxes provided for ordinary county or municipal revenue for debt-paying purposes, to the exclusion of their application for the necessary purposes of the county or municipality. The principle of Clay Co. v. U. S. and City of East St. Louis v. Zebley was recognized in the case before this court above referred to (City of Cleveland v. U. S.), in which it was held that the court, in a proceeding for a writ of mandamus, has no power to compel a city to pay a judgment in favor of the relator, so as to control the discretion of the city authorities in making appropriations from the taxes for current municipal expenses. In the case under consideration not only have we an express statute requiring a levy, but the principle underlying those cases is that, where the power of taxation to raise revenue for general purposes is exhausted in providing for the operations of the government, there is no power to disable the corporation from performing its necessary duties by withdrawing from such revenues sufficient sums to pay an indebtedness. There exists in the Ohio statutes ample power to meet such contingencies by a levy of taxes beyond the limit of eight mills imposed by statute. In section 2687 it is provided:

"Sec. 2687. Levy of a Greater Tax to be Submitted to Vote. A greater tax than that authorized by this chapter may be levied for either of the purposes mentioned therein, if the proposition to make such levy, shall have been first submitted to a vote of the electors of the corporation under an ordinance prescribing the time, place and manner of voting on the same, and approved by a majority of those voting on the proposition."

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In our judgment, this section is a complete answer to the applicability of those cases which preserve the public revenue for general in preference to debt-paying purposes. We here find power given without limit to levy a tax for any of the purposes mentioned in the chapter, upon the approval of a majority of the electors of the corporation. It cannot, therefore, be said that the corporation has exhausted its tax-levying power, and must stop the wheels of its administration if the fund is to be appropriated for the payment of debts. Electors of the corporation are the real parties in interest. They have never been appealed to, and it is within their power to direct the levy of taxes for the necessary purposes of the corporation, as well as to meet its legal indebtedness. This aspect of the case was passed upon in U. S. v. Sterling (decided in the circuit court of the Northern district of Illinois Jan., 1871) Fed. Cas. No. 16,388. In that case the relator sought to obtain payment of a judgment on certain bonds held against a municipal corporation in Illinois. In answer to the writ of mandamus it was set up that by the act of incorporation the city authorities were only authorized to levy taxes at the rate of 1 per cent. per annum on the valuation of the taxable property of said city; that the expenses of the city government amounted to $6,000 a year; that the total receipts from taxes, licenses, and fines, being all the source of revenue, were only about $6,000 a year. The charter of the city contained a provision that the city council "may, however, levy and collect a tax for city purposes greater than one per cent. providing the same be done with the consent of the majority of the legal voters of the said city voting at a general or special election ordered for such purpose." On this feature of the case, Judge Blodgett, delivering the opinion, said:

"For the purposes of this case, I do not deem it necessary to discuss the abstract question as to what courts shall do in cases where there is a want of adequate power of taxation to pay a legally contracted indebtedness, as it seems to me the respondent has ample corporate power to meet this emergency. It has power to levy a tax of one per cent. on the assessed value of all real and personal property within its limits. And with the consent of its legal voters, expressed at any general or special election, it has an unlimited power of taxation. It seems, then, clear to me that, if the tax of one per cent. was not sufficient to raise the amount needed to meet this liability, it was the duty of the city authorities to call an election, and require its voters to vote a sufficient tax for the purpose. The duty of paying municipal debts is as obligatory upon the citizens as upon the officers of the city. Indeed, the city authorities are only the agents of the citizens. Besides, what right had the city officers to expend the entire income of the city from the one per cent. tax in payment of current expenses, and leave this indebtedness unprovided for? Why did they not, from the proceeds of this one per cent. tax, pay the bonds and coupons on which this judgment was rendered, and take a vote as to the expediency of raising a further tax to defray current expenses? The proceeds of this one per cent. tax are not specially set apart and dedicated to the payment of current expenses. The bonds for which this judgment was rendered had been legally issued, and the city authorities and voters were all chargeable with notice that they were due and ought to be paid. They should then have levied and collected an adequate tax in apt time to have the money ready when their obligations matured, and, having failed to do so, are guilty of a breach of duty which the writ of mandamus will compel them to perform."

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This seems to us a sound view of the matter. The village has it within its own power to levy ample taxes for all purposes. Where a city has a discretion to levy a tax, yet, where that tax is required for the payment of a public debt, the city may be required to levy a tax if it refuses to do so. City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560.

The answer to this feature of the case suggested in the argument was that the council had not required such a vote to be taken, but, as suggested by Judge Blodgett, it has had ample time to do so. Meetings of the electors for the purpose of voting taxes were a part of the earliest form of municipal governments in this country. The council are chosen by the electors. They are a representative body; and, so long as the electors have it within their power to levy additional taxes, the dire consequences predicated from the appropriation of the general revenue to debt-paying purposes cannot follow, unless such result shall flow from the refusal of the voters to exercise the power clearly conferred by statute.

We are of the opinion that the court below did not err in issuing a writ of peremptory mandamus, and its judgment will be affirmed.

ROYTIO v. LITCHFIELD.

(Circuit Court of Appeals, First Circuit. January 24, 1902.)

No. 411.

MASTER AND SERVANT—DANGEROUS WORK—SPECIAL SUPERVISION—NECESSITY.

Defendant operated, in connection with a quarry, a stone-crushing mill. Ledge stone of all sizes were dumped over a cliff, rolled from the dump to a level place at its foot, and thence carted to the mill. Plaintiff and others had been engaged in dumping the stone over the face of the dump, and were ordered by the superintendent to throw certain stones which had accumulated on the dump into the road. Half way down the dump, and opposite where the superintendent was standing, was a place where had been left an overhanging rock, and plaintiff was directed to work at a point several feet below it. Before he had time to pick up a stone, the rock dropped, and injured him. *Held* insufficient to justify a finding that the condition of the dump was other than would naturally have arisen from the acts of plaintiff and his fellow workmen in removing the stone, or that the superintendent knew that it involved a special hazard which the men on the dump could not meet more intelligently than he could, and therefore insufficient to show any reason for special and unusual supervision on the part of the superintendent, so that a verdict for defendant was properly directed.

In Error to the Circuit Court of the United States for the District of Massachusetts.

William A. Pew, Jr., for plaintiff in error.

Herbert Parker (Charles C. Milton, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This suit was brought under the employers' liability act of Massachusetts. The circuit court directed a

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verdict for the defendant, and the plaintiff sued out this writ of error. The case is stated by him as follows:

"The defendant operated, in connection with a quarry, a stone-crushing mill. Stones of all sizes were brought from the quarry, and dumped over a cliff. The dump extended some distance along the face of the cliff, forming coves and promontories. At the foot of the dump was a level place upon which twelve or fifteen employés of the defendant broke up stones taken from the dump, and wheeled them to the crushing mill. At various times these stones were thrown or pried from the dump by the men, who cut them up, under the direction of one Tirrell, who was employed by the defendant as a superintendent to keep the men at work, and see that they did not get hurt. Two general methods were employed to get stones from the dump. When Tirrell wanted large stones, he sent three or four men with bars to pry the large stones down. When smaller stones were needed, Tirrell formed all the men in a line on top of the dump, and they came down, throwing and bowling such loose stones as they could lift in their hands, over the face of the dump and to the road. During this operation Tirrell watched the men from the road, to keep them steadily at work, and see that they did not get hurt. If there were dangerous places, he cautioned the men, ordered them to another part of the dump, or sent men to especially pry down the rocks that made the place dangerous. The plaintiff went to work July 6th, and was injured July 25th. In the afternoon of July 25th, under the direction of Tirrell, the men were rolling small stones over the face of the dump. Many of these stones accumulated on the dump, a few feet from the road. Tirrell ordered the men to come down, and throw these stones into the road. Half way down the dump, and opposite where Tirrell had been standing for half an hour, watching the men at work on the dump, was a place which had been quarried into some days before in such a way as to leave a large rock overhanging a cave, the entrance to which was seven or eight feet high. At the time of the accident this rock overhung and slanted in such a way that it appeared dangerous. This rock was on a part of the dump which projected between two coves. The plaintiff had never been in this place before. He did not work near it, and it was impossible to see the condition of this rock from above it, where the plaintiff had been at work. When Tirrell ordered the workmen to come down the dump, the plaintiff came down through a cove, where he could not see this rock, and when within a few feet of the road Tirrell directed him to come around from the cove, and work in a particular place, which he indicated by pointing first at the plaintiff and then at the place where he wished the plaintiff to work. This place was several feet below, and directly under, the overhanging rock. Tirrell did not warn or call the plaintiff's attention to this rock. The plaintiff came around the corner, and directly under this rock. He did not look above him to see what the character of the dump was, but attempted to go to work immediately, relying upon Tirrell, as was the custom, to warn him of any danger. The plaintiff was being hurried by Tirrell, and intended to begin work at once. Before he had time to pick up a stone, this overhanging rock dropped, and, after falling seven or eight feet, rolled down the dump, and pinned the plaintiff's leg against another rock.

"The plaintiff claims that, even if he had looked to see what sort of a place he was ordered to work in, he came so suddenly into the presence of danger that he did not have an opportunity to avoid the falling rock. The rocks generally lay on the dump as they were thrown over the cliff. As the men worked in removing these stones, the stones taken out might let down other stones above. This danger was incidental to the business, and was appreciated by the plaintiff. The plaintiff was not injured by a risk of this kind. Nothing was done by the plaintiff or his fellow workmen on July 25th, preceding the injury, to undermine the rock which fell. It was some distance above the plaintiff, and fell because it had been undermined and left hanging in such a position that some unnoticed cause, not apparently connected with the plaintiff's work, caused it to fall."

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So far as the record before us is concerned, we must assume that Tirrell was superintending within the meaning of the employers' liability act. The plaintiff says that Tirrell was negligent in three respects, namely, that he gave the plaintiff an improper order; that he continued the work under dangerous conditions, and failed to exercise a reasonable supervision; and that he failed to act under circumstances which called for a positive action of a precautionary nature,—that is to say, warning.

The most of these propositions are easily disposed of. The order given was a usual one. The work was dangerous, but it was inherently dangerous, and this fact was apparent to every person of the most ordinary intelligence. The evidence is undoubted that Tirrell was in the habit of giving warnings, and did give the usual warning in connection with the particular order under which the plaintiff was working at the immediate time of his injury. This leaves no proposition to be considered except the one to the effect that Tirrell failed to exercise reasonable supervision.

The circumstances of the case are mainly within that common knowledge which, in jury trials, the court is not only entitled to share with the jury, but must so share, and which, in the absence of any marked peculiarities of the plaintiff,—and such the record does not disclose,—he must also be assumed to share. With the rest are the facts that from the nature of the work on this shifting slope of loose ledge rocks the circumstances involving danger were never exactly the same at different points or at different times; that the methods of avoiding danger were, therefore, necessarily never the same; and that both the existence of dangers and the ways of meeting them were best known to the men engaged on the slope, and could not be known with any degree of certainty to one standing below it, where Tirrell properly stood in directing the work. Consequently, from the necessity of the conditions, any supervision which could be given by Tirrell would be faulty, and could not take the place of the care and means which could be availed of by the men immediately on the slope for their own protection.

So far the case is entirely clear. But the plaintiff maintains that the condition which caused his injury was a particularly peculiar one, not common to the work, visible to Tirrell, and not visible to the plaintiff until he was immediately in the locality, and simultaneously with the falling of the stones which struck him. He therefore contends that there was a special reason for peculiar acts of supervision on the part of Tirrell at that particular time. He claims that Tirrell was in a position where he should have perceived that the situation was a very peculiar one; but on this record the jury would not have been justified in finding that the condition was other than would naturally have arisen from the acts of the plaintiff and his fellow workmen in removing stone in the usual way from the slope, or that Tirrell did in fact know, or should have known, that it involved a special hazard, which the men on the slope could not meet more intelligently than he could, in the way they usually met dangers, as we have already explained. Consequently, the jury would not have been sustained in finding that there was any call

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on Tirrell for any special supervision. As, therefore, it would not have been justified in rendering a verdict for the plaintiff on the record before us, the circuit court properly directed one for the defendant.

The judgment of the circuit court is affirmed, and the defendant in error will recover the costs of appeal.

SWAN & FINCH CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 7, 1902.)

No. 69.

CUSTOMS DUTIES—FISH OIL.

Tariff Act 1897, par. 42, places a duty on seal, herring, whale, and other fish oils; and paragraph 568 exempts from duty grease and oils, excepting fish oils, commonly used in soap making, wire drawing, or for stuffing or dressing leather, and which are fit only for such purposes. *Held*, that oil known as "cod oil," made from putrid fish livers, which, while used principally for dressing leather, is fit for some other purposes not enumerated, and, while not technically known in the trade as a "fish oil," is subject to the duty; it not being within the exemption, and the phrase "fish oils" not having been employed in a technical sense.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal by the Swan & Finch Company from a judgment affirming a decision of the board of United States general appraisers affirming the classification by the collector of customs as to certain importations made by appellant.

This cause comes here upon appeal from a decision of the United States circuit court, Southern district of New York (109 Fed. 949), affirming a decision of the board of general appraisers which sustained the collector of the port of New York in assessing for duty certain oil extracted from the livers of codfish, and known as "cod oil." The article is made from the unhealthy, putrid livers of codfish, and in this respect differs from cod-liver oil, which is extracted from the fresh livers of such fish.

Wickham Smith, for appellant.

D. Frank Lloyd, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The collector assessed the article for duty under paragraph 42 of the tariff act of 1897, which reads as follows:

"(42) Seal, herring, whale, and other fish oil, not specially provided for in this act, eight cents per gallon."

The importers claimed free entry under paragraph 568 of the free list, which reads:

"(568) Grease, and oils (excepting fish oils), such as are commonly used in soap-making or in wire-drawing, or for stuffing or dressing leather, and which are fit only for such uses, and not specifically provided for in this act."

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The record abundantly sustains the contention of the importers that cod oil is commonly used for stuffing or dressing leather. Indeed, but a small fraction of it is used in the arts for any other purposes. But "common use" or "predominant use" is not the only qualification. The oil must also be one "fit only" for the enumerated uses. It matters not that some other article is better fitted and more frequently used for the nonenumerated use, so long as cod oil is fit for such use. The evidence shows that it is fit, inter alia, for the manufacture of blacking, and has been so used to a substantial extent. This fact would remove cod oil from the designation of the main clause in the paragraph; but, if the evidence on that branch of the case were less persuasive than it is, we are still of the opinion that cod oil is not covered by the paragraph, being within the exception. The testimony as to commercial designation is voluminous, the importers undertaking to sustain the proposition that the words "fish oils" had a commercial designation which so restricted the class of articles they covered as to exclude cod oil. The witnesses are not entirely in accord, but the phraseology of the tariff indicates quite plainly the meaning which congress gave to those words, which must be assumed to have the same meaning in both paragraphs of the same act. One of the witnesses for appellant (a dealer in oils) indicated the use of the phrase in common speech:

"Any man who is not in the oil trade will say every oil that is made from the fish would be called 'fish oil,' though commercially different designations are used to distinguish one oil from the other."

Now, it seems quite clear that congress used the words "fish oils" in the sense in which they are used in common speech. Paragraph 42 provides for "seal, herring, whale, and other fish oil." Evidently these words are not used with technical precision; for neither the seal nor the whale is a fish, and therefore oil made from them, or from any part of them, is not technically fish oil. Nor are the words used with a close appreciation of commercial distinctions; for, if the evidence in this case be held sufficient to establish the proposition that cod oil is not known to the trade as a "fish oil," it is equally sufficient to establish the proposition that neither seal oil nor whale oil is fish oil in trade; but congress understood at least whale oil to be a fish oil, and therefore used the phrase "seal, herring, whale and other fish oil."

The decision of the circuit court is affirmed.

SPRECKELS SUGAR REFINING CO. v. McCLAIN, Internal Revenue Collector.

(Circuit Court of Appeals, Third Circuit. January 13, 1902.)

No. 17.

1. INTERNAL REVENUE—WAR REVENUE ACT OF 1898—CONSTITUTIONALITY.
Section 27 of the war revenue act of 1898, imposing a tax upon the gross receipts of refiners of oil and sugar, *held* constitutional.

2. SAME—TAX ON SUGAR REFINERS—GROSS RECEIPTS OF BUSINESS.
Under section 27 of the war revenue act of 1898, which imposes an excise tax "on the gross amount of all receipts" of sugar refiners "in

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their business" in excess of $250,000 annually, rentals from wharves owned by a corporation organized for and engaged in the business of sugar refining, and used as a necessary adjunct to said business, are receipts in the business, to be included in computing its gross income for the purpose of such tax.

3. SAME—INTEREST ON DEPOSITS.
Interest received by such company on corporate funds deposited or invested for the time being, while not in use, is also a part of its receipts in the business, and subject to the tax.

4. SAME—MODE OF COLLECTION—MONTHLY ASSESSMENTS.
War Revenue Act 1898, § 27, which provides that every person, company, etc., doing the business of refining petroleum or sugar, or owning a pipe line, whose gross annual receipts exceed $250,000, "shall be subject to pay annually a special excise tax" on the amount of their gross receipts in excess of said sum, and which further provides that a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by such persons or companies, requires the payment of such tax annually, and on annual receipts; and a regulation of the commissioner requiring the assessment and collection of the tax monthly, on the monthly returns, is unauthorized.

Gray, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

John G. Johnson, for plaintiff in error.
J. W. Thompson and James B. Holland, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The plaintiff below (and here) is a corporation erected under the law of Pennsylvania for the purpose "of refining sugar, which will involve the buying of the raw material therefor and selling the manufactured products, and of doing whatever else should be incidental to the said business of refining." The defendant is the collector of internal revenue for the First district of Pennsylvania. The action was brought to recover certain sums of money which he had exacted under section 27 of the war revenue act of 1898, and which the plaintiff had paid under protest. That section is as follows:

"That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed $250,000, shall be subject to pay annually a special excise tax equivalent to one quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of $250,000. And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation or company may be located, or in which such person has his place of business."

The parties agreed upon a special verdict, the material portions of which are set out in the opinion of the court below (109 Fed. 76), and need not be here repeated.

1. The first and most important question raised by the assignment of errors is whether the above section is unconstitutional. This question, however, the learned judge of the circuit court declined

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to discuss, because "the present suit is a test case, destined for the supreme court of the United States"; and for the same reason we also refrain from discussing it, and deem it expedient to merely state our affirmance of the constitutionality of the section, upon the ground that the presumption in favor of its validity has not been clearly confuted.

2. The use which the plaintiff really made of its wharves was in "carrying on or doing the business of * * * refining sugar." They were part of the plant of that business, and, as it was actually conducted, they were an essential condition of it. Consequently their receipts were its receipts, and as such they were properly comprised in the assessment. Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683.

3. The interest received by the plaintiff upon its corporate funds, either deposited in bank or invested in income-producing securities, was also rightly included. The special verdict states that it was "interest upon its investments of moneys and property as explained by the testimony of Mr. Ball"; and it appears from that testimony that the only business of the plaintiff was sugar refining, and that this interest was received by it upon investments or deposits of such part of the capital of that business as at the time being was not in active use therein. Mr. Ball, it is true, also testified that it did not have anything to do with sugar refining; but the question for our decision is not whether this interest was derived from the refining of sugar, which, of course, it was not, but whether or not it was received in the business of sugar refining, and upon this very different question the facts found are conclusive. The funds of the corporation, however any portion of them may have been temporarily applied or held, were all embarked in the sugar refining business, and to it, therefore, all receipts which those funds produced necessarily belonged. Any diminution of them would certainly have been its loss, and it seems to be equally clear that their augmentation, however occasioned, must have been its gain. Except in connection with and as incidental to that business, the plaintiff was neither an investor nor a depositor, and therefore, by becoming either the one or the other, it did not engage in an additional and separate business.

4. The learned judge, in deciding that the collector had been justified in demanding monthly payments, said:

> "The tax is, no doubt, an annual tax, in the sense that it is paid each year; and, if provision for its assessment and collection had been made by the act, such provision would have been obligatory, both upon the government and upon the refiner."

But he was of opinion that the act contained no such provision, and that therefore the regulation of the commissioner of internal revenue directing its monthly assessment and collection was authorized by section 3447 of the Revised Statutes. We are unable to concur in the construction which was thus given to section 27 of the act of June 13, 1898. It is, of course, a possible one, but its correctness is at least so questionable as to render it inadmissible to impose a duty upon a citizen. Hartranft v. Wiegmann, 121 U. S.

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609, 7 Sup. Ct. 1240, 30 L. Ed. 1012; U. S. v. Isham, 17 Wall. 496, 21 L. Ed. 728. But aside from this consideration, the meaning attributed by the court below to the phrase "shall be subject to pay annually" is not, we think, its natural meaning. The requirement, as directly and plainly expressed, is for payment annually, and upon annual receipts; and, this being so, there is, in our opinion, no warrant for inferring from the quite distinct provision for monthly returns that it was intended that monthly payments might also be demanded, and upon monthly receipts. The tax, moreover, is only on gross annual receipts in excess of $250,000; and it cannot be supposed to have been contemplated that any person or company whose first return, as in the present instance, exhibited gross receipts exceeding that amount, would be subject to a different rule respecting the time of payment from that which would apply to others, whose gross annual receipts might be shown to be greater than $250,000 only by a later return. We have already pointed out that it is not necessary to put an interpretation upon this section which might involve such inequality in its administration, and, except by necessity, no such interpretation could be justified.

Solely upon the ground that the circuit court erred in holding that the plaintiff was required to pay the tax in question otherwise than annually, its judgment is reversed, and the cause is remanded to that court for further proceedings to be there taken in conformity with this opinion.

GRAY, Circuit Judge. Agreeing with the opinion of the court as written in paragraphs 1, 2, and 4, I am compelled to dissent from that expressed in paragraph 3, to the effect that the interest received by the plaintiff in error upon its deposits in bank, and as dividends from investments in shares and other securities, should be included in the amount of gross receipts in its business of sugar refining, returned for assessment and taxation. Keeping in mind the well-settled rule that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language, and that, where the construction of a tax law is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid, I cannot assent to the affirmance of the judgment of the court below in this respect. I do not think that the income derived from such investment of funds is in any proper sense receipts in the business of sugar refining. The very term "gross receipts" in "the business" would seem to exclude all such receipts as the interest upon investments here referred to.

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PILCHER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1902.)

No. 1,043.

1. CRIMINAL LAW—REMOVAL OF SPIRITS—BREAKING LOCK OF WAREHOUSE—EVIDENCE—FORMER ACQUITTAL OF BREAKING LOCK.
On the trial of one indicted under Rev. St. U. S. § 3296, for the removal and concealment of distilled spirits on which the tax had not been paid, testimony was offered that, on the night before the whisky was removed, accused broke the lock of the warehouse where it was stored. Defendant objected on the ground that he had been indicted under section 3268 for breaking such lock, and at the last term of the court had been tried thereon and acquitted. *Held* that, though such acquittal could be considered by the jury in considering the credibility of the witnesses, it was not ground for excluding the testimony.

2. SAME—IMPRESSION OF WITNESS.
On the trial of defendant for removing whisky on which the tax had not been paid from a distillery warehouse belonging to his father, a witness testified that he was employed by a revenue officer to get up evidence against the guilty parties; that, while concealed under the father's house, witness heard some men discussing the removal of the whisky, and the best way to get out of the trouble, and it was his impression that one of the voices was that of defendant, but he was not quite certain. *Held*, that the admission of such testimony was error.

In Error to the District Court of the United States for the Middle District of Alabama.

Wm. C. Oates, for plaintiff in error.

W. S. Reese, Jr., and J. Sternfeld, for the United States.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The plaintiff in error was indicted under section 3296 of the Revised Statutes of the United States, which reads:

"Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

There were five separate counts in the indictment, each charging different ones of the specific acts against which this section denounces a penalty. The verdict in the case was, "We, the jury, find the defendant guilty as charged in the indictment;" and the judgment and sentence ordered that the defendant be imprisoned in the state prison at Nashville, in the state of Tennessee, for the term of two years, and pay a fine of $500 and costs. The defendant brought this writ of error. Numerous errors are assigned, but we notice only two.

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The United States offered to prove by the witnesses Rees Pilcher and Henry Pilcher that, on the night before the whisky was removed from the warehouse, the defendant broke the lock of the warehouse, or drew out the staple to the lock with a road pick. To the admission of this evidence the defendant objected on the ground that he had been indicted for breaking the lock, and had been tried thereon at the previous term of the court and had been acquitted, and that this evidence was irrelevant in this case, and calculated to confuse, mislead, and prejudice the jury against him. The court overruled the objection, and the defendant duly excepted. He assigns this as one of the grounds of error. The transactions were so close together in point of time, and so nearly related in their character, that the evidence offered would have been clearly admissible if the case then on trial for a violation of section 3296 had been heard before the trial and judgment in the case against the defendant brought under section 3268, which reads:

"Every person who destroys, breaks, injures, or tampers with any lock or seal which may be placed on any cistern-room or building by the duly authorized officers of the revenue, or opens said lock or seal, or the door to said cistern-room or building, or in any manner gains access to the contents therein, in the absence of the proper officer, shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than one year nor more than three years."

While the judgment of acquittal in that case would be a bar against any further effort to punish him for a violation of section 3268, and could rightfully be considered by the jury in passing upon the credibility of the witnesses testifying on this trial, it was not ground for sustaining the objection to the introduction of the testimony offered. This assignment of error is not well taken.

The United States offered to prove by one John Harmon that about one week after the burning of the distillery warehouse, while he was in the employment of a revenue officer, and charged, as such employé, to get up evidence against the guilty parties, he crawled under Richard Pilcher's house one night, and overheard some other men talking with Richard discussing the removal of the whisky, the destruction of the warehouse, and the best way to get out of the trouble, and that it was his impression that one of the voices he heard talking was that of the defendant, with whom he was acquainted; but of this he was not certain, and he could not say it was the defendant's voice because he did not see him. The defendant objected to the admission of this evidence on the ground that it was too indefinite, and did not tend to prove the defendant's actual presence or participation in the conversation. The court overruled the objection, the evidence was admitted, and the defendant excepted. This action of the court is assigned as error. The bill of exceptions shows that the distillery warehouse was a legal one; that there were a number of packages of whisky therein, subject to the tax imposed by the laws of the United States, on which the tax had not been paid; that the warehouse was destroyed by fire on the night of July 5, 1899; that, soon after the burning, six or seven barrels of this whisky, which had been in the warehouse, and on which the tax had not been paid, were found concealed

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in Rees Pilcher's potato patch; that this Rees Pilcher had also been indicted for removing and concealing this whisky, and on a day prior to this trial had pleaded guilty to that indictment; that the distillery at which the whisky was made, and the warehouse that was burned, belonged to Richard Pilcher, and that steam to run the distillery was supplied by means of a pipe from the boiler of the sawmill of the defendant, situated 300 feet distant from the distillery. The defendant's dwelling house, in which he and his family resided at the time the offense was committed, was situated half a mile distant from the distillery and the warehouse. The objection to the admissibility of John Harmon's testimony was that it was too indefinite, and did not tend to prove the defendant's actual presence or participation in the conversation. This seems to present, somewhat vaguely, two grounds of objection: (1) That the witness was not able to identify the defendant by his voice so as to show that he was present in the house under which the witness had placed himself in prosecution of his effort to get up evidence against the guilty parties; and (2) that the witness did not attempt to relate anything that the voice, which impressed him as being that of the defendant, uttered; did not testify to any language, or the substance of any language, used by the defendant, or others present, which would tend to incriminate the defendant, or to incriminate specifically any other person; and hence that the testimony was irrelevant, and should not have gone to the jury for any purpose. It is not expressly stated in the record what was the family relation existing between the various Pilchers mentioned in the record; but it seems to be clearly implied that Richard Pilcher, now deceased, the owner of the distillery and of the warehouse that was burned, was the father of the defendant and of the witnesses Rees and Henry Pilcher. There can be no question that a witness will be allowed to identify a person by his voice if able to do so; that is to say, the testimony is competent to be considered by a jury. And if the presence of the defendant at his father's house a week after the removal of the whisky and the burning of the warehouse was a fact which of itself would tend to charge him with the offense, the objection to the testimony that he was identified only by his voice, and that the witness would say no more than that it was his impression that it was the voice of the defendant,—was giving his impression, rather than stating a fact,—would not be well taken. The presence of the defendant at his father's house a week after the commission of an offense at another place does not tend to show that either the defendant or his father, or any other certain person, had committed the offense. The witness was allowed to testify that he, while under Richard Pilcher's house, overheard some other men in the house talking with Richard, and discussing the removal of the whisky, the destruction of the warehouse, and the best way to get out of trouble, and that it was his impression that one of the voices he heard talking was the voice of the defendant. The witness does not give any of the language, or the substance of the language, that impressed him as having been uttered by the voice of the defendant. He does not give any of the language of any of the other persons present in the house that would show, or tend to show, that the

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speakers said or implied that the defendant was in the trouble, or that he had any connection with the destruction of the warehouse or with the removal of the whisky. The bill of exceptions shows that much other testimony given on the trial was sharply conflicting as to the guilt of the defendant. While this testimony did not tend to show his guilt, and should have been excluded because irrelevant, in the very nature of the case, and especially in the condition of the proof, it had a tendency to prejudice the minds of the jury against the defendant. The admission of this testimony seems to us to violate fundamental principles too well known to admit of discussion. For this error, the judgment must be reversed.

It is ordered that the judgment of the district court is reversed, and the cause is remanded to that court, with the direction to award the defendant therein a venire de novo.

UNIVERSAL SAVINGS & TRUST CO. et al. v. STONEBURNER et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 418.

1. COURTS—JURISDICTION—RESTRAINING ORDER.
Where a bill in chancery is filed with the court, it has jurisdiction to issue an order restraining defendants and appointing a receiver, though the bill is not lodged in the clerk's office and subpœna issued until two days thereafter.

2. INJUNCTION—RECEIVER—APPLICATION TO REMOVE—HEARING—DECREE—APPOINTMENT.
Where an order restraining defendants and appointing a receiver is awarded before subpœna is issued, if such award is improvident a decree, made after hearing on defendants' application to discharge the receiver and dissolve the injunction, denying such relief, amounts, in substance, to the granting of an injunction and the appointing of a receiver.

3. SAME—BILL—RIGHT OF STOCKHOLDERS TO SUE—JURISDICTION—EQUITY.
Complainants in their bill alleged that they owned full-paid stock in a building association, which, under the by-laws, they were entitled to withdraw and receive the value thereof; that they had given the prescribed notice and demanded such value repeatedly, but, though other stock on which notice was served after theirs had been paid, payment was refused them; that the managers of the association had squandered and mismanaged the funds, and conspired with the directors of a rival company to turn the assets and business over to such company, and, pursuant to such conspiracy, had caused the election of the majority of such directors as directors of the association, and officers thereof; that such new directors and officers were conducting the business for their own personal gain and in the interest of the other company, ignoring the interests of the stockholders; and that the association was wholly insolvent. Complainants prayed an injunction and receiver. *Held*, that the bill stated facts entitling complainants to equitable relief, and giving the court jurisdiction; application by them to the directors or a meeting of the stockholders for redress or leave to institute the suit being unnecessary.

4. SAME—DISCRETION.
Where, on the application for receiver and injunction, the allegations of such bill were fully supported by affidavits and exhibits, the court did not improvidently exercise its discretion in awarding such relief.

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5. SAME--APPEAL—ERROR NOT PLAINLY APPARENT.

Where an injunction and receiver were properly awarded on the bill, affidavits, and exhibits presented by complainants, and the answer and testimony presented by defendants on their application to set aside such order did not materially change the case, and the application was denied, though the evidence is conflicting, it not being plainly apparent that the court erred in entering the orders, they should not be reversed.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

W. P. De Saussure and Wyndham R. Meredith, for appellants.

Robert Stiles, A. L. Holladay, and Emmett Seaton, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

GOFF, Circuit Judge. The appellees, who were complainants below, on the 25th day of May, 1901, tendered their bill to the circuit court of the United States for the Eastern district of Virginia, alleging, among other things, that they were the owners of stock in the defendant company to the amount of $12,000, and that they had paid cash to said company for the stock to the par value of the same; that the appellee Stoneburner owned of said stock 50 shares of class E and 50 shares of class C, each share of said stock being of the par value of $100; that the money invested in the stock of class E could be withdrawn at any time after 6 months from the date of the certificate therefor, and the money invested in class C stock could be withdrawn at any time, upon the holder thereof giving written notice of his purpose so to do, but that, in its discretion, the company could require the lapse of 60 days before making payment of the money due on class C stock; that the appellee Stoneburner on the 3d day of April, 1900, gave notice in writing to the company of his intention to withdraw the value of all his stock of both classes, and that shortly thereafter the appellee Young did also give such notice; that the receipt of such notices by the company was duly admitted; that both of said appellees repeatedly made demand upon the company for the payment of the withdrawal value of their stock, and that such payment was always refused, nor had the same been made when the bill was filed, that said failure so to pay was because of the improper manner in which the business affairs of the company had been theretofore managed; that it was the duty of the officers and directors of the company to make provision for the payment of withdrawing stockholders, and that many stockholders owning relatively smaller amounts of stock than said appellees held had been paid in full the amounts due them, to the prejudice of the appellees, since their said notices had been served; that within the two years immediately preceding the filing of the bill the business of the company had materially decreased, as also had its assets, but that during the same time its liabilities had increased; that the officers and directors of the company in office prior to January 23, 1901, formed a plan with the defendants other than said company, seven in number, that they would, by their votes, and the votes of others controlled by them,

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deliver said company into the hands and management of said seven defendants, who constituted the board of directors of the Prudential Banking & Trust Company, then a competitor for the character of business the defendant company was engaged in; that on January 23, 1901, five of said defendants were elected directors of the defendant company, one of them secretary and treasurer, and the remaining one assistant secretary and treasurer, the old board and old officers then and there retiring; that after such election the new officials set to work to carry out their preconceived plan of personal gain to themselves, ignoring the interests of the stockholders of the defendant company, the control and management of which had been absolutely turned over to them; that said new officials did, by all means in their power, endeavor to prevent the payment of the cash value of the stock of those who had filed notices for withdrawal, their intention being, instead of paying cash therefor, to issue new stock that would not have the withdrawal feature; that their purpose was to combine the assets of said company with the assets of the Prudential Banking & Trust Company, of which they were then also directors; that said new directors, soon after their election, increased the expenses connected with the management by voting additional salaries to the officers thereof, and that they also passed a resolution reducing the stock of all stockholders 20 per centum; and that the defendant company was, at the time of the filing of said bill, insolvent. The prayer of the bill was that the complainants therein be paid the withdrawal value of their stock, and that the same be declared a lien upon the assets of the company, that a receiver be appointed to take charge of and administer the affairs of the defendant company under the direction of the court, and that the defendants be enjoined and restrained from disposing of any of such assets, and also for such general relief as, under the circumstances, to equity appertains. The bill was sworn to by both of the complainants, and with it were filed a number of exhibits containing the by-laws of the company, its plan of doing business, and copies of various statements published by its management, showing its financial condition. On the day the bill was so presented to the court, an order was made and signed by the judge thereof, after he had read and considered said bill and exhibits, by which it was decreed that the company show cause before the court on the 6th day of July, 1901, why an injunction should not be granted, enjoining and restraining it and its officers from disposing of or exercising control over its assets; and, it appearing to the court that there was danger of irreparable injury from delay, it was ordered that in the meantime, and until the further order of the court, a restraining order issue in accordance with said prayer, but it was provided that said company might at any time, on giving five days' notice to complainants, move to vacate such restraining order and discharge the receiver which the court then proceeded to appoint. The bill so filed in court on the 25th day of May, 1901, was lodged in the clerk's office at Richmond, Va., on the 27th day of May, 1901, on which day the subpœna in chancery summoning the defendants to appear was duly issued, as was also the restrain-

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ing order; and likewise on that day one of the receivers gave bond as required by the order appointing him, and took charge of the assets of the defendant company. The restraining order was served on all the defendants on the 27th day of May, 1901, as was also the subpœna; and on that day the defendant company served a notice on the complainants that it would on June 1, 1901, move the court to set aside the order appointing the receiver and granting the restraining order. On the 1st day of June, 1901, the complainants and all of the defendants, by their respective counsel, appeared before the court,—the former to resist, and the latter to move, the discharge of the receiver and the dissolution of the restraining order. On that day the receiver filed a report, as he was required to do by the order appointing him, showing the condition of the defendant company, and the assets of the same that had come into his hands; and the defendant company, as well as the individual defendants, filed their several answers to the bill, as also the affidavits of accountants and bookkeepers, and certain statements purporting to show the financial condition of the company; and the cause was then argued by counsel and submitted on said motions. On the 4th day of June, 1901, the court below entered an order declining to dissolve the injunction and refusing to discharge the receiver. From this order, as well as from the order signed by the judge on the 25th day of May, 1901, the defendant company prayed an appeal, which was duly granted.

The assignments of error are many in number, but we find that the consideration of a few will dispose of all the questions really involved in this appeal. Appellants insist that when the order of May 25, 1901, was entered, the suit in which it purported to be issued had not at that time been instituted, and that therefore said order was null and void. This claim is based upon the fact that the bill was not lodged in the clerk's office until the 27th day of May, 1901, and that the subpœna did not issue until that date. In other words, the insistence is that a suit in equity has not been commenced until the subpœna has issued. Appellants, therefore, claim that the receiver was appointed and the restraining order granted before the suit was commenced. While it is true that no process of subpœna can issue from the clerk's office in any suit in equity until the bill has been filed in such office, still it does not follow that the court, or a judge thereof in chambers, may not enter an order on consideration of the bill before it has been so lodged in said office. Under the old English practice, from which our procedure is taken, all bills in equity were first presented to the judge, who determined whether process should issue thereon; and, if he so ordered, then the bill was filed in the clerk's office. Subsequent proceedings in such suits have been controlled chiefly by rules of court, and the practice established thereunder. We are not aware of any statute or rule of practice, nor of any authoritative decision, by which the contention of the appellants in this particular instance can be sustained. In this case the bill was presented to the court on Saturday, the 25th day of May, 1901; and one of the orders now complained of was on that day, after due consideration of the bill and

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exhibits, directed to be entered. The bill, therefore, was in fact filed on the 25th day of May, though it seems that process thereon did not issue until Monday, the 27th,—a practice not at all uncommon in the courts of the United States. If, as a matter of fact, the order of the 25th of May by which the receiver was appointed was improvidently awarded, would not the decree of the court made on the 4th of June following, after subpœna had issued, after appellants had given notice to discharge the receiver and dissolve the injunction, and after the court had heard argument thereon, amount, in substance, to the granting of an injunction and the appointing of a receiver? We think so.

Nor do we find merit in the claim of appellants that the court below did not have jurisdiction in this controversy. We think that the appellees, on the allegations in their bill contained, were clearly entitled to be heard in equity. In the case as made by the bill, it would have been useless for them to have again asked the directors of the defendant company for the relief such officials had repeatedly refused to grant them,—relief complainants were entitled to, but the granting of which was antagonistic to the plans the directors had in view. Under such circumstances, it was not necessary that complainants, as stockholders, should have applied to the board of directors or to a meeting of the stockholders for redress, or for permission to institute a suit by means of which relief could have been secured; for, if complainants' charges are true, such procedure would have been little less than a farce, and such suit, if instituted, should not have been under the control of such directors. Phosphate Co. v. Brown, 20 C. C. A. 428, 74 Fed. 321; Cook, Corp. § 741; McGeorge v. Improvement Co. (C. C.) 57 Fed. 262.

Appellants insist that even if the case was properly before the court below, and if the order granting the injunction and the appointing the receiver were regularly made, nevertheless, on the motion to dissolve and discharge, and on the case as made by the answers and the exhibits filed therewith, the court below erred in refusing to dissolve the injunction and in declining to discharge the receiver. It must be borne in mind that this is an appeal from an order appointing a receiver and granting an injunction, as well as from an order refusing to discharge said receiver and declining to dissolve the injunction. The court appointed the receiver and granted the injunction on the allegations of a bill, duly verified, charging the improper and fraudulent management of the defendant company by its directors; that the company was running at a loss and practically insolvent; that such condition of affairs was well known to the old board of directors, and that they, because thereof, abandoned the management of said company; that the new directory, being also the directors of another company, were using the assets of the defendant company in the interest of that other corporation; that complainants were refused payment of the withdrawal value of their stock, although other stockholders, whose applications for withdrawal were filed after complainants had given their notices, were paid in full. Also, we should bear in mind that the affidavits and exhibits filed by complainants fully sustained the charges in the

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bill, and demonstrated the insolvency of the defendant company. Such being the case, the judge who entered the order of May 25, 1901, did not improvidently exercise the legal discretion with which he was invested.

Nor did the court below err in its order of June 4, 1901; for the case, as made by the answers and the testimony filed with them, was not materially changed thereby. We would not be justified in reversing the orders complained of by appellants, unless it was plainly apparent that the court below committed errors in entering them. The facts were found by the judge who heard the case, from conflicting testimony, we concede; but we think he exercised his discretion wisely, and we cannot, on the evidence now before us, do otherwise than affirm his action.

We are not at this time disposing of the case as if the appeal were from a final decree on the merits, and it will now go back to the court from whence it came, for further proceedings therein to be had, when additional evidence will doubtless be offered, and the questions at issue be finally disposed of.

Affirmed.

HULL COAL & COKE CO. v. EMPIRE COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1902.)

No. 414.

1. CONTRACTS—CONSTRUCTION—QUESTION FOR COURT.
   The construction of a contract in writing is a matter of law for the court, and it is immaterial at whose suggestion particular clauses were inserted.

2. SAME—PERFORMANCE BY PARTY CLAIMING DAMAGES—NECESSITY.
   A party suing for breach of a contract containing mutual dependent agreements must show a performance on his part.

3. SAME—STIPULATION QUALIFYING GUARANTIES.
   A provision that the usual strike clause shall mutually govern in a contract for the purchase of all the coke manufactured by the seller during a fixed period (the latter guarantying a specified amount; the price, time of payment, and quality of the coke being agreed upon) qualifies only the guaranties that the purchaser will take all the coke manufactured, and that the seller will furnish a specified amount, during such period.

4. SAME—STRIKE CLAUSE—SUSPENSION OF DELIVERIES—EFFECT.
   A provision in a contract for the purchase of all the coke manufactured by the seller during a fixed period (the latter guarantying a fixed amount; that in case of strikes, accidents, or other causes causing stoppage in the works of the seller, deliveries under the contract may be "suspended") relieves the seller from the obligation of its guaranty, where such causes have prevented it from furnishing the guarantied amount during the specified time, for the word "suspended" does not mean "postponed," and therefore the purchaser cannot demand delivery of coke, to make up the deficiency, after the expiration of the fixed period.

5. SAME—TIME—ESSENTIAL ELEMENT.
   In a contract for the purchase of all the coke manufactured by the seller during a fixed period, time is an essential element, because of the fluctuations in the market, and the life of the contract must be limited to the time fixed by the parties.

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6. SAME.
Where the intention of the parties to limit a contract to a certain period is manifest, time is of the essence of the contract.

7. SAME—CONSTRUCTION—GENERAL RULES.
The subject-matter and purposes of a contract, and the situation of the parties to it, are material to determine the intention of the parties and the meaning of the words used; and, where these are ascertained, they prevail over the dry words used.

8. SAME—BREACH BY ONE PARTY—REPUDIATION BY THE OTHER.
Where a buyer in a contract for weekly shipments of coke for a fixed period failed to pay on the 20th of the month for the coke received during the preceding month, as required by the terms of the contract, the seller might repudiate the contract; the latter not being in default.

9. SAME—CONDUCT CHANGING TERMS OF CONTRACT—SUFFICIENCY.
The terms of a contract for the purchase of all the coke manufactured by the seller for a fixed period, the seller guarantying a specified amount, are not changed by the buyer sending to the seller orders for delivery of coke in excess of the specified amount, where such orders are received in due course of business, but are not accepted.

In Error to the Circuit Court of the United States for the Southern District of West Virginia.

Lucian H. Cocke and Malcolm Jackson (A. J. Reynolds, on the brief), for plaintiff in error.

L. A. Anderson and G. E. Price (Rucker & Anderson and Flournoy, Price & Smith, on the brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

PURNELL, District Judge. Plaintiff brought its action on the case in assumpsit, claiming $10,000 damages for breach of contract. The Hull Coal & Coke Company, plaintiff below, a corporation with its chief office at Roanoke, Va., was engaged in purchasing and selling coal and coke in Virginia and West Virginia. The Empire Coal & Coke Company, defendant below, a corporation with its chief office at Landgraf, W. Va., was engaged in mining coal and manufacturing coke. On November 19, 1898, the plaintiff addressed a letter to the defendant, which was afterwards accepted, and mutually agreed should be a contract between them. This letter was as follows:

"We make you the following proposition for the purchase by us of all the coke you can make at your ovens at Landgraf, W. Va., from January 21st, 1899, to December 31st, 1899: We guaranty to give you orders enough to keep all of your ovens—one hundred (100)—running full. You to guaranty to furnish not less than twenty thousand (20,000) net tons of coke during the above-mentioned time. Orders and deliveries of coke to be made in as nearly as possible equal weekly installments. Price to be one dollar and sixteen cents per net ton, f. o. b. cars at ovens. Settlements to be made in cash on the 20th day of each month for shipments of the previous month. The usual strike, accident, and transportation clauses to mutually govern. Coke to be of standard quality, and you to ship no coke to others than ourselves, except as covered by attached memorandum. Your acceptance of this letter to constitute a contract between us."

It is agreed that the following was the usual strike, accident, and transportation clause referred to, or that part applicable to this controversy:

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"In case of strikes, accidents, deficient transportation, or other cause, unavoidably causing stoppage or partial stoppage of the works of the manufacturer of this coke or its shipment, or in case of strikes or accidents unavoidably causing stoppage or partial stoppage of the works of the buyer, deliveries herein contracted for may be suspended or partially suspended, as the case may be, or, at the option of the party not in default, may be immediately canceled during the continuance of such interruption, by immediate notice to that effect given to the other party."

The Hull Coal & Coke Company made requisition upon the Empire Coal & Coke Company for coke to the capacity of the ovens, and in excess of the guarantied output of 20,000 tons; and the defendant company failed to furnish the amount,—only furnished during the period contemplated by the contract 14,572 tons and 1,100 pounds, which was 5,427 tons and 900 pounds less than the 20,000 tons called for in the contract; and it is claimed that, acting on the faith of the contract, the plaintiff below (appellant) had made sales of the coke which it had purchased, and, in order to meet its obligations, purchased coke at $2.50 per ton, being $1.34 per ton in excess of the price under the contract; and, for the damages thereby caused, this suit was brought. The Empire Coal & Coke Company relied on several defenses; i. e., the failure on its part to furnish the amount of coke guarantied by it was due to deficient transportation, a strike among its employés, a severe drought, which prevented it from securing the necessary water to manufacture the coke, and because plaintiff failed and refused to pay for the November delivery by the 20th of December. Under the ruling of the trial court these defenses were deemed sufficient, and under the instructions of the court there was a verdict for defendant.

It is conceded the Empire Company shipped to the Hull Company all the coke manufactured at its ovens, except that covered by the memorandum referred to, and under the strike clause the defendant was excused from deliveries at the particular times it failed to make such deliveries. The record does not disclose any complaint by or difference between the parties until December. The contract was executory, dependent on mutual agreements, containing guaranties, all governed by the strike clause as applicable. It can make no difference who suggested the strike clause, as argued. The contract is what the parties agreed to, and, being in writing, the construction is a matter of law for the court. Under a contract dependent on mutual agreements, the party alleging and claiming damages for a breach must allege and prove he has complied with his agreement and discharged his obligations. These are fundamental principles, which it is well to observe and keep in mind in considering the contentions in this case. What did the parties contract to do? Plaintiff agreed to purchase all the coke defendant could make at its 100 ovens from January 21, 1899, to December 31, 1899; to give orders enough to keep ovens running full; to make orders in as nearly as possible equal weekly installments; to pay $1.16 per net ton f. o. b. cars at the ovens in cash on the 20th day of the month for shipments of the previous month. Defendant agreed to furnish all the coke it could make, except as noted in memorandum attached, not less than 20,000 net tons of standard

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quality during the time specified. Plaintiff was a dealer—a middleman—securing a market for coke. Defendant was a manufacturer. The stipulations were important to the business of each. The defendant had no coke ovens at Roanoke, and there was no market for coke at Landgraf. The manager of each corporation understood the business it was engaged in, and also the difficulties which might arise in connection therewith. Strikes, accidents, and deficient transportation are not uncommon obstacles in this branch of business, and other contingencies which might arise were well understood. Hence the strike clause was adopted to "mutually govern." To govern what? Not the price of coke, for that was fixed. Not the character of the coke, for that was also fixed at standard quality. Not the time of settlement, for that was to be on the 20th day of each month for shipments of the previous month. Why, then, insert this clause? Evidently to qualify the guaranties,—that of the plaintiff to give orders to keep all the ovens (100) running full, and the defendant to furnish not less than 20,000 tons, net, during the time specified. The second paragraph of the strike clause has no application, as the defendant was to deliver the coke f. o. b. cars, and paid no freight. This strike clause is a form used by the Hull Company in dealing with its customers, which it would be difficult to apply fully to the contract. Some of the stipulations have no application. This, however, does not affect the contention of the parties as presented by the record. A strike did occur; also an unavoidable accident, a drought in September, and a deficiency of transportation. There does not seem to have been any complaint on the part of the plaintiff of a failure to ship coke during the year, though for every month except May the shipments were short of the orders. About December 1st a correspondence by letter and telegram was commenced, plaintiff seeking to obtain a similar contract for coke for 1900 at an advanced price. About the 8th of December a disagreement as to whether, under the contract, coke should be shipped after December 31st, arose; but the negotiations for a new contract continued until December 23d, when defendant canceled the contract because plaintiff had not paid on the 20th for November deliveries, and no shipments were made after this date. The contract was limited to the product of the ovens, and was expressly limited to such product from January 21 to December 31, 1899, and was so treated by both parties until December 8th, when the contention arose. That plaintiff regarded the contract as so limited is shown by the proposition to obtain or enter into a new contract for the purchase of coke after December 31st. Plaintiff contended the word "suspended," in the strike clause, should be construed "postponed," and shipments not made within the time should be made after December,—in short, that the guaranty of 20,000 net tons was absolute. The authority cited for this contention is not in point, does not sustain it, and we cannot take that view. The two words are not synonymous, and the presumption is the parties understood the meaning of the words used. Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, cited, and the following case in the same volume (Filley v. Pope, 115 U.

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S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372), not cited, applicable to another branch of the case, are not in point as to this contention, but against it. In both cases it is held:

"In a mercantile contract, a statement descriptive of the subject-matter or some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty or condition precedent, upon the nonperformance of which the party aggrieved may repudiate the whole contract."

Time may be an essential element in a contract, as in the case at bar. It is well known that coke fluctuates in price. When the contract was made it was $1.16 at the ovens. At the end of the year it was worth $2.50 in the market, and plaintiff on December 20th declined to accept a proposition to contract for the sale of its entire output at the ovens in 1900 at $2.24 f. o. b. cars at ovens, but offered to enter into such contract at $2.75 per ton, etc. Time is therefore of material importance in this class of contracts, both as to sales, delivery, and payments. Other business transactions of the parties for the year were dependent on the time element of the contract. Knowing this, the parties fixed the time within which the contract was to be operative, and to put a different construction on it would be to ignore the language of the contract itself, and the evident intention of the parties when it was made. That plaintiff subsequently made contracts with other parties in which losses were incurred cannot affect the construction of this contract. Defendant possibly lost, too, by being compelled to deliver coke at $1.16, when the market price was much above that amount. There is nothing in the contract or strike clause which can reasonably be construed as extending the deliveries beyond December 31, 1899. Where the intention of the parties to limit a contract to a certain period is manifest, it is of the essence of the contract. Carter v. Phillips (Mass.) 10 N. E. 561; Scarlett v. Stein, 40 Md. 512.

The subject-matter of the contract, its purpose, and the situation of the parties, are material to determine their intention and the meaning of words used. When these are ascertained, they must prevail over the dry words used. Kauffman v. Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; Fox v. Tylor, 109 Fed. 258, 48 C. C. A. 356. The authorities cited in these cases are numerous. It is clear, considering these material matters, what the intention was,—to limit the sale to the output of the ovens for a specified time, and to modify the guaranty of defendant to deliver not less than 20,000 tons by the strike clause. Hence there was no error in the following instruction of the trial judge, to which plaintiff excepted, and which is assigned as error:

"Under the contract, the defendant was obliged to deliver to the plaintiff all the coke the defendant could make at its ovens at Landgraf, W. Va., from January 21 to December 31, 1899, except what it was allowed to furnish to others by the terms of the contract, and covered by memoranda attached to said contract, but that the defendant was not obliged to deliver any coke under said contract after December 31, 1899. That defendant guarantied to furnish not less than 20,000 tons during said period, but said guaranty was modified by what is called the 'Strike Clause' in said contract; and if the jury believe from the evidence that the defendant, by the exercise of

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due diligence, was unable to make as much as 20,000 tons of coke at its said ovens during said period, by reason of stoppage or partial stoppage of its works by any or all of the causes hereinafter mentioned, and that it did make and furnish to plaintiff all that it could make at said ovens from January 21 to December 31, 1899, but at times during said period its works were stopped or partially stopped by a strike, by deficient transportation, by lack of water caused by a long-continued drought of such extraordinary severity that it could not have reasonably been anticipated or provided against, or by other unavoidable cause, then the defendant is relieved from liability under its guaranty for such quantity of coke as it was prevented from furnishing by reason of the stoppage of its works by any or all of the causes aforesaid."

Another exception pressed in the argument was as to the right of the defendant to cancel the contract on December 23d for the nonpayment of November deliveries. As before said, negotiations commenced about the 1st of December for a contract for coke; deliveries to begin on January 1, 1900. On December 8th the manager of the Empire Company wrote to the Hull Company that he was advised that by December 31st the entire amount of coke under the contract, except the deliveries prevented by causes within the relief stipulated in the contract,—the strike clause,—would be made, and offered to sell the Hull Company the output of the ovens for 1900 at $2.75 per net ton, etc. Plaintiff claimed the entire amount guarantied had not been delivered, but should be delivered after, if not before, December 31st, but continued the negotiation for the 1900 product. The November deliveries were not paid for on the 20th, as provided in the contract; the reason alleged being because the Empire Company denied any obligation to deliver any coke after December 31st, and such claim was a breach of the contract. On the 23d of December, allowing three days of grace, the defendant canceled the contract on account of the plaintiff's failure to pay. Was this sufficient cause for refusing to pay according to the stipulation? The obligation to pay for the deliveries of the previous month by the 20th was a plain obligation of plaintiff. It is familiar law that under an executory contract, dependent on mutual obligations, the party asking damages must allege and show he has discharged his obligation,—is not in default. This was a contract for weekly shipments, which were made,—true, not in as great quantities as ordered, but, as has been seen, this shortage was not complained of, was provided for by the strike clause, and for the particular times condoned by plaintiff, if they amounted to a breach,—and for monthly payments. All the provisions of the contract were important to the parties. Defendant needed the money in its business, and that it should have it on the 20th day of the month was an express stipulation. Contracts of this nature are not governed by the same rule as simple debts, where the measure of damages is interest from the day the debt, whether bond or other form, is due. The day of payment is an essential element in the contract. The supreme court, in a recent case (Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953), held, quoting the rubric:

"After a careful review of all the cases, American and English, relating to the anticipatory breaches of an executory contract by the refusal of one party to it to perform it, the court holds the rule laid down in Hochster v.

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De la Tour, 2 El. & Bl. 678, is a reasonable and proper rule. That rule is that, after the renunciation of a continuing agreement of one party, the other party is at liberty to consider himself absolved from any further performance of it. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time of performance, as well as a performance of the contract when due."

The other rulings refer to the question of damages. This is conclusive. The authorities cited in the brief sustain this view. Reybold v. Voorhees, 30 Pa. 116; 1 Whart. Cont. § 580; Coal Co. v. Coxe, 19 R. I. 380, 35 Atl. 210; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Rugg v. Moore, 110 Pa. 236, 1 Atl. 320; Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248.

This was a deliberate failure to pay, not an inadvertence, because of a dispute as to the construction of the contract; not a breach, either actual or alleged, on the part of defendant. Even if plaintiff's contention had been correct,—that deliveries not made on account of strikes, drought, and deficient transportation were postponed, only,—it is not claimed there had been a breach of the contract by the defendant. Under these circumstances, the Empire Company had the right to cancel the contract; and there was no error in the charge of the court that if the plaintiff failed to pay the defendant on or before the 20th day of December, 1899, and up to the 23d of that month, for the coke furnished it by the defendant in the month of November, 1899, and has not yet paid for the same, then the defendant had the right to cancel the contract, and if the defendant did so cancel the contract on the 23d day of December, 1899, and notified the plaintiff thereof on that day, then the plaintiff cannot recover of the defendant any damages for failure to deliver any coke to it after said 23d day of December, 1899.

The other assignments of error are to the refusal of the court to give instructions asked by plaintiff which present reverse views to those heretofore considered and passed upon. Only one not herein decided which was pressed on the hearing and in the brief, as to the refusal of the court to give an instruction asked for, to the effect that, if defendant accepted orders for the deliveries of coke in excess of the 20,000 tons, then as to such orders it could not avail itself of the exemption provided for by the strike clause. This instruction was properly refused. Defendant company was under no obligation to ship coke to plaintiff, except under the contract, and there is no evidence to support the idea that the orders sent were accepted. The mere fact the plaintiff gave orders apparently in excess of the capacity of the ovens could create no obligation aliunde the contract. The guaranty was that it would give orders sufficient to keep the ovens running full. It bought the entire product of defendant's ovens, except as specified, and, it is conceded, received it. No ex parte act of either party could create any new obligation, and the evidence does not show any acceptance of these orders,—merely that they were received in due course of business. This could not deprive either party of rights under the contract, and the instruction asked for is inconsistent with other instructions of plaintiff,—the relief afforded by the strike clause, as herein decided, which was, in express terms, made a part

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of the contract. This strike clause was furnished by, and is conceded to be the one used by, the plaintiff in dealing with its customers, and its terms are more applicable to such dealings than to those involved in the case at bar. If plaintiff followed its custom, and used this clause in the contracts for the sale of coke purchased from defendant, it then can avail itself of the protection therein afforded. It has the same protection under this clause. It can avail itself of the same defenses. It had it in its power to protect itself against strikes, deficient transportation, and unavoidable accidents well understood in its business. If it did so, the misfortune complained of is imaginary. If it failed to do so, or elected to not avail itself of its defenses, it was its own oversight in the one instance, and choice in the other.

There is no error. Affirmed.

SIMONTON, Circuit Judge (concurring). Under the contract in the record, the plaintiff agrees to purchase all coke defendant can make between January and 31st December, 1899. Defendant guaranties within that time to make not less than 20,000 tons. Deliveries and orders to be made weekly. If defendant could make the 20,000 tons within the time specified, and did not make it, there would be a breach of the contract. If the defendant could not make 20,000 tons, this is a breach of the guaranty. It seems that defendant could have made 20,000 tons, and did not make it. Is it protected by the strike clause? The causes mentioned in this strike clause did stop the manufacturer for a time. In this event the deliveries could be suspended; that is, cease temporarily, to be resumed when the cause of suspension was removed. What effect did this have on the total delivery? All the output of the plant—all the coke the defendant could make within the time specified—was purchased by plaintiff. If the weekly deliveries were suspended in whole or in part for causes within the strike clause, just as soon as they were resumed the whole output—all that could be made—belonged to plaintiff, under the contract of purchase. So none of it could be used by the defendant to make up any deficiency. This would be impossible, as the contract was that the plant must during this period be run to its full capacity, for the benefit of plaintiff, and it was entitled to all that could be made. If this be so,—that when the deliveries were suspended the deficiency could not be made up,—then the causes mentioned in the strike clause prevented the output of 20,000 tons within the period limited. This clause certainly excused the nondelivery in the weekly installments. The failure to deliver these weekly installments prevented the delivery of 20,000 tons in the time specified. Nothing is said in the contract of any delivery after 31st December. On the contrary, the contract applies only to the output between January and December 31st. Suppose that coke had fallen in price, and that, when 31st December came, by reason of the causes in the strike clause there was still 6,000 tons to be made to make up 20,000 tons; could the defendant compel plaintiff to take these 6,000 tons at the contract price, greatly above the market price? It cannot be said that plaintiff

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could protect itself by canceling the contract. This cancellation must be during the continuance of the suspension. It appears, then, that the defendant contracted to deliver in weekly installments all the coke its plant could make, running full, between January and 31st December, 1899, guarantying that it would deliver at least 20,000 tons. The strike clause justified the suspension of the weekly deliveries. The deficit of such suspension could not be made up out of the subsequent output, because the plaintiff was entitled to all that could be made. Therefore the cause mentioned in the strike clause prevented the delivery of 20,000 tons, and excused its non-delivery. And as the contract applied only to the output up to 31st December, the deficiency could not be supplied by any output after that time.

For these reasons, I concur in the opinion of the court.

KALAMAZOO RY. SUPPLY CO. v. DUFF MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1902.)

No. 978.

1. APPEAL—SUFFICIENCY OF RECORD—RULINGS ON ADMISSION OF EVIDENCE.
Under the rules of practice of the supreme court and of the circuit courts of appeal, a ruling on the admission or rejection of evidence is not reviewable either on a writ of error or on appeal in equity, unless the record discloses the ruling made, and the taking of an exception thereto, and there is a specific assignment of error on that ground.

2. PATENTS—EVIDENCE OF INVENTION—PRACTICAL SUCCESS OF DEVICE.
Where the question of invention or patentable novelty is fairly open to doubt, the practical success of the device, with the fact that it displaced similar devices in previous use, is sufficient to turn the scale in favor of invention and sustain the patent.

3. SAME—VALIDITY AND INFRINGEMENT—LIFTING JACKS.
The Barrett patent, No. 312,316, for a lifting jack, claim 3, describes an improvement over previous structures, which, while narrow, shows merit, and, in view of its practical success, must be conceded invention and novelty. Also *held* infringed.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This was a bill by the Duff Manufacturing Company against the Kalamazoo Railway Supply Company for an injunction and for an account and recovery of damages for the alleged infringement of letters patent No. 312,316, issued February 17, 1885, to Josiah Barrett. Claim 3 is the one specifically alleged to have been infringed by the defendant, and is as follows: "(3) In a lifting jack, a lever having its inner end composed of a stem provided with curved seats, and of side plates having openings in line with such seats, in combination with pawls 22 and 23, having their pivotal shafts formed integral with their lower ends, said shafts being constructed to fit in the openings in the side plates and in the seats in the stem, and having a firm bearing therein, substantially as set forth." The defenses relied on are: First, invalidity of the patent; and, second, noninfringement. Upon final hearing upon the pleadings and proofs the case resulted in a decree in favor of the plaintiff, adjudging that the patent was valid, and finding that claim 3 was infringed by the defendant, and the case is brought here on appeal for review.

See 100 Fed. 357.

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Fred. L. Chappell, for appellant.
James I. Kay, for appellee.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after making the foregoing statement, delivered the opinion of the court.

Two points of advantage are insisted upon in the improvement covered by claim 3 as involving invention as distinguished from mere mechanical improvement, such as would be apparent to any one skilled in the art. The advantages are described by one of the machinists, introduced as a witness as being:

"The great strength and durability of the jack, the construction giving an extra length of bearing or wearing surface, and great strength between the pawl body and its shaft. The strength in the support for the pawl was obtained by the seating of this shaft for its full length in the handle, the pawl shaft being supported in a curved seat for the full width of the pawl, and, in addition to that, in the same seat extending into the bearings or side plates, which held the pawl into the seat."

With reference to this asserted improvement over anything found in the prior state of the art, the learned judge, presiding in the circuit court, said:

"The idea of a lever with its inner end composed of a stem with a curved seat presents no novelty, but this patent presents the first instance called to the attention of the court in which this seat is extended and the long bearing obtained by lengthening the pawl shafts so that they extend into the side plates. The play of the pawls in the complainant's device is not restricted. The pawls are held firmly in place, and the seat is extended by means of the side plates the full length of the bearings and pawls. This result had been sought, but not attained, before the issue of the patent to Barrett, and the proof shows that the lifting jack made after this patent practically displaced all previous jacks. In the Otstot patent there is no 'stem provided with curved seats and side plates having openings in line with such seats,' nor pawls 'having their pivotal shafts formed integral with their lower ends,' said shafts being constructed to fit in the openings in the side plates and in the seats in the stem and have a firm bearing therein. * * * The McIntyre and other patents introduced do not anticipate the third claim of complainant's patent, and, although the step from the previous devices was a short one, it was the all-important step, and shows more than mechanical skill which had been expended on the previous long line of lifting jacks displayed in the patent office. I find the complainant's patent valid."

And the circuit court disposed of the question of infringement by saying:

"The defendant's jack is a copy of the complainant's, except that the stem is split in the center, and then riveted together, and it has only one separable side plate instead of two; but everything contained in the third claim of complainant's patent is found in the defendant's jack, and the imitation has not even sought to be disguised."

The peculiar advantages in the handle and pawl construction in suit and relied on in the argument at bar were said to be in that feature of the construction by which the pawl shafts were made integral with the pawls and extended beyond them, resting in the curved seats in the hand lever and within side plates, by which they are held securely in the curved seats, thereby providing for a full and free swing of the pawls, and a solid support of the pawl upon the hand lever

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directly under the body of the pawl, this being of greater width than the pawl body, because the pawl shafts extend out into the bearings; the combination making a firm and durable connection, capable of sustaining the heavy loads, jolts, and strains to which lifting jacks are constantly subjected in practical use. Stated in another form: It is claimed that in practical operation, by means of the broad seat for the pawl shafts, which are formed integral with the pawls and extend into the side plates, the combination sustains great weight and strain, and avoids "shearing strain" by retaining the pawl in position, and thereby avoiding the danger of breaking by striking against the sides of the seats for the pawl shafts. The evidence does disclose that the operative machine made under the patent in practical use does sustain great weight, and the danger of accident from breaking down, whether from direct weight or "shearing strain," is prevented, or much diminished. As the general construction and practical use of this and other lifting jacks are well understood, a more particular statement of the case or description of this and other devices is not deemed necessary.

Certain questions were made on argument in this court in relation to rulings in the court below on the admission of parts of the evidence. The record does not disclose, however, what ruling was made in the court below, nor does it disclose that particular exception was taken and reserved, and there is no specific assignment of error on this ground. It is assumed that the practice in this court is similar to what is said to be the practice on appeal in the supreme court of the state of Michigan in equity cases, under which error in the admission or rejection of evidence may be relied on for reversal without any assignment of error, and without the record showing any specific ruling in the court below on which such error is assigned. But the supreme court of the United States as early as 1791 adopted the system of appellate procedure of the court of chancery in England as outlines for its practice on appeals in equity, and the practice and procedure on appeals in equity are the same as those of the English system, as changed and modified by the rules of the supreme court of the United States or by act of congress. And the system of procedure on appeal in the supreme court of the United States, with such rules as have been adopted by the circuit court of appeals, constitute the system of procedure in the circuit courts of appeals; those courts having, by rule, adopted the practice in the supreme court of the United States, so far as the same shall be applicable. Under rule 35 of the United States supreme court (11 Sup. Ct. iii.) and under rule 11 of the circuit court of appeals (31 C. C. A. cxlvi., 90 Fed. cxlvi.) regulating the practice in this court, when the error alleged is to the admission or rejection of evidence, there must not only be an assignment of error, but this assignment is required to quote the full substance of the evidence admitted or rejected. It is needless to add what is plainly evident, and expressly declared on the face of the rule, that it applies equally to a case brought to this court for review on appeal in equity or on writ of error at law. Moreover, rule 13 of the supreme court of the United States (3 Sup. Ct. x.) declares that:

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"In all cases in equity or admiralty heard in this court no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record, but the same shall otherwise be deemed to have been admitted by consent."

And this rule has been expressly adopted in rule 12 of the circuit courts of appeals (31 C. C. A. clii., 90 Fed. clii.), under which it has been decided that an objection made for the first time on appeal to the admissibility of any exhibit is unavailing. Sugar Refining Co. v. Funch, 20 C. C. A. 61, 73 Fed. 844. The purpose of these rules, and their bearing and effect on the practice in this court, are quite evident. As the record discloses no exception or ruling in the court below, and there is no assignment of error in this court, the questions suggested are not open to consideration on this appeal. Randolph v. Allen, 19 C. C. A. 353, 73 Fed. 23; Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York, 11 C. C. A. 96, 63 Fed. 48; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246.

With reference to the question of infringement we need only say that we concur in the view that the lifting jack made by the defendant is for every substantial purpose a mere copy of the complainant's structure. Practically speaking, it is quite evident that the stem is simply split in the center, the parts separately made, and then united by being firmly riveted together, and that the parts thus united effect the same result, and in substantially the same way. An infringement by the defendant is not thereby escaped. Bundy Mfg. Co. v. Detroit Time-Register Co., 36 C. C. A. 375, 94 Fed. 524; Sessions v. Gould (C. C.) 49 Fed. 855. The fact of infringement is too plainly evident to admit of extended discussion or treatment, and this issue may be dismissed with the statement that infringement is quite clear upon the record.

In regard to the question of validity it is evident that the patent described in claim 3 is a very narrow one in view of the prior art, and must be so construed, and that the issue is close. In practical use it is obviously true and necessary that a lifting jack be constantly subjected to the strain of great weight and to the force of heavy jolts. It is of primary importance, therefore, that a lifting machine or device, such as the jack in question, should be so devised and constructed as to sustain much strain from weight and jolting. Inspection of the complainant's structure made in accordance with claim 3 will disclose that the lever with its inner end composed of the stem provided with curved seats and with the side plates into which the shaft of the pawls extend with a firm bearing in the openings in these side plates and in the seats in the stems is well adapted to enable the shaft to sustain, in practical use, the strain made necessary in heavy work. Furthermore, in considering the question of patentable novelty the fact that the complainant's device was at once successful, and that, to a large extent, it practically displaced all lifting jacks in previous use, must be regarded as a circumstance of decided significance. Such circumstance clearly discloses the meritoriousness of the device or invention. And it is well set-

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tled that, when the question of patentable novelty is fairly open to doubt, the practical success of the device, with the fact that it displaced similar devices in previous use, is sufficient to turn the scale in favor of the invention, and to sustain it. Smith v. Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952; Magowan v. Packing Co., 141 U. S. 333, 12 Sup. Ct. 71, 35 L. Ed. 781. In the case of National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 45 C. C. A. 554, 106 Fed. 693, Judge Sanborn, in speaking for the circuit court of appeals, said:

"The patent itself is prima facie evidence of the novelty of his combination, and, if that issue was doubtful, this presumption would entitle it to a construction which would sustain, in preference to one which would destroy, the grant it evidences. In five years after Hein disclosed his invention and obtained his patent, his brake beam was in use on 85 per cent. of the railroads controlling 85 per cent. of the cars using iron brake beams in this country, and in eleven years from the date of his patent more than 1,000,000 of his brake beams had been made and sold. It is true that the extensive use of a machine or combination which is clearly without novelty does not dispense with that statutory requirement, and that it will not alone sustain a patent. But, where the question of novelty is fairly open for consideration under the law, the fact that a patented device or combination has displaced others which had previously been used to perform its function, and has gone into immediate and general use, is pregnant and persuasive evidence that it involves invention."

Numerous cases are cited as supporting this statement of the law. In the case of National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co. it was declared that an old result obtained in a more facile, economical, and efficient way may be protected by patent as securely as a new machine or composition of matter. This was going further than we need go in the case at bar. In Hallock v. Davison (C. C.) 107 Fed. 482, it was said, in effect, that the presumption in favor of the validity of a patent arising from its issuance is much re-enforced by the fact that the patented machine was the first of its class to accomplish successfully the purposes intended, and that it had been admittedly copied by the defendant. "It is often difficult," said Judge Coxe, "to draw the line between invention and mechanical skill; but when the court has to deal with a machine which, for the first time, has achieved success after a long line of failures, which accomplishes results never attained before, which is new and useful and in large demand, it is generally safe to assert that the man who made it is an inventor, and not a mere mechanic." The proposition that courts incline to sustain a patent to the man who takes the final step which turns failure into success was distinctly and emphatically recognized in the case of The Barbed Wire Patent 143 U. S. 275, 12 Sup. Ct. 450, 36 L. Ed. 161. "Under such circumstances," said Mr. Justice Brown, giving the opinion of the court, "courts have not been reluctant to sustain a patent to a man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins." So, in Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, in view of the extensive use made of the invention, which was for an improvement in connected carriage springs, the invention was held patentable and valid, although the question was regarded as by no means free from doubt. In Krem-

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entz v. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, the supreme court expressly approved the case of the Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. (C. C.) 47 Fed. 894, in which Mr. Justice Brown had said:

"When the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, is sufficient to turn the scale in favor of the existence of invention."

And in the still later case of Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, Mr. Justice Shiras, speaking for the court, said:

"It must be admitted that both of these patents granted to Augustus Adams, one in 1861, the other in 1866, describe mechanical contrivances closely resembling the invention in question, patented by H. A. Adams, October 15, 1872. There is present in all three machines a rotating shaft with spurs or wings, and the purpose sought to be effected is the same. But, as we have seen, when the test of practical success is applied, the conclusion is favorable to the last patent. Where the patented invention consists of an improvement of machines previously existing, it is not always easy to point out what it is that distinguishes a new and successful machine from an old and ineffectual one. But when, in a class of machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the patent office has granted a patent to the successful inventor, the courts should not be ready to adopt a narrow or astute construction, fatal to the grant."

It is manifestly just to a patient and meritorious inventor that the court should be careful not to regard with too much importance the mere mechanical resemblance in the parts of the combination, or the combination as a whole, to the neglect of the result, and the success and efficiency with which the object aimed at is accomplished.

Upon the whole case, after examination of prior inventions and patents, we conclude that the structure described in claim 3 of the complainant's patent was not present in the prior patents relied on as anticipating, and that, practically, the desirable result accomplished by the complainant's patent and the method in which this is done are wanting in the earlier inventions of this class. While, as stated, the patent is a narrow one, we think it is valid and sustainable, and the decree of the court below is accordingly affirmed.

ERIE R. CO. v. MOORE.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

No. 900.

1. RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — BRAKEMAN—TRACK —EVIDENCE.

Plaintiff was a brakeman. As his train approached a side track which it was to take to enable another train to pass, he, in the line of his duty, was to go forward to throw the switch. There had been a runway at the side of the track on which brakemen were accustomed to travel, and when plaintiff saw it the summer before it and the track were in good condition. Shortly before the injury the track had been raised, and the ballast between the ties had not been replaced, but the spaces were

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filled with snow. The runway was covered with piles of slag, and was very difficult to walk on. The engineer wanted to make the side track without stopping the train. When the train had slowed down to one or two miles an hour, plaintiff alighted from the pilot, and ran forward to open the switch. His foot slipped between the ties, where he was held fast, and he was run over and injured by the engine. *Held*, that the questions of defendant's negligence and of plaintiff's contributory negligence were for the jury.

2. SAME—SURROUNDING CIRCUMSTANCES—EVIDENCE.
Where a brakeman, while running on the ties in front of a moving train, the runway at the side of the track being blocked, to open a switch, fell, and was injured, testimony that the engineer told him to hurry up, and get off the front end of the engine, and get the switch over as soon as possible, so they could get in out of the way of another train without stopping, was competent as a circumstance showing the situation under which the brakeman was acting, though the engineer did not have authority to control the brakeman as his superior, within the terms of the Ohio statute.

On Rehearing.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case was heard at the October term, 1900, and is reported in 46 C. C. A. 683, 108 Fed. 986. Upon that hearing we reached the conclusion that the court did not err in submitting the case to the jury upon the question of the negligence of the railroad company and upon the alleged contributory negligence of the defendant in error. The rehearing was granted upon the questions raised as to the admissibility of certain testimony. In view of the importance of the case, however, we have re-examined the record, and have again considered the case as developed by the testimony. We see no reason to change the conclusion previously reached that the case was one to be submitted to the jury, and that the charge of the trial judge was not open to objection by the plaintiff in error. The testimony tended to show that the defendant in error was a brakeman in the employ of the railroad company; that upon the day of his injury he was upon the front part of the train, which was proceeding westwardly from Youngstown to Kent on the line of the railroad of the plaintiff in error; that upon nearing Freedom station the train was to go upon a side track to permit the passing of an eastwardly bound train. The defendant in error, being the front brakeman, in the line of his duty, went forward for the purpose of throwing the switch. Approaching this switch, upon the northerly side of the track, there had been a runway upon which brakemen had been accustomed to travel. The summer before the injury, which occurred in December, the defendant in error had seen this runway, and it, as well as the track, was then in good condition. Shortly before the happening of the injury the track had been raised, and the ballast between the ties was not replaced. The runway, which sloped off at the point of the accident, was, for a considerable distance, covered with piles of slag, rendering it very difficult to travel upon. There was snow upon the ground at the time, which filled up the spaces between the ties. Standing upon the step of the pilot of the engine, the defendant in error observed this condition,

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and when the engine had slackened to a very slow rate of speed—barely moving, as some of the witnesses say; going one to two miles an hour, as others say—alighted from the pilot, and stepped upon the ties in front of the engine, took three or four steps forward, when his foot slipped between the ties, where he was held fast, and run over by the engine, suffering the loss of the lower part of both legs. In view of this state of the case and the guarded charge of the court, we think now, as we did upon the former hearing, that it was not error to submit to the jury the question of the negligence of the railroad company in failing to provide a reasonably safe place for the defendant in error to work, as well also the alleged negligence of the defendant in error in stepping upon the track in front of an engine in view of the situation, and the fact that the testimony tended to show that the engine was running very slowly.

Upon the rehearing the question principally argued was as to the admission of certain testimony. The plaintiff, being on the stand in his own behalf, was permitted to answer the question as to what he did immediately before the accident:

"Q. What, if anything, did he [the engineer] say to you about making the switch? A. He told me to hurry up, and go out in front of the engine, and get off the front end of the engine, and get the switch over as soon as possible, so we could get in out of the way of No. 4 without stopping."

The weight to be given this testimony is carefully limited by the trial judge in his instructions to the jury. The judge said:

"The engineer had no right to direct him to do an obviously dangerous thing, and the engineer's direction would not justify him in doing an obviously dangerous thing. Nothing can justify that, unless, possibly, an emergency such as would justify a conductor in undertaking to save the lives of his passengers. But if he said he was in a hurry, that is simply a circumstance constituting part of the situation in the light of which you will look at this question. So that when you have taken all the circumstances just as they were, if you think he exercised that care and caution that ought to have been exercised and ought to be expected of a reasonably prudent man in just that situation, then he would not be guilty of negligence, and if he did not do that he would be; and, if he is guilty of it, it defeats his suit."

The trial judge was of the opinion that the engineer was not in authority over the brakeman in such wise that he would be a superior for whose negligence the railroad company could be held responsible under the Ohio statutes, and the testimony was admitted for the sole purpose of throwing light upon the alleged contributory negligence of the defendant in error. For this purpose, we think, it was competent. Negligence consists in the doing of that which a man of ordinary prudence, under the same or similar circumstances, would not do, or in not doing that which ordinary prudence requires in the same or similar circumstances. In order to judge of the conduct of an individual under given conditions, and to determine whether the same is or is not negligence, it is necessary that the trier should be advised of the very situation in which the person charged with negligence is placed at the time; for it is in the light of such circumstances that his conduct must be judged. The question of contributory negligence is usually one of fact, and only becomes one of law when the circumstances are such that fair-minded men

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can draw no other inference than that of negligence from the conduct in question. There is no exact standard of conduct which will determine whether one is guilty of negligence, applicable to all cases. It is of the highest importance that the conduct of one charged with negligence shall be viewed in the light of the situation in which he is placed at the time. In this case it appears that the engineer who made this statement to the brakeman, although he may not have been a superior servant for whose conduct the company would be responsible under the Ohio law, nevertheless was clothed with authority to direct the front brakeman to turn the switch, to tell him when he wished this to be done, and upon receiving such directions it was the duty of the brakeman to go forward for that purpose. It is true that no such direction would justify the brakeman in exposing himself to certain injury or self-evident danger in the discharge of his duties. It was a circumstance, however, which, with others, was entitled to weight in enabling the jury to determine whether the defendant in error, in choosing to go upon the track in front of the locomotive was guilty of negligence or not. The condition of the runway, the apparent smoothness of the track, the slow rate of speed at which the engine was moving, the order of the engineer to act promptly in throwing the switch that the train might go upon the side track out of the way of the coming train, were all pertinent circumstances to enable the jury to determine the situation, and the conditions under which the defendant in error acted at the time of his injury. The charge of the judge carefully limited the admission of this testimony to this purpose. It was not admitted as a ground of recovery against the railroad company, but solely for the purpose of aiding the jury in determining the question of contributory negligence on the part of the defendant in error. In Railroad Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052, the supreme court of Ohio held it competent to show that one who was charged with contributory negligence in crossing a railroad track to take a train upon another track of the company had been informed by a messenger not connected with the railroad company that the train which was expected upon the track which he was crossing was late. This testimony was admitted, not to show negligence on the part of the railroad company, but for the purpose of enabling the jury to weigh the conduct of the plaintiff in the light of the circumstances which surrounded him at the time. Limited as it was by the charge of the judge, we think the statement of the engineer was competent.

It is said that this conclusion is in direct opposition to two cases decided in the supreme court of the United States: Railroad Co. v. Jones, 95 U. S., 439, 24 L. Ed. 506, and Coyne v. Railroad Co., 133 U. S., 372, 10 Sup. Ct. 382, 33 L. Ed. 651. In the former of these cases the plaintiff, who was a laborer on a work train, returning from work in the evening, rode upon the pilot of the engine, and while there was injured by some cars standing in a tunnel. He tried to excuse his alleged negligence in riding in such a place by showing that the foreman directed him to "jump on anywhere; that they were behind time, and must hurry." The supreme court held that such direction was no excuse for the plaintiff in getting on the pilot

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of the engine when there was ample room for him in the car, and that he needlessly exposed himself to the injury which was due to his own carelessness and folly. In the Coyne Case the action was brought to recover for the alleged negligence of one McDonald, a boss, under whose directions the plaintiff, with others, was engaged in lifting rails to a flat car. McDonald ordered the plaintiff and others to make haste, and they commenced to lift the rails, which they were accustomed to raise by concerted action upon the order of McDonald, but, hurried, and agitated by the curses of McDonald, they threw the rail at one end with great force, and at the other with less force, so that it struck the end of the car, and fell, injuring the plaintiff. The supreme court held that there was nothing in this connection to show the negligence of McDonald, but that the testimony rather tended to show the injury to have resulted to the plaintiff because of the failure of himself and fellow servants to wait for the command and lift together. In the case of Railroad Co. v. Egeland, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82, Mr. Justice Peckham states the reasons upon which the case of Railroad Co. v. Jones, supra, was decided, and also holds in the case then under consideration that it was competent to show that a laborer who had jumped from a moving train, receiving injuries, had been ordered so to do by the foreman in charge, and that this direction was competent to be considered by the jury in determining whether the plaintiff had been guilty of negligence contributing to the injury. It is true that the direction to jump in that case was given by one in authority over the plaintiff. In the case at bar there was testimony tending to show such relation between the engineer and the brakeman that it seems to us competent to permit the jury to consider this statement as a circumstance in determining the alleged contributory negligence of the plaintiff.

We find no error in the record to the prejudice of the plaintiff in error, and the judgment will be affirmed.

TELLER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 30, 1901.)

No. 1,537.

1. PUBLIC LANDS—TIMBER—CUTTING—INTENT—MISDEMEANOR—CHARGE.
Under Rev. St. 1878, § 2461, 20 Stat. 89, and 27 Stat. 348, making it a misdemeanor for any person to cut timber on any lands of the United States situate in any of the public-land states with intent to export or dispose of the same, where the cutting is admitted, the only intent necessary to show is the intent to export or dispose of the timber.

2. SAME—EVIDENCE—PURCHASE OF OTHER LANDS.
On the trial of one accused of unlawfully cutting timber on land of the United States, evidence that about the time of the cutting defendant purchased and paid for the full quantity of similar land, which he could purchase under the act of June 3, 1878, is inadmissible to show that he would not intentionally commit a trespass.

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3. SAME—VIOLATION OF LAW—CUSTOM.
On the trial of one accused of unlawfully cutting timber on land of the United States, evidence of a custom in that locality, known to the general land office, of entering on land and cutting the timber therefrom before patent was obtained, is inadmissible, since a custom to violate the law cannot justify itself.

4. SAME—HONEST INTENT.
Where defendant unlawfully cut timber on public land, the fact that he acted in accordance with a general custom in that locality is not evidence of an honest intent on his part.

5. SAME.
Where defendant unlawfully cut timber on public land, the fact that before cutting he endeavored to ascertain whether the land was surveyed, and also notified a special agent of the government that he was cutting the timber, and was not warned off for three weeks, is not evidence of an honest intent.

6. SAME—CHARGE.
On the trial of defendant for unlawfully cutting timber on public land, the court charged that, in order to convict, the jury must find that there existed in his mind a willful and wrongful purpose to obtain the timber in violation of law; and that if he entered on public land knowing it was such, without having complied with the provisions of law giving him a right to do so, and cut timber therefrom, they would be authorized to find the requisite criminal intent. *Held*, that such charge fairly stated the law, and was as favorable to defendant as he was entitled to.

7. SAME—EVIDENCE—INTENT.
Where defendant admits that he had cut timber on 300 acres of unsurveyed government land, to which he had no claim or color of title, and there is evidence that he was informed by the register of the land office that he could not acquire title because the lands were not open to entry, and that he promised his workmen that he would stand between them and the government, and that he had fully exhausted all his privileges of purchasing such lands, the intent constituting the offense of unlawfully cutting timber on government land, defined by Rev. St. § 2461, and Act June 3, 1878, is sufficiently shown.

8. SAME—APPLICATION TO PURCHASE—RIGHT TO CUT TIMBER BEFORE PATENT—LICENSE TO CUT.
An occupant of a mineral claim, who has applied for a patent before the purchase price is paid and before he receives a certificate, has no right to cut the timber on such claim with intent to export or remove the same, and a license from him to so cut the timber gives no protection to the licensee as against the government.

9. SAME—MINERAL CLAIM—SEPARATION FROM PUBLIC DOMAIN.
The exclusive right to occupy and work a mineral claim, given to the locator by the mining laws during his occupancy, does not segregate such claim from the public domain, so as to exclude such land from the operation of Rev. St. § 2461, 20 Stat. 89, and 27 Stat. 348, making it a misdemeanor for any person to cut timber on the public lands.

In Error to the District Court of the United States for the District of Wyoming.

Willard Teller (Clayton C. Dorsey, on the brief), for plaintiff in error.

Timothy F. Burke, for the United States.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

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ADAMS, District Judge. On November 25, 1899, a criminal information was filed in the district court of the United States for the district of Wyoming against John C. Teller, the plaintiff in error, charging him with having, between January and September of the year 1898, willfully and unlawfully cut and procured to be cut 150,000 feet of timber growing on the public lands of the United States in said district, with intent to export and dispose of the same. In due course a trial was had, the defendant found guilty, and sentenced to pay a fine of $1,000.

The statutes under which this information was lodged—Rev. St. 1878, § 2461; Act June 3, 1878 (20 Stat. 89); and Act Aug. 4, 1892 (27 Stat. 348)—make it a misdemeanor for any person to cut or procure to be cut timber growing on any lands of the United States situate in any of the "public-land States" with intent to export or dispose of the same. The defendant is accused of cutting timber from two certain tracts of public land in Carbon county, Wyo., one located on Cottonwood creek, and supposed to have been land subject to entry and sale under the act of June 3, 1878, commonly known as the "Stone and Timber Act," and the other being a certain mining claim known as the "Montezuma Placer." The record shows that an admission was made by the defendant at the trial "that he cut timber on 300 acres of unsurveyed government land to which he had no claim or color of title." This admission relates to the cutting on the first-mentioned tract, located on Cottonwood creek. The trial court charged the jury that, before they could convict the defendant, they must find that there existed in his mind "a willfull and wrongful purpose to obtain the timber in violation of the law"; and also that, "If the defendant entered upon the lands of the United States, knowing the same to be a part of the public domain of the United States, and without complying with the requirements of the statute, or attempting to do so, cut, or caused to be cut, timber growing thereon, you will be authorized to find that such cutting was willfull and intentional, and if you do so find the defendant would be guilty, and you should say so in your verdict." In other words, the trial court practically instructed the jury that the intentional cutting of timber found growing on lands known by the person cutting the same to be a part of the public domain constituted a misdemeanor denounced by law. The defendant takes issue with this declaration, and contends that the jury should have been told that there must have been an actual evil or criminal intent, or bad purpose, amounting to moral culpability, in order to convict, and that the court erred in excluding evidence tending to show that the defendant, although cutting timber from lands known by him to have been public lands, cut the same with an honest purpose. The particular facts offered to be proved and relied on by defendant to establish such honest purpose with respect to the cutting from the first-mentioned land are as follows: In June, 1898, the defendant entered 160 acres, and four other persons each entered 160 acres of the same character of lands lying in the near vicinity to those upon Cottonwood creek now in question, for which defendant paid to the United States the price required by the stone and timber

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act, namely, $2.50 per acre, or a total of $2,400. Defendant's counsel contend that such purchase by him of similar lands and payment therefor at about the same time as is laid in the information is a circumstance which ought to have gone to the jury as evidence that he would not intentionally commit a trespass for the sake of obtaining timber of the same character a short distance away. We entirely fail to appreciate the force of this contention. The act of June 3, 1878, supra, provides in express terms that the timber lands therein contemplated may be sold to citizens "in quantities not exceeding 160 acres to any one person or association of persons." Defendant had already purchased his full limit of 160 acres, if, indeed, he had not indirectly secured the four other quarter sections above referred to; and, conceding that he had paid for that land, it cannot be that such fact would have any tendency to show that he had an honest purpose in trying to appropriate other lands. He had exhausted his right already, and he knew it, and such evidence, in our opinion, would tend to impugn the motive of defendant in trying to secure other forbidden lands, rather than palliate his conduct in so doing.

It is next urged that the court erred in excluding evidence of a custom prevailing in the vicinity where the offense was committed of entering upon land and immediately proceeding to cut timber therefrom before patent was obtained, and while proceedings to secure the same were pending, and that the custom was known to the general land office. This evidence of custom was offered in connection with an avowal by the defendant of his intention at the time he commenced cutting timber on the tract in question to purchase the same afterwards from the government. We entirely agree with the trial court that this evidence was incompetent. A general custom to violate the law cannot, on any principles of morality or law, justify itself. Neither can it justify an individual instance of violation of the law. Neither can knowledge of such violation by an agent of the United States excuse or justify it. If it were otherwise, then the register of the land office at Cheyenne, or any other agent of the government, and certainly the commissioner of the general land office at Washington, could annul any act of congress at pleasure. But it may be said these observations do not meet the argument that such custom, known to defendant, and acted upon by him, is evidence of an honest intent and purpose on his part in doing that which was customary. Every person is supposed and must be held to know the law. Any laxity in enforcing this axiomatic and fundamental rule would lead to endless disorder and crime. Teller, therefore, knew, or must be held to have known, that any such custom as is claimed in his behalf was an unlawful custom, amounting in and of itself to a violation of law, and it must also be held, in the light of the facts disclosed by this record, that any such custom, if lawful and competent in other cases, could not be of any avail to him, because, as just seen, he had already exhausted his full privilege of purchasing timber land under the act of 1878, and could not directly, in the manner prescribed by congress, or in any other manner, lawfully acquire any more. If

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he could not do it directly or lawfully, it is impossible for us to conceive how he can shelter himself under a general custom, and thereby justify himself in the attempt to accomplish the same purpose indirectly and unlawfully.

In the case of U. S. v. Mock, 149 U. S. 273, 13 Sup. Ct. 848, 37 L. Ed. 732, the supreme court considered a case of trespass for cutting and carrying away timber from public lands. The trial court had charged the jury as follows:

"It is a matter of history that the government permitted the early pioneers, as they went ahead to make their homes for themselves, to go on the public domain, and take such timber as was necessary for domestic use; and, although there never was any law or license to that effect, it was done with knowledge of every department of the government, legislative, judicial, and executive. * * * While I wish you to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes."

The court, speaking by Mr. Justice Brewer, commenting on the foregoing observations of the trial court, says:

"The specific portions [of the charge] to which the attention of the court was called at the time and exceptions taken are that which refers to the history of the attitude of the government towards pioneers and others who took timber from government lands for domestic use, and that which declared that no verdict could be returned in favor of the government except for the value of the lumber manufactured. In these there was obvious error. * * * Nor were the observations of the court in reference to the attitude of the government justifiable. Whatever propriety there might be in such a reference in a case in which it appeared that the defendant had simply cut timber for his own use, or the improvement on his own land, or development of his own mine (and in respect to that matter, as it is not before us, we express no opinion), there certainly was none in suggesting that the attitude of the government upheld or countenanced a party going into the business of cutting and carrying off timber from government land, manufacturing it into lumber, and selling it for profit."

The principles enunciated in that case are, in our opinion, irreconcilable with the claims of defendant's counsel in this case.

The defendant contends that the facts shown by the record that he endeavored, prior to cutting any timber on the land in question, to ascertain whether the land had been surveyed; that while at work cutting the timber he notified one Abbott, a special agent of the government, that he was so doing; that he received no notice to quit for three weeks thereafter,—constitute evidence of an honest purpose on his part, and should have been submitted to the jury on that issue. The principles hereinbefore discussed are, we think, entirely applicable to this last contention. The land was unquestionably unsurveyed public land, and, if defendant had prosecuted his alleged honest purpose far enough, he would have ascertained that fact. But whether he knew or could have known that it was unsurveyed public land was immaterial. All that he was required to know was that it was public land, surveyed or unsurveyed, and, if he knew that,—which unquestionably he did,—the fact that he endeavored to find out whether it was surveyed or not was quite immaterial; and certainly the toleration of a trespass for three

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weeks—or for any time, for that matter—by a special agent of the government, whose duty it was not to tolerate it at all, can be of no avail to a trespasser by way of showing that his trespassing was done with an honest purpose.

So far we have treated the several contentions of defendant's counsel as if it was competent for him to disprove an actual bad purpose or evil intent; in other words, as if it was incumbent on the government to show a bad purpose or evil motive in the mind of the defendant in committing the trespass complained of. We have considered the excluded testimony on that theory (and even on that theory we have been unable to find any substantial error in the rulings of the court), but in so doing we have given the defendant the benefit of a position which, in our opinion, is unwarranted by the law. For the purpose of protecting the public domain from the invasion of trespassers, congress denounced as a crime the cutting of timber on public land "with the intent to export and dispose of the same." This is the intent that is made criminal by the law, and the only intent necessary to establish the crime in a given case. This intent is fully admitted in the present case. It is undisputed that the defendant cut the timber in question for the purpose of fulfilling a contract with the receivers of the Union Pacific Railroad Company for the delivery of 250,000 ties at Ft. Steele. It has been held by the supreme court in Stone v. U. S., 167 U. S. 188, 17 Sup. Ct. 778, 42 L. Ed. 127, that it is necessary in prosecutions under the statute now in question to prove a criminal intent, "or at least that [defendant] knew the timber to be the property of the United States." The elements of the offense charged against the defendant are three in number: (1) Cutting timber; (2) from land known to be public land; and (3) with intent to export or dispose of the same. These three elements concurring, the crime, in our opinion, is complete, and the jury would be fully justified in finding—and, indeed, it would be their duty to find—all the criminal intent required by the act.

The trial court charged the jury that, in order to convict, they must find that there existed in the mind of the defendant a "willful and wrongful purpose to obtain the timber in violation of the law." Taken by itself, this portion of the charge would have been misleading; but, taken in connection with other portions of the charge, to the effect that, if the defendant entered upon public land knowing it was such, without having complied with the provisions of the law giving him a right to do so, and cut timber therefrom, the jury would be authorized therefrom to find the requisite criminal intent, it fairly stated the law to the jury, and certainly as favorable to the defendant as he was entitled. The admission of the defendant at the trial that he had cut timber on 300 acres of unsurveyed government land to which he had no claim or color of title; the evidence of E. M. Johnston, register of the land office at Cheyenne, that he had informed the defendant, prior to his cutting the timber, that he could not acquire title to the lands, because they were not open to entry; the testimony tending to show that defendant promised his workmen, when they called his attention to the fact that the

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lands were public lands, to stand between them and the government; and the further important fact that defendant had fully exhausted all his privileges of purchasing land under the stone and timber act,—all conduce to show, and, in our opinion, satisfactorily show, that defendant well knew the land was public land, and had all the criminal intent required by section 2461, Rev. St., and the act of June 3, 1878, to constitute the offense there denounced. In our opinion, none of the facts relied upon by him as evidence of an innocent intent or purpose were relevant or material to the case.

The next assignments of error relate to the cutting of timber by the defendant on the Montezuma placer claim, and arise on the following state of facts: One Mullison had been in possession of the Montezuma placer claim, working the same for the precious metals therein, for about 30 years prior to 1898, but he had never applied for a patent, or taken steps to acquire title from the United States prior to that day. In October of that year Mullison and the defendant entered into a contract by which it was agreed that defendant, in consideration of being permitted to cut all the tie timber growing thereon, should pay all the expenses, including the government price of $2.50 per acre, for securing a patent by Mullison to his claim. Pursuant to this agreement, Mullison, early in January, 1898, applied for a patent, and between that day and June 22, 1898, defendant proceeded to cut and did cut over about 300 acres of the claim, and advanced money amounting to about $2,000 for the payment of the expenses and purchase price of the land from the United States. On June 22, 1898, the payment was made, and Mullison secured a receiver's receipt for the same, entitling him in due course to a patent for the lands. The contention of defendant's counsel, based on several assignments of error relating to the exclusion of evidence and the court's charge, to which particular reference need not now be made, is that his cutting timber from this land after the application for a patent was made, and before the money was paid and a receiver's certificate secured, does not constitute an offense under the statutes of the United States. His proposition is that the ultimate payment of the money and securing the receiver's receipt conferred upon Mullison a title to the land, which, by relation, operated as of the date of the application, and in fact as of the time of his original location of the claim, and therefore that the cutting of timber at the time in question with the consent of Mullison constituted no violation of the laws of the United States. It may be conceded that the payment for the land conferred upon Mullison an equitable title to the same, which entitled him to a patent, and that he was not required to wait for the actual issue of a patent converting the equitable right into a legal title before exercising all the incidents of ownership. This, we think, is the law as established by the authorities (Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 839; Stark v. Starrs, 6 Wall. 402, 417, 18 L. Ed. 925; Deffeback v. Hawke, 115 U. S. 392, 405, 6 Sup. Ct. 95, 29 L. Ed. 423; Cornelius v. Kessel, 128 U. S. 456, 460, 9 Sup. Ct. 122, 32 L. Ed. 482; Railroad Co. v. Whitney, 132 U. S. 357, 361, 10 Sup. Ct.

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112, 33 L. Ed. 363; Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; Bogan v. Mortgage Co., 11 C. C. A. 128, 63 Fed. 192), and the contention of the government in this case to the contrary is not well founded. The foregoing cases are, however, no authority for the proposition that lands cease to be public lands, or that a claimant secures an equitable right to a patent, until all the acts are performed and all the money is paid by the claimant, which are made by the law prerequisite to securing the legal title. Mullison, it appears, had located upon and worked his claim for some 30 years prior to 1898, and had thereby, under the mining laws, secured the right of possession to work the claim for precious metals as long as he desired to exercise that right, and had also acquired the option to apply for, and, on certain terms prescribed by law, to secure from the United States a patent conferring upon him title in fee simple to the lands contained in the claim, with all its incidental rights, privileges, and immunities. It is strenuously argued by defendant's counsel that the possessory title acquired by Mullison by virtue of the location, record, and working of his claim for so long a time segregated the same from the public domain, and conferred upon him such an equitable right as entitled him or his licensees to all the rights and incidents of absolute ownership. We cannot agree to any such proposition. Three separate rights or titles are recognized by the supreme court in and to public lands. In Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., supra, the court quotes approvingly from an opinion of the secretary of the interior, as follows: "By the laws of the United States, three distinct classes of titles are created, namely: (1) Title in fee simple; (2) title by possession; (3) the complete equitable title." Title by possession is the first one in order of time acquired. Possession of a mining claim, in accordance with the provisions of the statute, by well-settled authority, confers the right, subject to certain limitations and conditions, upon a locator, to work the claim for precious metals for all time, if he desires to do so; but confers no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining. The next right in order of time is the equitable one, already defined. The last one in the sequence is the perfect legal title in fee simple absolute, created by the issue of the patent by the United States. The claimant may be entirely satisfied with his possessory title, and be neither able nor willing to perform the further acts or pay the further consideration requisite to securing the equitable or legal title. For reasons of public policy, and for the purpose of encouraging the mining industry, the United States gratuitously grants the privilege to any citizen, or person having declared his intention to become a citizen, of locating a claim for mineral lands and working the same for precious metals; but it has not seen fit to give away the land containing the minerals, but, on the contrary, has adopted the policy of selling the same to the locator, if he desires to purchase, on terms fixed by the acts of congress.

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Mullison's location, record, and working of his claim secured to him the possessory title only. While his location so far segregated and withdrew the land from the public domain that no rival claimant could successfully initiate any right to it until his location was avoided and his entry was canceled (James v. Iron Co., 46 C. C. A. 476, 107 Fed. 597, 603, and cases there cited; Hartman v. Warren, 22 C. C. A. 30, 76 Fed. 157, 160; Pacific Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122), it gave him nothing but "the right of present and exclusive possession" for the purpose of mining. It did not devest the legal title of the United States, or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste. While for the purpose of subsequent entry and location by private parties the lands which Mullison claimed were segregated from the public domain and appropriated to a private purpose, they were so segregated for that purpose only, and the legal and equitable title to them still remained in the government and they were still "lands of the United States" within the meaning of section 2461, Rev. St., and the act of August 4, 1892 (27 Stat. 348), which are under consideration in this case. Shiver v. U. S., 159 U. S. 491, 494, 16 Sup. Ct. 54, 40 L. Ed. 231. The case of Belk v. Meagher, 104 U. S. 279, 283, 26 L. Ed. 735, 737, relied on by defendant's counsel, clearly recognizes the limited character of the right conferred upon a locator. The court there says (page 283, 104 U. S., page 737, 26 L. Ed.):

"The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time.' Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States."

The two titles recognized by the United States confer totally different rights. The first one confers a right (and it may properly enough be said to be vested in the locator) to the possession of the land for the purpose of carrying on his mining operations as long as he performs the required conditions. This, however, he may at any time abandon by ceasing to perform the conditions upon which it depends. The second is a complete and absolute title, which may or may not be acquired by the locator, and, if acquired, is for other and valuable considerations moving from him to the United States. This title is dependent upon no conditions, but confers all the rights incident to an indefeasible estate in fee simple. Considerations like the foregoing conclusively show that there is no warrant for the contention that the locator's right of possession segregates the land from the public domain, and appropriates it to a private purpose in any such way as to withdraw it from the effect of the provisions of the criminal statutes under which the defendant was convicted. After the locator shall have applied for a patent, in the event in the exercise of his option he sees fit to do so, and after he shall have fully perfected his entry upon the land by the

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payment of the purchase price, and not till then, has the land ceased to be a part of the public domain, and not till then has he acquired any vested right to the absolute title. Witherspoon v. Duncan, supra. When such an entry is made, the land is not only withdrawn from the public domain, but the entryman has acquired an equitable title, and thereafter, and not till then, the United States holds the legal title in trust for him.

This brings us to a consideration of the effect to be given to the application for a patent made by Mullison on January 5, 1898, and to the perfection of his entry by payment of the purchase price on June 22, 1898. Between these dates the trespass charged against the defendant was committed. Counsel strenuously urge that Mullison's actual payment for the land on June 22, 1898, and securing the receiver's certificate of such payment, conferred title on him by relation certainly as of January 5, 1898, when he applied for the patent. The argument need not here be repeated, nor the authorities again referred to, showing that the payment for the land and securing the receiver's receipt therefor operated to create a perfect equitable title in Mullison. "The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued." Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., supra. But does this title relate to or become effective as of any day prior to the actual payment of the purchase price in any such sense as to entitle the applicant for a patent, or any one acting under or by his authority, to enter upon the land in the meantime, and appropriate the timber to his or their own use? The application for a patent in and of itself imposes no obligation upon the applicant to pursue his purpose to secure a patent. It is only the first step to that end. He is afterwards required by the mining laws to perform certain other prerequisite duties, and particularly to make payment for the land and secure the receiver's receipt therefor. At any time prior to the actual payment it is within the power of the applicant to abandon his purpose. Can it be possible that congress intended to open the door to such depredation and fraud as would be feasible on defendant's theory? According to it, Mullison might have made a formal application for a patent, proceeded to sell and dispose of the timber growing on the land, impairing its value accordingly, and then, without penalty, have abandoned his entry, leaving the land wasted, and stripped of its timber, which might have been its chief value, for the government to hold without the probability of sale. Unless congress by clear and unambiguous expression of its will has left this door open, we will not open it. We not only fail to find any such expression of legislative intent, but authority and reason alike conduce to the contrary. In U. S. v. Nelson, 5 Sawy. 68, Fed. Cas. No. 15,864, a case much like the present was considered. A locator of a placer claim had taken all the steps entitling him to a patent for the land, except the final payment of the price fixed by law. Afterwards he cut timber therefrom, not incidental to a bona fide mining operation, but for the purpose of selling it as firewood. The

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court held that this constituted an offense, within the meaning of section 2461, supra, and among other things said:

"The defendant in this case occupies the premises under this law, and claims the right to cut and remove the timber therefrom as incidental to and in aid of his right to mine thereon; but he is not the owner of the land until he pays for it and obtains the United States patent. It is a part of the public domain. In the meantime the defendant is occupying it under a mere license from the government, which may be revoked at any time by the repeal of the act giving it. * * * If the land, or the greater portion of it, is of little or no value as mining ground, but valuable for its timber, the defendant might occupy it for a few years until he had stripped the tract of its timber and worked out the few acres that really contained valuable deposits, and then abandon it to the government. * * * The temptation to locate 160 acres of timber land as mining ground, and by putting a few dollars worth of labor upon it annually, and thereby be enabled to dispose of the timber upon it at from $50 to $100 an acre is very great; and, if the defendant's construction of the law is to obtain, there is nothing to prevent its being done. * * * The removal of timber from a mining claim, to be justifiable, should proceed pari passu with the operation of mining. Whoever wants to go further or faster than this, and for any reason appropriate the timber to his own use in advance of his mining operations, can only do so safely by paying the purchase price of the land and becoming the owner thereof."

The views so expressed by the district judge in that case commend themselves to our reason, and, it appears, so commended themselves to the reason of the supreme court of the United States that that court cites it in support of its decision in the case of Shiver v. U. S., supra.

The law relating to the acquisition of homesteads is so akin to that relating to the acquisition of mineral claims that the principles governing the rights of claimants while engaged in perfecting their titles are conceded by counsel in their argument to be similar. The homestead settler acquires no title until five years after his entry. During these years he must, among other things, reside upon the land entered, and cultivate the same. The performance of such acts, like the final payment by a claimant of mineral land, entitles him to a patent. In homestead cases the rule is well settled that the settler may cut during those five years only such timber as is reasonably incidental to cultivation, and cannot, under color of exercising this right, denude the land of its timber for the purpose of selling the same and securing its purchase price. Stone v. U. S., 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127; Shiver v. U. S., 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231; U. S. v. Cook, 19 Wall. 591, 22 L. Ed. 210; Conway v. U. S., 37 C. C. A. 200, 95 Fed. 615; Grubbs v. U. S., 44 C. C. A. 513, 105 Fed. 314. In the case of Shiver v. U. S., supra, the question turned upon what is meant by "land of the United States" within the meaning of section 2461, Rev. St., providing for the punishment of persons guilty of cutting timber upon such lands. After making a résumé of the provisions of the homestead act, Mr. Justice Brown, speaking for the court, says:

"It is evident: First, that the land entered continues to be the property of the United States for five years following the entry; * * * second, that such property is subject to divestiture upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own so far, and so far

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only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously, the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation; and to that extent the act limits and modifies the act of 1831, now embraced in Rev. St. § 2461. It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it. * * * The settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation."

The supreme court in the last-mentioned case cites a large number of cases determined in courts of original jurisdiction wherein views were expressed in harmony with those stated by the court, and finally concludes that the land of a settler for homestead purposes "remained the lands of the United States, within the meaning of 2461, supra," until the settler had acquired the right to a patent by the performance of all the conditions necessary under the law to the acquisition of such title.

In our opinion, the principles announced in the last-cited case, as well as those recognized or announced in other cases above cited, control the determination of this case, and require us to hold that the defendant, Teller, cannot justify his cutting of the timber in question under license from Mullison prior to the payment by him to the United States of the purchase price of the land from which the cutting was done.

We have not, in the foregoing opinion, deemed it necessary to take up the assignments of error seriatim, but have adopted the course of discussing the principles contended for, believing that in so doing we could in a general way dispose of the assignments of error more satisfactorily than by considering each separately. The conclusions reached dispose of each and all of the assignments of error adversely to the defendant, and result in an affirmance of the judgment.

The verdict was a general one, and it cannot be ascertained from the record whether the jury found the defendant guilty of unlawfully cutting timber from the unsurveyed lands, or from the Montezuma placer, or from both, but the conclusion reached demonstrates that there was no error on either hypothesis. The undisputed facts show that the defendant intentionally cut growing timber from the lands in question, knowing at the time of so doing that they were public lands belonging to the United States; and, finding no error prejudicial to the defendant, either in the admission or rejection of evidence, or in the charge to the jury, the judgment of the trial court must be affirmed.

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D. M. SECHLER CARRIAGE CO. v. DEERE & MANSUR CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 816.

PATENTS—ASSIGNMENT—CONSTRUCTION OF INSTRUMENT.

An instrument by which a patentee conveyed to a corporation, "its assigns and legal representatives, the exclusive right to manufacture, use, and sell, and to sell to others to be used and sold, said improvements as patented, * * * throughout the United States and territories thereof, to the full extent of the term for which said patents are granted," is not merely an exclusive license, but constitutes an assignment granting all the patentee's right, and which authorizes the grantee to maintain a suit for infringement in its own name alone; and its character is not changed by the fact that the consideration to the patentee was to be a certain sum on each machine made by the grantee embodying the patented invention, designated in the contract as a "license fee," nor by reason of a clause in the nature of a condition subsequent authorizing the termination of the contract by either party in certain contingencies, nor because it provided that in case of infringement suits against the infringers should at once be brought "at the request of the company," maintained under the joint direction and at the joint expense of the parties, and that the damages recovered should be equally divided. While the language of some of such provisions is inapt and obscure, construing the instrument as a whole, as must be done, it cannot control the plain words of the grant.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This is a bill brought by the appellant, D. M. Sechler Carriage Company, against the Deere & Mansur Company for infringement of letters patent numbered 593,295, dated November 9, 1897, to Clarence H. Dooley, for "combined check row and drill corn planter." The bill was in the usual form, and set out at large the instrument by which it is claimed Dooley assigned the patent to the appellant. This instrument is as follows:

"This agreement, made this 18th day of February, 1898, between Clarence H. Dooley, of Moline, in the county of Rock Island and state of Illinois, party of the first part, and the D. M. Sechler Carriage Company, a corporate body under the laws of said state, located and doing business at Moline, county and state aforesaid, party of the second part, witnesseth: That whereas, said Clarence H. Dooley has invented certain new and useful improvements in combined check row and drill corn planters, for which letters patent of the United States No. 593,295 were issued to him November 9th, 1897; and whereas, he has also made further improvements in the type of planter shown and described in said patent, and contemplates making still others; and whereas, said D. M. Sechler Carriage Company is desirous of acquiring the exclusive right to make, use, and sell, and sell to others to be used and sold, planters embodying the improvements of said patent, and the improvements as yet unpatented: Now, therefore, these parties have agreed as follows:

"(1) The party of the first part hereby gives to the party of the second part, its assigns and legal representatives, the exclusive right to manufacture, use, and sell, and to sell to others to be used and sold, said improvements as patented, which are made but not patented, and other improvements which may be made and patented, by said party of the first part, throughout the United States and territories thereof, to the full extent of the term for which said patents are or may be granted, on the conditions hereinafter named, at its factory in Moline, Illinois, or at such other place or places as it may elect.

"(2) The party of the second part agrees to make full and true returns to the party of the first part, upon the first day of January in each and,

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every year, of all such improvements in planters made and shipped by it in the term or year last past and previous to the first day of November of the preceding year; and, if said party of the first part shall not be satisfied in any respect with such return, then he shall have the right, either by himself or his attorney, to examine any and all of the books of account of said party of the second part containing any items, charges, memoranda, or other information relating to the manufacture or sale of said patented or unpatented planters, and, upon request made, said party of the second part shall produce all such books for said examination.

"(3) The party of the second part agrees to pay the party of the first part fifty cents (50c.) as a license fee upon each and every one of said planters made and shipped by it, and containing all or either of the improvements of said patent hereinbefore referred to, or containing any or all of the further improvements hereinbefore referred to. Also the sum of fifteen cents (15c.) on each and every single corn or corn and cotton planter made and disposed of under said patents. The whole of said license fee for each term of one year, as hereinbefore specified, to be due and payable in one payment on the first day of January of each year, and, if not paid at that time, to be paid with legal rate of interest added thereto.

"(4) The party of the second part hereby agrees to use its best skill, efforts, and endeavors to make a good, practical, working machine of the planter, and further agrees to introduce said machine to the trade, and to supply all reasonable demands of the trade for the same.

"(5) In the event of the said party of the second part not using its best skill, efforts, and endeavors in making a good practical planter, or in not making and introducing the planters provided for herein to the trade as provided for in clause 4 of this agreement, then the party of the first part may terminate this license by giving the party of the second part thirty days' notice thereof in writing; but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fee due at the time of said service.

"(6) Should the party of the second part conclude that the planter made by it and containing said improvement is not a salable or practical machine, it (the second party) may terminate this license by serving a written notice upon the party of the first part; but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fees due at the time of service of said notice.

"(7) It is further agreed that, should suit be brought against the party of the second part for alleged infringement of any other patent, payment of royalty as provided for in this agreement shall cease until the final determination of the suit, the expense of which suit shall be borne equally by the parties hereto; and, should such suit result in defeating such charge of infringement, then the royalties accumulating during the pendency of said suit shall be paid to the party of the first part, the same as if no such litigation had taken place. It is hereby agreed between the parties hereto that this clause refers only to the seeding devices proper, and not to other features that may be included in or claimed by said patent.

"(8) Should that part of the patent issued, or of those to be issued, which part or feature relates to the seeding devices proper, be infringed by any person, company, or corporation, suit shall at once be brought at the request of said second party, and shall be vigorously prosecuted to a termination under the joint direction of the parties hereto, and at the joint expense of said parties; and, should damages or royalties be recovered for said infringements, said damage or royalties shall be equally divided between the parties hereto."

The appellee (the defendant below) demurred to the bill upon the grounds: (1) That it appears upon the face of the bill that Dooley is the sole owner of the letters patent, and that the D. M. Sechler Carriage Company, the complainant, is the owner of the exclusive right to manufacture, use, and sell, and to sell to others to use and sell, the patented improvements; (2) that the complainant has no authority to bring suits for infringements in his own name as such exclusive licensee; (3) that Dooley is not a party to the suit, either as complainant or defendant, nor does it appear that the

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suit was brought with his knowledge and consent. On the 26th of June, 1901, a decree was entered sustaining the demurrer and dismissing the bill for want of proper parties.

C. E. Pickard and L. L. Bond, for appellant.

John R. Bennett, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

The only question presented is whether Dooley is a necessary party to the suit. This question in turn depends upon the further question whether the contract constituted an assignment by Dooley of his title to the patent, or was merely an exclusive license. An assignment or grant conveys (1) the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States. "A transfer of either of these three kinds of interest is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer short of one of these is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for infringement." Waterman v. McKenzie, 138 U. S. 252, 255, 11 Sup. Ct. 334, 34 L. Ed. 923. See, also, Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504; Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co., 144 U. S. 248, 249, 12 Sup. Ct. 641, 36 L. Ed. 419. In the construction of this instrument, seeking to ascertain the intention of the parties to it, we must be governed by the familiar canons of interpretation. We must gather that intention from within the four corners of the instrument, giving to the language employed its usual signification, and, if possible, reconcile discrepancies and avoid repugnancy, having regard also to the ancient rule that general words in one clause may be restricted by the particular words in a subsequent clause. The preamble of the contract recites that Dooley has invented certain improvements, and contemplates making still others in the particular mechanism stated, and that the company is desirous of acquiring "the exclusive right to make, use, and sell to others to be used and sold" planters embodying the patented improvements and those as yet unpatented; and thereupon Dooley conveys to the company, "its assigns and legal representatives, the exclusive right to manufacture, use, and sell, and to sell to others to be used and sold, said improvements as patented, which are made, but not patented, and other improvements which may be made and patented, by said party of the first part, throughout the United States and territories thereof, to the full extent of the term for which said patents are or may be granted, on the conditions hereinafter named, at its factory in Moline, Illinois, or at such other place or places as it may elect." There is here no obscurity, ambiguity, or defect

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of expression. Standing alone, the clause has no need of interpretation. It is a grant conveying the same right and all the right which Dooley acquired by virtue of this patent from the United States. The grant was "on the conditions hereinafter named." It is urged that the conditions specified control the language of the general grant, and convert the instrument into a mere license. The consideration to Dooley for the conveyance was the amount to be received by him upon the planters made and shipped by the company, and in the contract denominated a "license fee." Full and true returns are to be made to Dooley annually of the sales by the company, and with liberty to Dooley to examine the company's books of account. The company agrees to use its best skill and efforts to make a good, practical working machine, and to introduce it to the trade, and to supply all reasonable demands, and upon failure so to do Dooley "may terminate this license upon notice." So, also, the company, should it conclude that the planter containing Dooley's improvements is not a salable or practical machine, "may terminate this license upon notice." It is urged that the use of the expression "may terminate this license" qualifies the language of the grant, and converts it into a mere license. We cannot concur in this view. It is a circumstance to be considered in the construction of the instrument as a whole, and in ascertaining whether there be provisions subsequent to the granting clause which are so repugnant to it that both cannot stand together. But the calling of an instrument which conveys the whole title of the grantor a license cannot qualify or limit the grant. Johnson R. Signal Co. v. Union Switch & Signal Co. (C. C.) 59 Fed. 20; Newton v. Buck (C. C.) 72 Fed. 777. The provisions in paragraphs 5 and 6, authorizing the termination of the agreement, are conditions subsequent, and do not limit or qualify the character of the estate granted. By the seventh paragraph it is provided that, in case suit should be brought against the company for the alleged infringement of any other patent, payment to Dooley should cease until the determination of that suit, the expenses of which should be borne equally by the parties, and in case of a successful issue to the suit the sums due Dooley which had accumulated during the pendency of the suit should be paid to him as though no litigation had taken place. This clause only refers to the seeding device proper, and not to the other features of the patent. We see nothing in this paragraph which in any way conflicts with or should qualify the language of the grant. As compensation to Dooley depended upon the amount of manufacture and sale, and as the manufacture of planters embodying new and untried devices entailed upon the company a great outlay of money, it was but equitable that expense of a suit attacking the validity of the patent should be borne by both parties. The most obscure and the most difficult of interpretation of the clauses of the agreement is paragraph 8, which provides that, if that part of the patent issued, or of those to be issued, which relates to the seeding devices proper, be infringed, suit should at once be brought at the request of the company, and should be vigorously prosecuted to a termination under the joint direction of both parties and at their joint expense, and

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that damages or royalties recovered for such infringement should be equally divided between the parties. It is said that, if title to this patent was wholly in the company, it needed no request on its part to bring suit, nor was the assent of Dooley essential; and that, as stated, is true. But it must not be overlooked that in any such prosecution the aid of the inventor was desirable, if not invaluable; that the company undertook at large expense to introduce this planter; that Dooley depended for the extent of his compensation upon the extent of the sales made by the company; that infringements might greatly affect the amount of sales, and so injure Dooley, who, for his compensation, was to receive a percentage upon the planters sold. It was therefore manifestly for his interest, as for the interest of the company, that he should assist, upon request, in the prosecution of such suits; and it was proper, in that view, that the damages recovered should be equally divided. The language employed does not forbid a suit by the company without the cooperation of Dooley, but gives to him the privilege, aiding the prosecution, to receive one-half the damages, paying one-half the expenses. While the language of this paragraph is perhaps inapt and somewhat obscure, it is not so obviously repugnant to the clear and well-defined expressions of the granting clause as to warrant the court in a forced and unnatural construction of the plain language which constitutes the grant. We are of opinion that Dooley is not a necessary party to the suit.

The decree is reversed, and the cause is remanded, with direction to the court below to overrule the demurrer.

BARTHOLOMEW et al. v. UNION PAPER & BAG CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

APPEAL—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.

An interlocutory order granting a preliminary injunction is largely discretionary, and will not be reversed on appeal unless it appears to have been improvidently entered.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Thomas A. Banning, for appellants.
Charles K. Offield, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

PER CURIAM. This case is before us on an appeal from an interlocutory order restraining the appellants from selling, disposing of, or in any way incumbering a certain patent application filed by them in the patent office in January, 1901, and from issuing, or causing to be issued, a patent on such application, and from entering into any contracts or agreements or taking any steps which will jeopardize appellee's interests in certain inventions embodied in a contract entered into between the parties August 27, 1900, or in any improve-

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ments upon such inventions. It is enough now to say that appellants have failed to show that the provisional order was improvidently entered; and, inasmuch as the case will probably be before us again on its final hearing, no further reasons for our judgment need be given.

The decree is affirmed.

KIRLICKS et al. v. INTERSTATE BUILDING & LOAN ASS'N.

THOMAS v. SAME.

(Circuit Court of Appeals, Fifth Circuit. January 21, 1902.)

No. 1,061.

1. ESTOPPEL — COVENANT TO PAY TAXES — SUBSEQUENT ACQUISITION OF TAX TITLE.

One who has obligated himself to a mortgagee of property to pay the taxes thereon, but fails to do so, by reason of which the property is sold for taxes, and he becomes the purchaser, takes the same subject to the mortgage, or as trustee for the mortgagee.

2. USURY—LAW GOVERNING—PLACE OF CONTRACT.

A contract of loan made by a building and loan association is not usurious, if valid under the laws of the state where it is made payable, by which, in the absence of a fraudulent intent, it is governed.[1]

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

M. E. Kleberg and Jas. B. Stubbs, for appellants.

Edgar Watkins and W. A. Wimbish, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Under the conceded facts of this case, the appellant Thomas contracted with the Interstate Building & Loan Association and appellant Kirlicks to pay in installments the taxes on the mortgaged property due to the city of Houston, and having failed therein, whereby the city obtained judgment and caused the sale of the property, he must, in equity, be held to have purchased from the city of Houston subject to the mortgage of, or as trustee for, the Interstate Building & Loan Association. See Mendenhall v. Hall, 134 U. S. 559, 10 Sup. Ct. 616, 33 L. Ed. 1012.

The contract of loan was not usurious. See Association v. Logan, 14 C. C. A. 133, 66 Fed. 827; Association v. Abbott, 85 Tex. 220, 224, 20 S. W. 118; Association v. Goforth (Tex. Sup.) 59 S. W. 871.

The decree of the circuit court is affirmed on both appeals.

[1] Statutory exemption of building and loan associations from operation of usury laws, see note to Andrus v. Association, 86 C. C. A. 843.

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THE PECK BROTHERS & COMPANY v. PECK BROS. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 818.

1. UNFAIR TRADE—ADOPTING SIMILAR CORPORATE NAME—RIGHT TO INJUNCTION.
"Peck Brothers & Co.," a Connecticut corporation, conducted business in that state as a manufacturer of brass and plumbers' goods for over 30 years, during which time its goods became widely known over the country, and attained a high reputation. Becoming embarrassed, a suit was instituted by stockholders for a dissolution and receivership, for the purpose of reorganization. The receivers continued the business until by order of the court the entire property, good will, trade-marks, etc., of the company, were sold to a committee representing all the stockholders, who reorganized under the name of "The Peck Brothers & Company" and the old corporation was dissolved. Prior to the receivership the company maintained a branch house for the sale of its goods in Chicago, which was in charge of three stockholders, one of whom, whose name was Peck, was vice president of the company, and one of the complainants in the receivership suit. Another of the number was appointed ancillary receiver of the Chicago property. Pending the receivership such parties, with the possible exception of the receiver, and joined by the attorney for the receiver and one other, procured a charter from the state of Illinois for a corporation under the name of "Peck Bros. Co." to engage in the same business, in which company the ancillary receiver also became a stockholder and officer prior to his resignation as receiver. The Eastern receiver, having learned such facts from outside sources, protested against the use of the name before the organization of the new company was completed, and directed the Western receiver not to recognize it. The new company purchased the Chicago stock of the old, but not its good will. There was but one person named Peck interested in the new company. Both companies continued in business in the same territory, and a considerable confusion of goods resulted, even with experienced purchasers, owing to the similarity of the names with which such goods were stamped. *Held*, that the name of the new company, which was unwarranted in fact, because there were no "Peck brothers" interested therein, was clearly adopted for the fraudulent purpose of obtaining the advantage of the reputation and established trade of the old company, and in violation of the duty which its organizers owed to the old company as stockholders, and that the carrying on of business thereunder in the manner shown constituted unfair competition, against which the old company was entitled to an injunction.

2. TRADE-NAMES—TRANSFER BY SALE OF GOOD WILL OF CORPORATION—RIGHTS OF SUCCESSOR.
The sale under a decree of court of all the property of a manufacturing or commercial corporation, including "its franchises, name, and good will," to a reorganization committee representing all its stockholders, passes to the purchasers and the reorganized company the right to the old company's trade-name, and to protection in its exclusive use to the same extent that such protection could have been invoked by the old company, had it continued in business.

3. SAME—SUIT AGAINST CORPORATION FOR INFRINGEMENT—EFFECT OF STATE CHARTER.
The fact that a corporation has been chartered by a state under a certain name, which it selected, does not afford it immunity from a suit in a federal court by a corporation of another state to enjoin it from prosecuting its business under such name, where the name was deliberately adopted by its incorporators in imitation of complainant's for the fraudulent purpose of deceiving the public and appropriating complainant's good will and reputation.

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Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The appellant, a corporation of the state of Connecticut, filed its bill against the corporation "Peck Bros. Co." and the individual defendants, who are its officers and directors, to restrain (1) the use of the name "Peck Bros. & Co." or "Peck Bros. Co." or "Peck Bros." or names substantially identical therewith, in connection with the prosecution of the business of the manufacture, purchase, and sale of plumbing, gas and steam fitting materials and supplies, fixtures, brass and iron goods; (2) from holding out or representing that the goods manufactured by them are the same as those manufactured by the complainant; and (3) from using or interfering with the paramount right of the complainant to the name of "Peck Brothers & Co.," or "Peck Bros.," or "Peck Bros. Co.," in connection with the manufacture and sale of goods of the character stated; and seeking also to recover damages sustained by reason of the alleged unauthorized interference with the complainant's paramount right in the use of the names stated. The bill was answered to, and upon the evidence taken the court below on July 8, 1901, dismissed the bill for want of equity.

Elnathan Peck and his two sons, J. M. Peck and Henry F. Peck, under the firm name of E. Peck & Sons, in the year 1859, commenced the business of the manufacture of brass goods for plumbers and gas and steam fitters at New Britain, in the state of Connecticut. In the year 1862, the corporation "Peck Brothers & Co." was organized, and became the successor in business of the firm of E. Peck & Sons. This corporation was composed, in part, at least, of the two sons of Elnathan Peck, and the plant of the business at that date had been removed to the city of New Haven. The capital stock of the corporation was originally $35,000. This was increased from time to time until in March, 1896, it was $750,000. The business had greatly grown in volume, and its product had become well and thoroughly known to the trade throughout the country as "Peck Brothers' Goods." Branch offices for the sale of its product were established in the cities of New York, Boston, and Chicago,—in the latter city in the spring of 1889. The office in Chicago was placed in the charge and management of the defendants Oliver D. Peck and Albert D. Sanders. The former was then a stockholder in, and the secretary of, the Connecticut corporation, and was its vice president from 1894 to 1896, and is now the president of the defendant corporation. The latter was a stockholder in the Connecticut corporation, and conducted the branch on a salary, and is now the general manager of the defendant corporation. The defendant William A. Ratcliffe was also a stockholder in the Connecticut corporation, and was the principal salesman in the Chicago branch, and is now the secretary of the defendant corporation. On the 14th day of March, 1896, the corporation became embarrassed; and a bill was filed in the superior court of the county of New Haven, Conn., by the owners of a majority of the stock, against the corporation, for the appointment of a receiver. Oliver D. Peck, one of the defendants in this suit, was a plaintiff in that suit. Receivers were duly appointed, who took charge of the corporation and managed its business. On March 16, 1896, the defendant Oliver D. Peck, with others, filed an ancillary bill in the circuit court of the United States for the Northern district of Illinois, upon which the defendant Albert D. Sanders was appointed ancillary receiver of the corporation with respect to its property in the state of Illinois, for the benefit of the principal receivers, appointed by the superior court for the county of New Haven, Conn. On June 25, 1896, Henry D. Coghlan, W. J. Naughton, and George C. Morton filed with the secretary of state of the state of Illinois a certificate signed by them, respectively, in which they proposed to form a corporation under the name of "Peck Bros. Co.," for the manufacture and sale of plumbing, gas fitting, steam fitting, sewer pipe, sewer building materials and supplies, also hardware, brass, and iron goods, metals, and machinery, with a capital stock of $75,000, divided into 750 shares; the principal office of the company to be located in the city of Chicago. A license was thereupon issued to them as commissioners to open books for subscription for the capital stock. On August 21, 1896, they re-

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ported to the secretary of state that the stock was fully subscribed as follows: Oliver D. Peck, 100 shares, amounting to $10,000; Henry D. Coghlan, 200 shares, $20,000; William A. Ratcliffe, 72 shares, $7,200; James L. Ratcliffe, 378 shares, $37,800,—and that there had been elected as directors the four subscribers to the capital stock and George C. Morton, whereupon on that day the secretary of state issued his certificate "that the said Peck Bros. Co. is a legally organized corporation under the laws of this state." Mr. Coghlan, who subscribed for 200 shares, was the attorney of the Chicago branch and was one of the attorneys of the defendant Sanders as receiver, and is one of the solicitors of record for the defendants in this suit. The bill charges the fact to be "that, although the name of the defendant Albert D. Sanders does not appear as one of the incorporators of the defendant 'Peck Bros. Co.,' he was directly interested and contributed toward the payment upon the shares of its capital stock, and that as your orator is informed and believes, the two hundred shares of capital stock of said corporation subscribed by Henry D. Coghlan were in reality a subscription in trust for and in behalf of the defendant Albert D. Sanders; that the said Henry D. Coghlan was the confidential attorney of the said Albert D. Sanders both before and after his appointment as ancillary receiver; that said Albert D. Sanders immediately upon resigning his said receivership became the general manager of the defendant 'Peck Bros. Co.,' and has continued to be such general manager up to this time, and has taken an active part in the conduct and management of the affairs of said corporation from the time of its creation." To this allegation the defendant Albert D. Sanders answered that he "denies that on the 25th day of June, 1896, he conspired with the defendants William D. Peck and William A. Ratcliffe for the purpose of obtaining the name and good will and business of the firm of Peck Bros. & Company. He denies that he had anything to do with the organization of Peck Bros. Company, the defendant company. He denies that the subscription of Henry D. Coghlan to the capital stock of Peck Bros. Company was a subscription in trust for this defendant. He denies that the said Henry D. Coghlan was his confidential attorney, either before or after his appointment as ancillary receiver, but represents the fact to be that Henry D. Coghlan was the attorney for Peck Bros. & Company of New Haven, Conn., for years prior to its insolvency, and after its insolvency acted in connection with E. A. Otis as attorneys of the receivers in winding up the affairs of Peck Bros. & Company, and that everything done by the said Henry D. Coghlan in the organization of Peck Bros. Company was done for purposes and reasons unknown to this defendant, and in no way connected with him." All the defendants, except the defendant James L. Ratcliffe, "further answering, deny that the plaintiff has the exclusive right to the use of the name 'Peck Bros. & Co.,' 'Peck Bros. Co.,' or 'Peck Bros.,' or the name of 'Peck,' in connection with its said business. These defendants aver and charge that the defendant Peck Bros. Company is alone entitled to the use of the said name or names; that it was duly incorporated under the laws of the state of Illinois long prior to the complainant; that it purchased the assets and good will of the Western branch of Peck Bros. & Co.; that its company is headed by Oliver D. Peck, of the original firm of Peck Bros. & Co., who acts as its president; and that it had been in existence and doing business since June, 1896, and under the name adopted has built up a large business, which it alone is entitled to share and enjoy." No evidence was taken on behalf of the defendants below, except the deposition of one Wilson, the representative of the defendant corporation in the city of New York, touching the location of its office in that city.

There were negotiations in the spring of the year 1896, between the Connecticut receivers and Mr. Sanders, the ancillary receiver, on the one hand, and William A. Ratcliffe, representing a syndicate for the purchase of the property of the Connecticut corporation located in the city of Chicago. It was unknown to the Connecticut receiver who composed that syndicate. After some negotiation a price was fixed for the goods, and the sale was finally consummated in the month of September. The Connecticut receivers heard of the proposed new corporation in Illinois, not from the parties, but from some person on the outside, and on August 8th wired Mr. Sanders

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as follows: "We object to title of new company. Avoid recognizing in any way,"—and on the same day addressed to him the following letter:

"New Haven, Conn., August 8, 1896.

"Mr. A. D. Sanders, Receiver, Chicago—Dear Sir: Since we heard of the organization of the new company to succeed to our business in Chicago, we have seriously considered the matter of allowing them to use the name Peck Bros. in any way, and in conversation with one of our prominent stockholders, Mr. W. H. Hart, he decidedly objected to it. While the intentions of the projectors might be all right, I can readily see where serious complications might arise from any company doing business in the same line under the name of Peck Bros., and we shall be under the necessity of refusing to recognize this company by making any sale of goods to them. I have just wired you to this effect, and I think, if you will stop to consider the matter, you will readily see the necessity of our entering the protest. I presume there may be some way by which the use of this name might be permitted under restrictions and limitations, but have not had an opportunity, as yet, of consulting our attorney in reference to the matter. I thought best to enter the protest, and will notify you and write you further after consultation with our attorney.

"Yours truly, J. M. Peck, Receiver."

On August 14, 1896, he addressed a letter to "Mr. W. A. Ratcliffe, Agent for the Peck Bros. Co.," which contains the following: "We have talked over the matter of the name of the new company, viz., 'The Peck Bros. Co.,' and we could see where it could and might be used by you to the detriment of the business of Peck Bros. & Co., but I had your assurance when in conversation with you that your idea in taking the before-mentioned name was to preserve the present channels of trade for Peck Bros. & Co.'s goods so far as possible, and so far as it could be made mutually advantageous. To this we can see no objection, but if at any time in the future Peck Bros. & Co. should find that goods were on the market not of their manufacture but marked 'The Peck Bros. Co.' we have no doubt but the name of the new company is, in our opinion, so near like the old that it would at least warrant a trial of the matter in the courts. As no such case is likely to arise during the receivership, we think the matter can probably be left to the future board of directors of Peck Bros. & Co. In the meantime we shall consider that you are to sell Peck Bros. & Co.'s goods in Chicago and vicinity, and that all orders for goods shall be referred to you, and that we will not give competing prices against you." On August 24th he addressed a letter to Mr. Sanders, receiver, with reference to an inventory of the property at Chicago, in which he stated: "I did say to both you and Mr. Ratcliffe that I did not think it best for you to have any connection with the new firm until the matter was fully closed out, and I distinctly said that this was for your own interest." The negotiations seem to have at first contemplated the acquirement of the good will and name of the Connecticut corporation. On September 23, 1896, the Connecticut receiver wired Mr. Sanders: "Receivers have no authority to sell good will nor make contracts extending beyond the receivership. Instructions of August 14th cover all we can do. If those terms are not sufficient, call the deal off, and we will advise you further."

On September 23, 1896, the defendant Albert D. Sanders, the ancillary receiver, filed his petition in the ancillary suit, representing that the stock of goods in Chicago was valued at $37,665.60, and that the Illinois corporation, "Peck Bros. Co.," had offered to purchase the same for $18,830.80 in cash; that he submitted the proposition to the principal receiver of the Connecticut corporation, and had been instructed to procure authority of the court to consummate the sale,—and an order was entered by the court authorizing the sale of the goods, which sale was consummated. The order did not authorize the sale of any good will or trade-name, but simply all the stock on hand. In December, 1896, Mr. Porter, the Connecticut receiver, visited Chicago, and called at the office of the defendant corporation. He then found the defendant Sanders engaged in the service of that corporation. Subsequently, and on December 31, 1896, Sanders resigned as ancillary

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receiver, and on the same day Joseph Porter was appointed ancillary receiver in his place. The reports of the ancillary receiver showed payments of $500 to Henry D. Coghlan for services as solicitor of the receiver. On December 17, 1897, the New Haven court entered a decree, upon the application of the Connecticut receiver, for the sale of the property of the New Haven corporation, and directed "that Joseph Porter, the receiver of Peck Brothers & Company, be, and he is hereby, authorized and empowered to sell all of the property of said company, of every kind and wheresoever situated, including its franchises, name and good will," in such manner as, in the judgment of the receiver, would realize the greatest amount. The decree further provided that creditors and stockholders might bid at the sale. The report of the receiver, filed March 11, 1898, declares that the receiver offered for sale at public auction to the highest bidder at the designated date the entire property of the corporation, including its "franchises, name, and good will, and all other assets of every kind, and wheresoever situated." At that sale, P. N. Welch, F. C. Hollins, and H. C. Warren, who were agents for the committee of stockholders of the corporation, purchased the property, good will, etc., for the sum of $265,520. The report of the sale was on the same day confirmed, and the receiver was ordered to execute and deliver to such person or persons as shall be designated in the written request of the agents of the committee of stockholders who purchased said property a proper deed of conveyance. On the 4th day of April, 1898, Welch, Warren, and Hollins, as trustees of the stockholders in the original corporation, uniting with others, entered into articles of organization of the "Peck Brothers & Company," the appellant here, which was filed with the secretary of state of the state of Connecticut on the 5th day of May, 1898. The number of shares of the corporation was 24,000, of the par value of $25 each, and were fully subscribed for. Welch, Warren, and Hollins, as trustees of all the stockholders, subscribed for 23,836 shares. On May 5, 1898, the receivers of "Peck Brothers & Co.," the original Connecticut corporation, having received a written request from the trustees of all the stockholders to deliver a bill of sale to the new corporation "Peck Brothers & Company," conveyed to the last-named corporation all the property of the old company, "together with the franchises, name, and good will, and all trade-names, trade-marks, and patents and all other assets of every kind, and wheresoever situated, belonging to said Peck Brothers & Company, or to me as receiver thereof." On May 10, 1898, the receiver reported to the court, among other things, that he had received the final payment for the property and franchises sold; "that a committee representing all of the stockholders of said defendant corporation has purchased all of the property and franchises and name of said company, and has caused a new corporation to be organized for the benefit of the stockholders of the defendant company, and has transferred all of the property and franchises and the name of the defendant company to said new corporation; and that said committee, representing all of the stockholders of said defendant company, desires that said defendant company shall be dissolved, and has requested the undersigned to apply to this court for an order of dissolution." Thereupon on that date an order was entered by the court reciting the report of the receiver, "and the committee representing all stockholders of said defendant company, appearing by their attorneys, Alling, Webb & Morehouse, and joining in the prayer for dissolution, and, the facts recited in said report having been found to be true," it was ordered that the corporation in that case be dissolved, and its corporate existence terminated.

The record is replete with evidence touching the question of confusion of goods, and in the sales thereof. The defendant corporation, having its headquarters in Chicago, reaches out for its trade throughout the East and throughout the territory covered by the complainant corporation. Its goods are stamped, "Peck Bros. Co. Chicago." The stamp of both corporations upon their goods is necessarily in small letters, requiring close inspection to distinguish. The evidence discloses that in repeated instances experienced plumbers had purchased the goods made by the defendant corporation, supposing them to be the goods manufactured by the complainant corporation; and much confusion is proven to have occurred in the delivery of letters,

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checks, and statements forwarded by mail. Upon the question of confusion of goods there is no dispute.

E. A. Otis and Henry C. White, for appellant.

H. D. Coghlan, for appellees.

Before JENKINS and GROSSCUP, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Upon the evidence in this case, we think we are warranted in saying of this defendant, as we had occasion to say of another corporation under circumstances not dissimilar, that "it was conceived in sin and brought forth in iniquity, that wrong attended at its birth, and that fraud stood sponsor at its christening, imposing upon the corporate child a name to which it was not entitled, and which it had no right to bear." Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneip Medicine Co., 27 C. C. A. 351, 82 Fed. 321. The original Connecticut corporation had builded up a large manufacturing interest. Its goods were of superior quality, and commanded higher prices in the market than the goods of other dealers. They were universally known to the trade as "Peck Brothers' Goods." The name indicated the origin, and was a guaranty of the superior excellence of the goods, and was so recognized by all dealing in them. The name and designation was a property right belonging to, and a valuable asset of, the original Connecticut corporation. Its financial embarrassment caused no suspension of its manufacture or trade. That was continued by the receivers appointed under the bill filed manifestly for the purposes of reorganization. The defendant Oliver D. Peck was at the time the vice president of the Connecticut corporation, and bound by his duty to abstain from injuring its good will and trade name. So, likewise, were the defendants Albert D. Sanders and William A. Ratcliffe thus obligated. Each of them was a stockholder in the Connecticut corporation; the former the manager, and afterwards the receiver, of its Chicago branch, and the latter its principal salesman. So long as they occupied those relations of trust, they were bound in honor to refrain from acts detrimental to the company, and which would undermine its business and affect the value of its trade-name. Mr. Coghlan, one of the incorporators of the Chicago company, was the counsel of the Connecticut company for its Chicago branch, and was one of its counsel in the receivership proceedings in the Northern district of Illinois; and while that confidential relation continued he also was bound by ordinary professional ethics to take no part in a proceeding which must necessarily prove injurious to his client. Pending the proceedings for reorganization, and before it was known whether the corporation would be reorganized, or its property and assets disposed of to others, Coghlan, with two companions, proposed to form a corporation under the title "Peck Bros. Co." to carry on a like business, and, as events have proven, within the territory occupied by his client. Peck, William A. Ratcliffe, and

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Coghlan were three of the four subscribers to the stock of that company, and were three of its five directors. They assumed a name to which they had no warrant of right. There were no brothers Peck interested in this new enterprise. There was but one Peck. The name assumed was itself a falsehood, and we must believe that it was so assumed for a purpose. The fact of the proposed incorporation was by these parties either designedly concealed from, or was not made known to, the officers or the Eastern receivers of the Connecticut corporation; but the fact that such incorporation was proposed incidentally came to the knowledge of the Connecticut receivers, and as early as August 8th they wired to the defendant Sanders, who manifestly was not unfriendly to the proposed corporation, objecting to the title of the new company, and directing him to avoid recognizing it in any way. This was nearly two weeks before the incorporators met to elect a board of directors. On August 14th the Connecticut receiver addressed a letter to the defendant William A. Ratcliffe, likewise protesting against the use of the name to the injury of the Connecticut corporation. So that they proceeded with this incorporation, assuming a name to which they had no right, with knowledge that they who were then in charge, as officers of the court, of the rights of the stockholders of the Connecticut corporation, protested against the assumption of the name. Here, therefore, was no mere mistaken action, but a deliberate assumption of a name which, as we think, the corporation had no right to bear. We need not stop to inquire too curiously with respect to the real part played by the defendant Albert D. Sanders in this transaction. That he was knowing to it all cannot be doubted. He and his codefendants, it is true, deny all conspiracy to defraud; but they content themselves with mere denial. Having submitted to answer, they should have answered fully. In view of the allegations of the bill, it was incumbent upon all of the defendants having knowledge to have informed the court whether Coghlan's subscription was for himself or for others, or in part for himself and in part for others; whether his own money paid for his subscription to the stock, or whether it was in whole or in part paid for by others, and by whom. The fact that the defendant Albert D. Sanders was the general manager of the Chicago branch, and that within a few months after the incorporation, and while still receiver, he was, either as general manager or in some responsible position, aiding in the management of the affairs of the new corporation, made it incumbent upon him not merely to deny without explanation, but to fully explain, especially in view of the fact that it is conceded that he is now a stockholder and officer of the new corporation. But no word of explanation comes. They refrain from thus speaking by their answer. They refrain from testifying upon the hearing. Upon this whole business, and with respect to their connection with it, the defendants are as silent as the sphinx. We cannot but believe that the corporation was formed with a view to obtain, rightfully or wrongfully, the good will and trade-name of the Connecticut business. Indeed, the answer asserts that the company was formed "to buy the assets and good will of the insolvent con-

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cern," and "for the purpose of taking off the hands of the receiver the assets and good will of the Western branch." This affirmative allegation required of them proof of the fact, but that evidence is not forthcoming. If, however, the allegations of the answer were true, while it might acquit the defendants of "original sin," the wrongful assumption of the name and the prosecution of the business thereunder would, as against the lawful proprietors of the name and business conducted under it, render the enterprise illegal. The new corporation did not acquire any right or title to the trade-name or the good will of the Connecticut business. The receivers declined absolutely to deal with the Chicago parties upon any such postulate, and instructed the defendant Sanders, if that were insisted upon, to "call the deal off." The order of sale by the circuit court of the United States for the Northern district of Illinois carefully omits any inclusion of the trade-name or good will, and all that the defendant corporation acquired by the sale was the stock of goods at Chicago. There is here either original wrongful intent, or, if the design were originally honest, it became wrongful upon failure to acquire by purchase the business and trade-name.

It is now so well settled, both by the decisions of the supreme court and of this court, that the wrongful use of one's own name to the injury of another, which results in the palming off upon the public his goods as the goods of that other, will be restrained, that it is not needful to review the authorities. We need only refer to a few: Elgin Nat. Watch Co. v. Illinois Watch Co., 179 U. S. 665, 675, 21 Sup. Ct. 270, 45 L. Ed. 365; Meyer v. Medicine Co., 7 C. C. A. 558, 58 Fed. 884, 18 U. S. App. 372; Pillsbury v. Flour Mills Co., 24 U. S. App. 395, 12 C. C. A. 432, 64 Fed. 841; Stuart v. Stewart Co., 33 C. C. A. 480, 91 Fed. 243. See, also, Tussaud v. Tussaud, 44 Ch. Div. 678. While one may have the right to use his own name honestly in his own business, for the purpose of advertising he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business, firm, or establishment, or the article produced, and thus work injury beyond that which results from mere similarity of names. Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247. Here the artifice consisted not in using one's own name, but in assuming falsely the name "Peck Bros.," there being no brothers of that name in the incorporation. The name, manifestly, was thus assumed for the purpose of obtaining the good will of the established business of the Connecticut corporation, resulting, failing the acquirement by purchase of the business, good will, and trade-name, in fraud upon the public, and injury to the legitimate proprietors of the business and trade-name.

The stockholders of the original Connecticut corporation "Peck Brothers & Co.," including the defendants Peck, Sanders, and William A. Ratcliffe, reorganized under the corporate name of "The Peck Brothers & Company," and, under the proceedings in the Connecticut court, acquired the business, good will, and trade-name of the old corporation. Beyond question, the right to the trade-name passed by the proceedings to the complainant corporation. Kidd v. Johnson, 100

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U. S. 617, 25 L. Ed. 769; Chemical Co. v. Meyer, 139 U. S. 547, 11 Sup. Ct. 625, 35 L. Ed. 247; Nervine Co. v. Richmond, 159 U. S. 302, 16 Sup. Ct. 30, 40 L. Ed. 155; Sarrazin v. Tobacco Co., 35 C. C. A. 496, 93 Fed. 624, 46 L. R. A. 541; LePage Co. v. Russia Cement Co., 2 C. C. A. 555, 51 Fed. 941, 17 L. R. A. 354; Bank of Tomah v. Warren, 94 Wis. 151, 68 N. W. 549; Warren v. Warren Thread Co., 134 Mass. 247.

It is objected, however, that equity cannot extend its preventive arm to stay this wrong, because the defendant acquired the right to be a corporation from the state of Illinois, and that its name was given to it by the state, and that, since a foreign corporation can prosecute business in a state only by comity, it cannot obtain an injunction from a federal court against the formation of a domestic corporation bearing the same name. In support of this contention, thus broadly stated, reliance is placed upon the case of Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339. In that case, in the year 1881, one Hazelton, having invented certain improvements in steam boilers, joined with one Kennedy in the business of manufacturing and selling boilers containing such inventions, both of them being then residents of the city of New York. The business was conducted under the name of Hazelton Boiler Co.; and on July 10, 1884, Hazelton assigned his interest in the entire business, including three patents with all reissues and extensions thereof, or improvements in relation thereto, and all inventions which he might thereafter make in relation to steam boilers, to the father of his partner. On June 23, 1888, the business having in the meantime been actively carried on by Kennedy and his brother, a corporation was organized by the three Kennedys, under the laws of the state of New York, under the name of the Hazelton Boiler Co. In February, 1888, Hazelton organized a corporation under the laws of the state of Illinois, under the name of Hazelton Tripod Boiler Co., to manufacture and sell tripod boilers of the same character as those invented by him the patents for which he had sold to the Kennedys, except some minor changes in the structure of them. The statement of the case asserts the following:

"Neither the complainant nor the defendant corporation has ever been engaged in the business of disposing of its steam boilers by placing the same upon the market; both having confined themselves to dealings directly with customers purchasing for their own use, and not for sale, the sales by each corporation being all made upon orders of customers addressed to it directly in New York or Chicago, as the case happened to be; and neither kept any depository, warehouse, or sales room for the disposition of its engines, except at its home office."

The court held that there were two obstacles to recovery by the complainant, which were insuperable: The first, "that the complainant is a junior corporation seeking to contest with a senior corporation the right of the latter to the use of its corporate name"; the second, that a foreign corporation sought to contest with a domestic corporation the right of the latter to the corporate name given by the sovereignty which created it. Upon these propositions the court held that, as the incorporation of the defendant antedated

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that of the complainant by nearly four months, if there was any infringement, the complainant, and not the defendant, was the aggressor; overlooking, as it seems to us, the fact that if Hazelton, as was claimed, had by the transfer to Kennedy several years before of the assets of the business transferred also the right to use his name in connection with the manufacture of boilers, he could not rightfully, under any guise or pretense, either individually or by imposing that name upon a corporation, use it in connection with the same business, if thereby the public was imposed upon by reason of the confusion of goods naturally resulting from such use. It may be that the court supposed that the facts above stated with reference to the conduct of the business prevented such confusion. The court also seemed to have overlooked the fact that the New York corporation was composed of the Kennedys, and was merely successor to them in the business, and possessed all the rights which they had thereto, including trade-names. Upon the second proposition the court remarked:

"But the complainant is in the attitude of a foreign corporation coming into this state and seeking to contest the right to the use of a corporate name which this state, in furtherance of its own public policy, and in the exercise of its own sovereignty, has seen fit to bestow upon one of its own corporations. For such a purpose a foreign corporation can have no standing in our courts. Such corporations do not come into this state as a matter of legal right, but only by comity, and they cannot be permitted to come for the purpose of asserting rights in contravention of our laws or public policy. It is competent for this state, whenever it sees fit to do so, to debar any or all foreign corporations from doing business here, and whatever it may do by way of chartering corporations of its own cannot be called in question by corporations which are here only by a species of legal sufferance."

We are compelled, with deference, to differ with the learned court, if it intended to hold that incorporation under the laws of the state of Illinois protects one from the consequences of his own wrong. In a certain limited sense the sovereignty of the state had conferred the name. There is, however, in the term "sovereignty," no magic to conjure by. It can confer upon individuals no right to perpetrate wrong. Nor do we think that the sovereignty of the state of Illinois sought to do that. It has a general law of incorporation, by which any body of men combining for the purpose of business may incorporate under any name they may select. The name is not imposed by the law, but is chosen by the incorporators. With that selection the sovereignty of the state has nothing to do. The act of sovereignty allowing incorporation is permissive, not mandatory. It sanctions the act of incorporation under the name and for the business proposed, if that name and that business be otherwise lawful. The sovereign by the act of incorporation adjudges neither the legality of the business proposed, nor of the name assumed. That is matter for judicial determination by a court having jurisdiction of the subject when the legality of the business or of the name is called in question. If one may not use the name imposed upon him in invitum so that it shall work wrong to another, by what token may he become incorporated under a name selected by himself to effect like wrong? And how is the sovereignty of

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a great state impugned by the denial to incorporators of a right to perpetrate such a wrong? Is it possible that a sovereignty of a state can be thus invoked to perpetrate a fraud? If it may be, then indeed will that sovereignty stand for oppression, and not for justice. Then could one who, in connection with a business to which his name had been attached and had given value to it, having disposed of the right to use that name to another, and so by the law prohibited from using it in connection with a like business under circumstances that would work a fraud, be enabled to effect the fraud by simply becoming incorporated under that name under the sovereignty of the state of Illinois. We cannot bend our judgment to the conclusion that a sovereign state designed thus to confer immunity for wrong. The court, in a review of the evidence, further held that the trade-name and good will of the business were, as a matter of fact, not transferred by an assignment which merely transferred the right of the vendor to the business, "its assets, profits, and emoluments," and that the negotiations for a sale did not comprehend such transfer. Whether this legal conclusion be correct, we need not inquire; but the fact seems to have had influence, for the court seeks to distinguish the case then in hand from its decision in Frazer v. Frazer Lubricator Co., 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73, in which that court held that one selling out an established business, and with it his own name to be used in connection with the business, cannot afterwards assume it in carrying on a like business; and this upon the ground that the instrument of transfer in that case expressly authorized the vendee to use the name as a trade-mark, or as indicating the material or product theretofore manufactured by the vendor, and conferred upon the vendee the exclusive authority to use his name for such purpose. The court seems to have been also influenced by the fact that as the boilers were made for use by those ordering them, and were not upon the market for sale, there could be but little, if any, confusion or improper interference. If that fact be potential, it is unavailing in the case in hand. Here the defendants reach out into the markets of the East, and persistently and deliberately place goods of their manufacture upon the market, selling them under such guise that experienced dealers are imposed upon. With respect to the denial by the supreme court of Illinois of the right of a foreign corporation to contest in the courts of that state the right of a domestic corporation to the corporate name given it by the state in its articles of incorporation, even if that name be selected in fraud and be used to perpetrate a wrong, we are not concerned. The state of Illinois has the undoubted right to regulate its own courts in its own way, and, if it so will, to turn a deaf ear to a demand for justice. A federal court, however, is organized in part to listen to complaints of citizens and corporations of one state against citizens or corporations of another state, and its doors may not be closed by any ruling of a state tribunal. We study the decisions of the highest court of a state with respectful deference, but cannot be concluded thereby in such a case as the present one, when the ruling invoked, in our judgment, works a grievous wrong. We can-

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not follow the decision in the Hazelton Case. The doctrine of the Illinois court, as we conceive, is not in accord with the decisions of the federal and of other state courts. Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 32 Fed. 94; Rogers Co. v. Rogers Mfg. Co., 17 C. C. A. 576, 70 Fed. 1017; Publishing Co. v. Dobbinson (C. C.) 72 Fed. 603; Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; Holmes, Booth & Hayden v. Holmes & Atwood Mfg. Co., 37 Conn. 278, 293, 9 Am. Rep. 324. In the first of these cases Mr. Justice Bradley, of the supreme court of the United States, observed:

"As to the imitation of the complainant's name, the fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another."

The whole contention is well summed up by Mr. Hopkins in his recent work upon Unfair Trade:

"Where the defendant is a corporation whose corporate name includes a proper name, and was selected by its incorporators with the intent and for the purpose of deceiving the public into the belief that its goods are the goods of the plaintiff, such frauds will, of course, be enjoined." Hopk. Unfair Trade, 108.

Here the right to the name belongs to the complainant by virtue of the sale of the right to that name under the proceedings in Connecticut. The stockholders of the original corporation, including three of these defendants, are stockholders of the complainant company. The proceeding was a mere reorganization, and the complainant succeeded to all the rights of the old company, and to the equitable rights of the stockholders representing that company. The court below denied relief because the defendant company was incorporated two years prior to the incorporation of the complainant, overlooking the fact that the complainant corporation does not claim by virtue of its incorporation, but in right of the first corporation and its stockholders to the name it had acquired in the business. The right does not spring from the incorporation, but from the transfer of the trade-name and good will. The status of the complainant is precisely the same as though the original Connecticut corporation, continuing to exist and to prosecute business, was the party here complaining of the wrong. The assumption of the name "Peck Bros. Co." was of itself the utterance of a falsehood, for there were no brothers Peck interested in the incorporation. The name assumed was voluntarily selected, and, as we must believe, for the purpose of appropriating the good will and trade-name of another. If not originally so designed, it is clear that, upon failure to procure the right by purchase, the name was afterwards used for the purpose of misleading the public, and appropriating to itself, without right, the valuable trade-name of another. That wrong has been

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effected. Further wrong should be prevented. The remedy, if the defendants be honest, is simple. They have but, under the law, to change the name which they selected, and which has wrought the injury. In any event, they should be enjoined from further perpetration of the wrong.

The decree is reversed, and the cause remanded, with a direction to the court below to decree for the complainant in accordance with the prayer of the bill.

ADAM v. NEW YORK LIFE INS. CO.[1]

(Circuit Court of Appeals, Fifth Circuit. January 10, 1902.)

No. 1,057.

APPEAL—REVIEW—ACTION TRIED TO COURT.

Where a jury is waived by stipulation in an action at law in the circuit court, and no exception is taken to any ruling made during the trial, the only exceptions being to the findings and conclusion of law, and the refusal to find conclusions of law as requested, the only question reviewable in the appellate court is whether the judgment is warranted by the pleadings and the findings of fact.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

M. L. Malevinski, John Lovejoy and Alex. Sampson, for plaintiff in error.

D. Edw. Greer, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In this case a trial by jury was waived in writing, and the case was tried by the judge. In the progress of the trial no rulings of the trial judge appear to have been excepted to. The bill of exceptions found in the record merely shows that the plaintiff below excepted to all the conclusions of fact and law as found by the judge, and also excepted to the refusal of the court to find conclusions of law as requested. See City of Key West v. Baer, 13 C. C. A. 572, 66 Fed. 440. Under this state of the record, the only question for us to consider on this writ is whether the pleadings and the findings of fact thereunder warranted the judgment rendered in the trial court, and of this we have no doubt.

The judgment of the circuit court is affirmed.

[1] Rehearing denied March 15, 1902.

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HARDING v. HART et al.[1]

(Circuit Court of Appeals, Seventh Circuit. January 7, 1902.)

No. 438.

1. APPEAL—REVIEW—FINDINGS OF FACT.
Findings of fact made by the trial court in a suit in equity on conflicting evidence, while not absolutely conclusive upon an appellate court, are very persuasive, and will not be disturbed except on a very satisfactory showing.

2. CORPORATIONS—INSOLVENCY—UNLAWFUL PREFERENCE OF OFFICER.
A finding in a creditors' suit against an insolvent insurance company and its former president and director that a transfer of securities by the company to the president on a settlement between them was made after the company had become insolvent, and was void as against other creditors as an unlawful preference, *held* sustained by the evidence.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

George F. Harding and William J. Ammen, for appellant.
Frederic Ullmann, for appellees.

Before BROWN, Circuit Justice, WOODS, Circuit Judge, and BUNN, District Judge.

PER CURIAM. This cause was heard in this court at the June term for 1900, before Mr. Justice BROWN, one of the Justices of the Supreme Court, WOODS, Circuit Judge, and BUNN, District Judge. The case is an elaborate one, the testimony being very voluminous and filling many volumes. This, and the circumstance that Mr. Justice BROWN, since the hearing of the case, has been very steadily and laboriously occupied with work in the supreme court, has caused some delay in the decision of the case. The cause was begun in the United States circuit court for the Northern district of Illinois by a bill in equity filed on May 5, 1876, and has been pending in that court and in this for over a quarter of a century; thus rivaling in point of duration some of the most celebrated chancery cases existing either in fact or in fiction. The bill was a creditors' bill charging that the defendant Harding, who had been intimately connected with the Globe Insurance Company as director, stockholder, and president, had in his hands a large amount of assets and securities, aggregating over $100,000, belonging to the insurance company, which ought in equity to be applied in satisfaction of the company's debts. The bill sought a discovery, and the defendants were required to disclose what assets they had, if any, and the circumstances under which they received the same, with a view to the application of such assets to the payment of the general creditors of the company. The defendant Harding answered, setting forth the securities that he had taken from the company, and the circumstances under which he received them; and the principal contention in the case has been whether he could rightfully hold these securities as against the rights of the

[1] Rehearing denied February 27, 1902.

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general creditors. One of the principal contentions related to the time when the company became insolvent, as bearing on the question of Harding's right to a preference over other creditors to the securities in his hands. The court below found upon these questions, in a very elaborate opinion filed in March, 1882,—six years after the commencement of the suit,—in favor of the complainants. The cause was referred to Henry W. Bishop, as master in chancery, and a great mass of testimony taken, which consumed many years in the taking, and was filed in court on May 30, 1880, upon which the cause came on to a hearing before Judge Dyer holding the circuit court, and after hearing was held by him until February 14, 1882 (113 Fed. 307), when an opinion was filed by him after long and elaborate consideration of the case, finding the facts and conclusions of law in favor of the complainants and against the defendant Harding. Judge Dyer states in an examination had before the circuit court held by Judge Grosscup in February, 1898, in his testimony relating to some proceedings in the case had before him, that he spent two months of hard work upon the case after the hearing was had. This may well be believed from the great mass of evidence in the case, the nature and importance of the issues involved, and the evident thoughtfulness and care with which the opinion was prepared. Upon the filing of the opinion an interlocutory decree was entered in favor of the complainants and against the defendant Harding to the effect that the settlements between the defendant the Globe Insurance Company and the defendant George F. Harding, made in the year 1875, by virtue of which said defendant Harding obtained possession of and claimed title to the securities hereinafter described, be, and the same hereby are, adjudged and decreed invalid and void to the extent of the valid claims of other bona fide creditors of said defendant the Globe Insurance Company, and the said settlements are so decreed and adjudged invalid and void as aforesaid, not only in so far as the same embraced the interest of said defendant Harding in the "preferred debt," so called, amounting to the sum of $116,840.50, but also to the extent of the cash advances of said defendant Harding, amounting to the sum of $47,743.52; and the said defendant Harding is hereby ordered, adjudged, and decreed to account for the value of the said securities. The cause was thereupon referred to the master to ascertain the value of the securities in Mr. Harding's hands properly subject to the claim of the general creditors. A motion for a rehearing was made by the defendant Harding, and considered by the court, Judge Dyer still presiding, and in the decision overruling the motion the court says:

"Since the rehearing has been urged in behalf of defendant Harding with great earnestness, and in view of the importance of the questions involved, the court has taken occasion, not only to consider the particular question argued upon the rehearing (which related to the time the company became insolvent), but to go anew over the case, and is unable to take any other view than that which was announced in its former opinion, and its judgment is that the cause should proceed upon the basis of that opinion."

After a careful examination of the case and of the many assignments of error, this court concurs with this view. The cause was

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carefully and elaborately tried, was held under consideration by the court for nearly two years, and the opinion of the court below is so full and satisfactory that we are content to affirm the decree upon that opinion contained in the record. We do not find that the opinion, which covers some 52 closely-printed pages in the record, has ever been published, as it well deserves to be, and no doubt will be.[1] The questions were mainly questions of fact depending upon the evidence, and, while the findings upon the facts by the court below are not absolutely conclusive and binding upon this court, they are, in a case like this, very persuasive, and not to be disturbed except upon very satisfactory showing. Upon the coming in of the master's final report the case was argued before the circuit court, Judge Grosscup presiding, after Judge Dyer had, to the regret of all, retired from the bench. In that opinion Judge Grosscup says:

"Much of the argument of defendant and his counsel has been devoted to the proposition that the interlocutory decree heretofore entered by Judge Dyer was mistaken in fact in this: that the insurance company was not at the time then found in reality insolvent. It is claimed that events coming to consummation since the entry of that order disprove this finding. I do not feel at liberty to disregard that order, or to take up the question again as to whether the company was at the time insolvent, and have not pursued as carefully as if the question were before me de novo this specific inquiry."

It is proper to say that this court has considered that question, and finds no reason to disturb or question the correctness of the finding and conclusion of the court below upon that question. Although the assignments of error are numerous, being 121 in number, we have been unable to find any substantial error in the record which should suffice to affect the decree of the court. The cause was kept in the circuit court upon various motions and references until the final order was made by Judge Grosscup on February 28, 1899, upon the filing of which an appeal was taken by the defendant Harding, but the case was not heard in this court until the June session of 1900.

It may be proper to say that though WOODS, Circuit Judge, who participated in the hearing of the case, died in July, 1901, before this memorandum of opinion was prepared, he concurred in the decision.

The decree of the circuit court is affirmed.

[1] Since published in 113 Fed. 807.

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HART et al. v. GLOBE INS. CO. et al

(Circuit Court, N. D. Illinois. February 14, 1882.)[1]

1. JUDGMENTS—PERSONS CONCLUDED—CREDITORS' SUITS.

Judgment creditors of an insolvent insurance company filed a creditors' bill in the federal court against the company and one H., a former officer and director of the company, to set aside a transfer of securities from the company to H. as constituting an illegal preference, and in such suit a receiver was appointed for the company, to whom it conveyed its property. Two days prior to the commencement of such suit a similar suit was instituted in a state court by a simple contract creditor against substantially the same defendants, over whom the state court obtained priority of jurisdiction. Subsequent to the appointment of the receiver by the federal court, H. filed a cross bill in the state court, upon which, on final hearing, the court adjudged the validity of the transaction by which the company transferred the securities to him, determined the amount due him from the company, and ordered a sale of the securities to pay the same. Prior to such decree the company had been adjudged a bankrupt, the receiver had been elected assignee, and had joined as a co-complainant in the suit in the federal court, and H. had also filed a similar cross bill therein. *Held*, that the decree of the state court was not a bar to the further prosecution of the suit in the federal court; neither the original complainants therein, nor the assignee, nor any representative of the general creditors of the company having been made parties to the cross bill upon which such decree was based.

2. CORPORATIONS—INSOLVENCY—ILLEGAL PREFERENCE OF OFFICER.

Defendant purchased from two of the officers and directors of an insurance company stock of the company to the amount of $75,000, and by an arrangement made at the same time the sellers advanced the amount received for the stock and defendant a substantially equal amount as a loan to the company to make good its impaired capital, and place it in a condition to continue its business. The advances were accepted under an agreement embodied in a resolution of the board of directors providing that the advances, which consisted of cash and securities, should be held as assets of the company, and subject to its debts, but should be returned or repaid, with interest, when the company should be in a position to justify it. Defendant became president and a director of the company. A year later, when the company was in fact insolvent, defendant resold his stock to the persons from whom he bought it, receiving in payment an assignment of the identical cash and securities which he had paid therefor, and which had been advanced to the company. Subsequently, and while defendant was still president and a director, negotiations were entered into between him and the company, which resulted, either prior to or just after his retirement, in a settlement of his entire claim against the company on account of the advances so made and others, and the transfer to him by the company of securities amounting to about $200,000, either absolutely or as collateral to the company's note, through which he afterwards obtained title thereto. *Held*, that the advances having been expressly made and accepted as assets of the company, subject primarily to its outside indebtedness, the attempted repayment of such advances in the insolvent condition of the company and under the circumstances shown was void as against other creditors, and that defendant was accountable to such creditors for the value of the securities so transferred to him.

3. SAME—RESCISSION OF CONTRACT FOR FRAUD—LACHES.

The transaction by which defendant became a purchaser of the stock, and agreed to make advances to the company, having been expressly

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[1] This case has not been heretofore reported, and is now published in this series, so as to include therein all circuit and district court cases which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

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entered into by the sellers as individuals, and not on behalf of the company, which was not the owner of the stock sold, any fraud or misrepresentation on their part was not available by defendant to entitle him to rescind the contract as against the company, even if he had seasonably asserted his claim to such right; and for still stronger reason he could not assert it, after the company's insolvency, to the prejudice of its creditors, and after he had actively participated in the conduct of its affairs as president for a year.

In Equity. Creditors' suit against the Globe Insurance Company and George F. Harding.

Frederick Ullman and D. J. Schuyler, for complainants.
Lyman Trumbull and Geo. F. Harding, for defendant Harding.

The Parties.

DYER, District Judge. This is a creditors' bill, filed originally by Cynthia C. Hart and John S. Hart against the Globe Insurance Company, George F. Harding, the Firemen's Insurance Company, and V. A. Turpin. The bill was filed May 5, 1876, and on or about the 13th day of May of that year the Erie & Western Transportation Company intervened, and by order of court became a party complainant to the bill. On the 9th day of May, 1876, Robert E. Jenkins was appointed receiver of the insurance company, and on that day filed his bond, and on the 12th day of May the company executed to him a conveyance of all its property and property rights and interests. Subsequently the insurance company was adjudicated a bankrupt, and Jenkins was elected assignee, and on the 15th day of July, 1878, as such assignee, he was made a co-complainant in this suit with the Harts and with the transportation company. On the 5th day of January, 1877, by stipulation of the parties on file, the bill was dismissed as to the Firemen's Insurance Company. It was stated on the argument, and not denied, that the bill had been also dismissed as to Turpin, and it is understood that the insurance company and Harding are now the sole defendants.

The Pleadings.

The bill alleges the recovery of a judgment by Cynthia C. Hart against the Globe Insurance Company on the 4th day of May, 1876, for the sum of $1,028.15, and also the joint recovery of a further judgment by Cynthia C. and John S. Hart against the insurance company for the sum of $1,026.65; and that on the day last named executions were issued upon these judgments, which were, on the 5th day of May, 1876, returned nulla bona. The bill then charges as to the defendant Harding, on information and belief, that he has in his hands or under his control assets and securities of some nature or description belonging to the insurance company, or in which the company has some legal or equitable interest, which ought to be applied to the complainants' demands, and discovery is claimed and asked. The prayer of the bill, among other things, is that a receiver of the company may be appointed, and that Harding be decreed to account for the property of the company in his hands,

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and turn the same over to the receiver for satisfaction of complainants' judgments. On the 9th day of May, 1876, the defendant Harding answered the bill, and on the 15th day of February, 1877, filed an amended and supplemental answer. On the same 9th day of May, the Globe Insurance Company and the Firemen's Insurance Company also separately answered, but the issues to be here determined arise wholly upon the answers of the defendant Harding to the complainants' bill. Some time after this suit was begun, the defendant Harding filed a cross bill in the nature of a bill of interpleader against the insurance company, Robert E. Jenkins, one A. F. Fawsett, and the complainants herein, alleging that he (Harding) had in his hands and claimed to own as his own property some notes, amounting to over $40,000, signed by the South Chicago Land & Building Association, and secured by a trust deed or mortgage on property in this county; that said notes and mortgage were claimed by said Jenkins and by said Fawsett; that Fawsett had commenced a suit in trover for the value thereof against Harding; and he prayed that they might be decreed to interplead concerning the same It appears, however, that Jenkins has filed a disclaimer of all interest in said notes, and, as between Fawsett and Harding, the matter has been settled in Harding's favor (at least so far as this suit is concerned) by a trial of the trover suit, so that this cross bill is now out of the case.

Statement of Facts of Case.

There is, perhaps greater difficulty in determining what are the precise facts of this case in some of its branches than in determining correctly the principles of law applicable to the facts. The contention of the parties is of more than usual magnitude, and the court has therefore not been unmindful of the necessity of thoroughly searching the case in all its complicated details, to the end that correct conclusions might be reached upon the material issues involved. The testimony is very voluminous, but portions of it are found to be quite irrelevant, since certain of the issues originally involved have ceased to be the subject-matter of contest. Upon the argument the accuracy of the printed abstract of the testimony furnished to the court was much questioned by counsel on both sides, and the court has therefore felt it to be its duty to carefully read and examine the entire mass of original testimony as it came from the hands of the master, and as the result of such examination the material and important facts of the case are found to be as follows:

In July, 1874, and for several years prior thereto, the Globe Insurance Company was and had been engaged in the business of fire insurance in the city of Chicago. George K. Clark was then the president and Sidney P. Walker was the secretary of the corporation. On account of very heavy losses sustained by what is known as the fire of July 14, 1874, the capital of the company became impaired. This impairment was undoubtedly more serious than some of the parties to the transactions about to be narrated then supposed. In order to restore the company to a sound condition,

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Clark and Walker set on foot measures to obtain additional capital, and to that end opened negotiations with Harding, McCoy & Pratt, a law firm in Chicago, with a view to enlisting them in the enterprise. A trial balance of the company was exhibited to those parties, or some of them, for the purpose of enabling them to determine whether the purchase of stock would be a good investment. There is some conflict in the evidence upon the question of the extent to which the defendant George F. Harding examined this trial balance and investigated the affairs of the company at this time. To some extent, undoubtedly, he examined the statements exhibited to him, though the circumstances of the transaction tend quite strongly to show that the principal examination, so far as any was made, was left to Mr. Pratt. I do not, however, deem this very material. Whatever the facts may be in that regard, the negotiations between the parties resulted in a contract between Harding, McCoy & Pratt of the one part and Clark and Walker of the other, dated July 28, 1874, by which the parties formed a copartnership so far as related to their contemplated interests in the company, and which in its material parts was as follows:

First. Clark and Walker agreed to sell to Harding, McCoy & Pratt $75,000 of the stock of the company at par, and the purchasers agreed to pay therefor as follows: $25,000 in cash, $25,000 in real estate mortgages, and $25,000 in other securities.

Second. It was agreed that Harding, McCoy & Pratt should have the right to buy, and Clark and Walker were to aid them in purchasing, stock on the best possible terms until the interests of the respective first and second parties in the stock of the company should become equal in amount, it being declared in the contract that Clark and Walker then held, after selling $75,000 of the stock, $110,000 of the stock of the company.

Third. It was further agreed that in case Clark and Walker should retain their own stock and give to Harding, McCoy & Pratt the stock of other parties, Harding, McCoy & Pratt should have the right at any time within one year to demand from Clark and Walker an equal amount of their own stock at par, on like terms, but not to exceed the sum necessary to equalize the several amounts of stock of the several parties to the contract, and that after such equalization of stock all purchases made by either party should be shared by them fairly, dividing the stock and paying therefor according to the terms of said purchase.

Fourth. It was agreed that within 30 days, and before Harding, McCoy & Pratt should be obliged to pay more than the cash payment of $25,000 upon the stock then purchased, they might name and have elected three persons as directors of the company, and should have the right to name the vice president, and also the chairman of the executive and finance committee, which should consist of the president and vice president of the company and such chairman.

Fifth. It was further agreed that the several parties to this contract should unite in the election of the next and each succeeding board of directors of the company, each party naming one-half of

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the same, and that, if any odd number should be the number of the board, then the additional director for the odd place should be selected by mutual agreement or the place remain vacant.

Sixth. It was declared that the object of the contract was to make the insurance company a first-class company, and that all the assets, powers, and influence of the company and its several stockholders, as far as represented by the parties thereto, should be pledged and used to that end.

Seventh. That nothing contained in the contract should have the effect of making the several parties liable for each other as in the case of a common copartnership, nor beyond the scope of the contract; the intention being that the several interests should be regarded as one for the purpose of management only.

There are several features of this contract which should be particularly noticed; and first it is to be observed that Clark and Walker, in making the contract on their part and in selling the stock, acted in their individual capacities. Harding, McCoy & Pratt dealt with them as individuals, and not in any representative capacity, so far as the purchase of stock in the execution of the contract was concerned. Then it is evident that the parties contemplated that Clark and Walker might retain their own stock, and give to Harding, McCoy & Pratt the stock of other parties, and, in that event, Harding, McCoy & Pratt should have certain rights with reference to demanding from Clark and Walker at a future time an equal amount of their own stock at par, on like terms. Further, it was clearly contemplated that a large control over the affairs and management of the company should be exercised by Harding, McCoy & Pratt. This is evident from the provisions in the contract relating to the future election of directors and officers of the company and of the executive and finance committee, and, as will be seen hereafter, the subsequent action of the parties carried these provisions into effect. Lastly, it is observable that, so far as related to the interests of the parties in the company, and for purposes of management of the corporation, the contract created a copartnership, and it was the object of the agreement to put the company upon a sound basis, and the assets of the company, so far as they were represented by the parties to the contract, were pledged to that end and purpose. The stock thus contracted to be sold to Harding, McCoy & Pratt it is understood had belonged to Fawsett, Axtell, and Bowen, three stockholders in the company, who had put it in the hands of Clark and Walker to be used by them as the interests of the company might require; and it should have been previously stated that at a meeting of the directors of the company held July 21, 1874, the president was authorized to take such steps as he might deem advisable to restore the impairment of stock, and to place the company in a position to meet its obligations and maintain its credit. Under the contract before mentioned there was transferred to Harding, McCoy & Pratt stock to the amount of $75,000, which was paid for as follows: $25,000 in cash, $30,000 in real estate security furnished by McCoy or McCoy and Pratt, and $20,000 in railroad securities furnished by Harding. The last-named

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securities consisted of $10,000 of first mortgage bonds of the Chicago, Burlington & Quincy Railroad Company and $10,000 of first mortgage bonds of the Burlington & Missouri River Railroad Company. The stock thus paid for was delivered to the purchasers in the following proportions: To Harding $30,000, to McCoy $22,500, and to Pratt $22,500. This was followed by a meeting of the directors of the company held August 1, 1874, at which Harding and Pratt were elected directors and members of the executive and finance committee to fill vacancies occasioned by resignations tendered at said meeting. On the 25th day of August, at a meeting of the directors held on that day, the resignation of Clark as president of the company was received and accepted, and Mr. Harding was elected president. At the same meeting Mr. Clark, on motion of Mr. Pratt, was chosen chairman of the executive and finance committee. The next step in the proceedings was to remedy the impairment of the credit of the company occasioned by previous losses, and on the 11th day of September, 1874, at a meeting of the reorganized board, Mr. Harding presiding, the following resolutions offered by Mr. Pratt were adopted:

"(1) Resolved, that this company requires additional assets in order to overcome impairment, and to properly conduct its business. (2) Resolved, that this company will, out of its surplus earnings, pay to any person or persons who will furnish such assets a dividend of not less than 10 per cent. per annum thereon, and also a dividend of a sum equal to the amount of interest collected on the securities or assets aforesaid. (3) Resolved, that such assets shall be held by this company subject to the payment of all indebtedness of this company to policy holders, and that the honor and good faith of this company shall be pledged to keep said assets intact, and return the same, with the amount of the interest collected thereon, less the amount of the dividend paid for said interest to the several persons who shall advance the same, exhausting first all other assets, as well as the individual liability of the stockholders, before said assets shall be touched or impaired. (4) Resolved, that the amount wanted, the time when wanted, and the period for which the assets are wanted, and the return or surrender of the same, or other details of the arrangements for said assets, shall be determined by the executive committee. (5) Resolved, that the stockholders of this company, in proportion to the amount of stock held by them, respectively, shall, in the first instance, be entitled, and are hereby earnestly requested, to advance said assets; and the executive committee are instructed to give them a preference, fixing a date within which they shall severally exercise said privilege. (6) Resolved, that the secretary advise the several stockholders of the above resolution at once, in order that they may accept, if they desire, the offer in number five above."

Under the terms of these resolutions, Harding, McCoy & Pratt advanced to the company: In cash, $46,918.75; $5,000 Great Western Telegraph bonds, market value, $4,500; $14,000 stock of Second National Bank of Peoria, value, $21,000; $5,000 stock of Union National Bank of Chicago, $7,500,—making a total of $79,918.75 thus contributed by Harding, McCoy & Pratt. Clark and Walker also paid in under the resolutions the following sums: Cash, $15,000; bonds of Chicago, Burlington & Quincy Railroad Company, $10,000; bonds of Burlington & Missouri Railroad Company, $10,000; real estate security, $30,000,—making a total of $65,000 contributed by Clark and Walker; and of the money and securities thus advanced by them, it should be said that they were the same

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money and securities paid and delivered to them by Harding, McCoy & Pratt in payment for the stock which the latter purchased under the contract of July 28, 1874. There seems to be some question whether these advances made by Harding, McCoy & Pratt and Clark and Walker, and aggregating in all $144,918.75, were paid into the treasury of the company just prior to, or at the time of, or subsequent to the passage of the resolutions of September 11th. At all events, they were advances made for the benefit of the company under the resolutions, and the circumstances indicate that at the time the contract of July 28, 1874, was made, it was anticipated that advances would be made by the parties to that contract to remedy the impairment of the stock of the company, and to enable it to successfully conduct its business. These contributions thus made by Harding, McCoy & Pratt and Clark and Walker, are, I think, correctly defined by complainants' counsel in their brief. Although they were to belong to the company as part of its capital, and were to be held subject to the payment of its indebtedness to policy holders, they were still to occupy a higher plane than the ordinary contributions to capital, since provision was made for their ultimate return to the parties in interest in case they should not be required for the payment of debts. "They were midway between the debts of the company and its stock, subject to the debts, but preferred before the stock." And therefore these advances came to be known and spoken of in the company as the "preferred debt," and they may be thus hereafter referred to in this opinion, to distinguish them from other advances subsequently made by the defendant Harding.

Following these advancements of money and securities, there was held on the 30th of September, 1874, a meeting of the executive and finance committee, Messrs. Clark, Harding, and Pratt participating therein, at which the following resolutions were adopted:

"Resolved, that the amount required to make up the impairment and place the company in a strong financial condition is about the sum of $150,000. Resolved, further, that this committee accept of Geo. K. Clark and S. P. Walker the following securities, to wit [abbreviating the statement of the securities]:

Cash	$15,000 00
C., B. & Q. 1st Mort. bonds	10,000 00
B. & M. 1st Mort. bonds	10,000 00
McCoy and Pratt's mortgage	30,000 00
	$65,000 00

"And further accept of George F. Harding, A. McCoy, and L. G. Pratt the following, to wit [abbreviating as before]:

Cash	$ 46,918 76
Gt. Western Telegraph bonds, $5,000 par value, worth	4,500 00
Peoria Bank stock, par $14,000, worth	21,000 00
Union Nat'l Bank stock, par $5,000, worth	7,500 00
	$ 79,918 76
	65,000 00
In all amounting to the sum of	$144,918 76

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"That said securities were offered by the parties in response to the resolutions of the board of directors of the Globe Insurance Company passed September 11, 1874, and are accepted by the executive committee to be owned, held, and used under the terms of said resolution, the interest thereon to be allowed from the time the money and securities were deposited with the company."

On the same 30th day of September this action of the executive and finance committee was approved by the board of directors by resolution as follows:

"Whereas, by resolution of the board of directors of the Globe Insurance Company of September 11, 1874, it appears that the capital stock of said company was impaired, and had to be made up, and the amount, time when wanted, the period for which the assets were wanted, their surrender, etc., was left to the executive committee to determine; and whereas, the executive committee have fully considered the whole subject-matter, and have fixed the amount required at a sum not exceeding $150,000; and whereas, George K. Clark and Sidney P. Walker propose to furnish the following moneys and securities, to wit [naming the same moneys and securities as contained in the resolution of the executive committee], and George F. Harding, Alex. McCoy, and L. G. Pratt, the following [naming them as in the executive committee's resolution], in all amounting to the sum of $144,918.76, and the said securities having been examined and accepted by said executive committee: Now, resolved, that the action of said committee in the premises be approved by this board, and the said securities be accepted and held in conformity with the resolutions of September 11, 1874."

Subsequent to all of these transactions the defendant Harding became the owner of additional stock to the amount of $41,500, which had been pledged to certain Chicago banks by Clark and Walker, and at a later period Harding, McCoy & Pratt purchased still other stock to the amount of $8,000, two-fifths of which belonged to Harding; so that ultimately Harding held of the stock of the company the following amounts:

All of the $41,500	$41,500
Of the $8,000 his share was two-fifths	3,200
Of the original stock purchased by Harding, McCoy & Pratt under the contract with Clark and Walker of July 28, 1874, his share was two-fifths	30,000
Making in all	$74,700

As before stated, Harding, McCoy & Pratt advanced to the company under the resolutions of September 11, $79,918.76. Of this amount, the several parties contributed the following shares:

McCoy and Pratt jointly, the Peoria Bank stock	$21,000 00
McCoy and Pratt owned three-fifths of Union stock, $7,500	4,500 00
McCoy and Pratt owned three-fifths of telegraph bonds, $4,500	2,700 00
Making the amount contributed by them	$28,200 00
Harding advanced cash	$46,918 75
Also two-fifths of Union Bank stock	3,000 00
Also two-fifths of telegraph bonds	1,800 00
Making the amount contributed by him	$51,718 75

At some time after the adoption of the resolutions of September 11, 1874, the insurance examiner for the state of Michigan, in his examination of the assets of the company, made some objection

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to the form of the resolutions, and therefore, at a meeting of the directors held October 10, 1874, certain supplementary resolutions were passed, which, with the original resolutions, were declared to be the basis of the advance of assets made by Harding, McCoy & Pratt and Clark and Walker. The supplementary resolutions are as follows:

"It is further resolved, that in no event shall the interest be paid as stipulated in the second resolution aforesaid, except out of the surplus earnings of said company, putting the interest upon the same basis as to payment as the principal. It is further resolved, that nothing herein contained shall be held to modify or change the fundamental fact that the said above-described assets shall be the assets of the said company; and it is distinctly resolved that said assets must always be held to be the absolute property of said company, free and clear from any liens or claims thereon, and the same shall be held to be irrevocably pledged to the payment of all the creditors of said company. It is further resolved, that the phrase 'surplus earnings' contained in the second resolution aforesaid shall be strictly construed; and in no event shall any dividend be declared which shall reduce or impair the capital or assets of said company below the highest standard required in such cases to meet all liabilities, estimating reinsurance reserve according to the requirements of the various states in which the company does business."

From this time on, the insurance company continued to prosecute its business until its final collapse in 1876, but its history was marked by losses and financial embarrassments; and it is undoubtedly true that from time to time after October, 1874, Mr. Harding furnished moneys and securities to relieve the company from temporary difficulties. These moneys and securities which were advanced outside the resolutions of September 11, 1874, are known in the case and will be herein referred to as the defendants' "cash advances" to distinguish them from what has been spoken of as "the preferred debt." What was the amount of these cash advances is a much controverted question in the case, and one that will be considered hereafter. Mr. Harding continued to be the president of the company from the time of his election, August 25, 1874, until his resignation as both president and director was accepted on the 30th of August, 1875; and the records show that he attended all meetings of the board at which any business was done while he was such officer. In this connection it should be stated that it is claimed by Mr. Harding that he tendered his resignation as president August 19, 1875, but the record, which shows that his resignation was accepted on the 30th, must, I think, control.

In the summer of 1875—and probably in June—the insurance authorities of certain eastern states began to threaten to exclude the company from business in those states. In consequence of this new development in the affairs of the company, and for the purpose of averting its expulsion from the states referred to, Mr. Harding and Mr. Walker made a trip to the East, and had a conference with the state insurance authorities concerning the financial condition of the company. Nothing, however, was accomplished, except to secure time within which the company might retire from those states. Whether the defendant Harding then knew that the company was actually insolvent is a disputed question, but it can hardly be doubted

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that he became alarmed, and believed its situation to be precarious. McCoy testifies that upon Mr. Harding's return from the East he came to his (McCoy's) house, and stated that he was satisfied the stock was worth nothing, and that they ought to shape the company so as to save the preferred claims. This is controverted, but it is very clear that steps were speedily taken to protect Mr. Harding against loss to the extent that the circumstances of the case and the situation of the company permitted. On the 24th day of July, 1875, he transferred to Clark and Walker the entire amount of his stock, $75,000, and received from them an assignment of the identical securities and moneys which Harding, McCoy & Pratt had delivered and paid to Clark and Walker on account of their original purchase of stock in July, 1874. The contract evidencing this transaction is as follows:

"This agreement, made this 24th day of July, A. D. 1875, by and between George K. Clark and Sidney P. Walker, of the first part, and George F. Harding, of the second part, witnesseth: That George F. Harding hereby sells to said parties of the first part seventy-five thousand dollars of the stock of the Globe Insurance Company. And said parties of the second part hereby agree, in consideration thereof, to sell and deliver to said George F. Harding the following moneys and securities which were put and placed in the hands of the Globe Insurance Company in the name of George K. Clark and Sidney P. Walker, as shown by resolution of the said company of September 30, 1874, to wit: 1st. Cash (greenbacks), twenty-five thousand dollars. 2d. Chicago, Burlington and Quincy R. R. bonds, ten thousand dollars. 3d. Burlington and Missouri River R. R. bonds, ten thousand dollars. (Said bonds being first mortgage bonds of denomination of $1,000 each, and twenty in number.) 4th. Mortgage of Lorin G. Pratt and Alexander McCoy, securing their note to the Globe Insurance Co. for thirty thousand dollars, described in said resolutions. It is further agreed that, inasmuch as said securities are all in the hands of the Globe Insurance Company, or subject to its control in the payment of the indebtedness of the company, and are, with said moneys, pledged for the indebtedness, or some part of it, of said company to policy holders, and hence cannot now be delivered to said Harding, and for like reason and other good reasons, said moneys cannot be paid to said Harding, it is therefore agreed that said stock shall be transferred to U. P. Smith as trustee, to be held by him in trust, to hold the same as security for the performance of this contract on the part of said first parties by the payment and delivery of said moneys and securities above referred to to said Harding; and, after that is satisfied, then in trust for E. R. Bowen, O. P. Axtell, and A. F. Fawsett, according to their several interests as hereinbefore stated. It is further agreed that said Harding shall receive from said parties of the first part, and each of them, a full and careful transfer and assignment of their several and joint or joint and several interests in said moneys and securities, which shall be delivered to him with this agreement; and careful and full obligations of said company shall also be obtained to deliver and pay said moneys and securities (or their value in money) to said Harding free and clear from all claims, demands, and equities whatsoever, save such obligations as are created by the contract of September 30, 1874, and the resolutions of that date forming part thereof, by and between said parties of the first part, or some of them, with said company; and that said parties of the first part shall unite in and take the proper steps to terminate the liability of said securities and moneys for future indebtedness or policies hereafter issued by said company, and to contract its business and reduce its capital so far as needed for that purpose. It is further agreed and stipulated that A. F. Fawsett is the owner of forty-[illegible]nd dollars of said stock, that E. R. Bowen is the owner of twen-[illegible]sand dollars of said stock, and that O. P. Axtell is the owner [illegible] and dollars of said stock, and the same is to be delivered to them

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as required, by and upon the conditions of the foregoing agreement; said stock being held and pledged as security in the hands of said Smith, trustee. for the delivery and payment to said Harding of said moneys and securities aforesaid. *It is further agreed that A. F. Fawsett shall resign his position as director of said company, and said Smith shall be elected in his place.* It is further agreed that said Harding and Smith shall hold the proxy of said Smith and of said Bowen, Axtell, and Fawsett, irrevocably, to vote and act and cast the votes entitled to be cast in the name of said Smith, as trustee, as the holders of said stock, at all future meetings of the stockholders of said company, until said moneys and securities are paid and delivered to him; and said Smith, in addition to executing this agreement as a proxy, shall also make and deliver to said Harding, at any time, on demand, a paper giving the same power to him and said Smith, in the same terms, to vote and act for him touching said stock. It is further agreed on the part of Asbury F. Fawsett, E. R. Bowen, and O. P. Axtell that they assent to this agreement, and will assist in carrying it out as far as their influence and votes go as stockholders and directors of said company, *and will look to said stock, so far as said insurance company is concerned, and not to said company, for the return to them of said stock or its proceeds.*

"[Signed] Geo. K. Clark. S. P. Walker.
"A. F. Fawsett. Geo. F. Harding."

"It is agreed by George F. Harding that he will look to Geo. K. Clark only for the return of so much of said securities as the pro rata of Fawsett stock bears to the whole, and this he does with the consent of S. P. Walker.

"[Signed] Geo. F. Harding."
"Consented to. S. P. Walker."

*The portions marked (*) were apparently erased by pencil lines after the contract was drawn, before execution.

The transfer from Clark and Walker is as follows:

"For value received, we jointly and severally assign and transfer to Geo. F. Harding the following moneys and securities, and all our right under and to the same, to wit:

First. Cash, greenbacks	$25,000
Second. C., B. & Q. R. R. bonds	10,000
Third. B. & M. R. R. bonds	10,000
Fourth. Mortgage of McCoy and Pratt	30,000

—Described in the resolution of September 11, 1874, of the Globe Insurance Company, and being securities for the preferred stock, so called, of said company; the intention being to place said Harding in the same position touching the same, with all the rights touching the same under said resolutions, occupied by any or either of us, and especially of the said Clark and Walker; and we request said insurance company to treat said Harding as the owner of the same. July 24, 1875."

In fact, Mr. Harding never got from Clark and Walker or the company any of these identical securities and moneys, for they had been already used by the company, and were beyond its control or that of Clark and Walker. But he did get by this transaction all of Clark and Walker's interest in the so-called preferred debt, for the property thus assigned to him consisted of Clark and Walker's advances under the resolutions of September 11, 1874.

Following up the transactions of the parties and of the company in their historical order, it is found that on the 29th day of July, 1875, a meeting of the board of directors of the company was held, at which the following resolutions, which the secretary's record states were offered by Mr. Harding, were adopted:

"(1) Resolved, that the moneys and securities advanced under the resolutions of September 11 and 30, 1874, be returned to the parties from whom

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the company received them, as soon as the obligations contracted on the faith of them shall be paid. (2) Resolved, that the company will make no claim to set off indebtedness of said parties to said company against the said securities and moneys on the obligation to return the same, but will recognize the right of them or their assigns to the same, without set-off, diminution, or discount. (3) Resolved, that no more obligations of any kind be contracted on the faith of said securities and moneys, but said contract touching the same be regarded as terminated so far as future obligations of this company are concerned, and immediate steps be taken to enable the company to return the same, and stop the payment of interest thereon. Also, whereas, A. F. Fawsett, O. P. Axtell, and E. R. Bowen, acting by Geo. K. Clark and S. P. Walker, put into the Globe Insurance Company certain securities and moneys under the terms of the resolutions of September 11 and 30, 1874: Now, therefore, resolved, that said moneys and securities be returned, as soon as the terms of said contract are completed, to the said Fawsett, Axtell, and Bowen, in the proportions of $44,000 to Fawsett, $21,000 to Bowen, and $10,000 to Axtell, provided the claims of all creditors of Clark and Walker against the same be first discharged and defeated. And whereas, the losses by fire of the company in July, 1874, impaired its capital stock to a sum exceeding twenty-five per cent. thereof; and whereas, on September 11, 1874, the company resolved to make good said impairment, and undertook so to do on September 30, 1874, by an advance then made to this company of securities and moneys by parties in interest as will more fully appear by the records of this company of September 11 and 30, 1874; and whereas, objections have been made to said mode of making up said impairment, and it is deemed advisable to terminate the same, and to proceed under the general insurance law of this state by first reducing the capital stock, and gradually returning, as fast as good faith will admit, the moneys and securities so advanced, and then increase the capital stock as soon as possible: Therefore resolved, that the capital stock and par value of the shares of the Globe Insurance Company be reduced to $200,000, and that the auditor of public accounts of the state of Illinois be requested to make an examination of its affairs, and grant a certificate that it is proper, and is justified by the property and assets of said company, to reduce the capital stock and the par value of the shares of said company to said sum."

Then, on the 12th day of August, 1875, at a meeting of the executive and finance committee, a committee consisting of Messrs. Clark and Kimball was appointed "to confer with Mr. Harding in regard to disposing of preferred debt and his account." It is claimed by complainants that a settlement was immediately negotiated between Clark, acting for the committee, and Harding, of the latter's entire account, including "preferred debt" and cash advances, and this claim is supported by the testimony of Clark, which, in substance, is as follows:

Witness says he was on that committee. Mr. Kimball was also on the committee, but gave it no attention. "I transacted the business of the committee. Met Harding on the subject of his account, which embraced his interest in the preferred debt and his cash advances. This resolution was passed in order to get a settlement with Harding. I had previously had a number of interviews with him relative to his account. Mr. Harding was anxious to get some pay for what he had put into the company. He became alarmed about its solvency, and the matter of a settlement had been talked over before the committee was appointed. It was talked over directly after he had acquired Clark and Walker's rights under the resolutions. We had a number of conversations on the subject as to how it could be done. We could not pay him back in kind. The money had been expended in paying losses. The cash securities had been hypothecated for nearly all they were worth, and paying him back in kind was out of the question. But he expressed a willingness to accept other securities in place of those that had been put in, and a committee was appointed to agree upon values and ad-

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just the matter. That was the object of the committee. His claim was, the entire Clark and Walker preferred account, $75,000.00; amount put in by himself under the resolutions, $51,718.75,—total preferred debt, $126,718.75. In addition, he claimed somewhere from $9,000 to $12,000 cash balance. This was exclusive of the interest provided for by the resolutions, the profit on the stock he purchased, and a little discrepancy between the railroad bonds which he had furnished to the company of $24,500 and $21,918.75,—$2,591.25,—as before explained. Met Mr. Harding at his residence on Indiana avenue, in the evening, in the latter part of August, 1875, on the matter. No one present excepting Harding and witness. No other member of the committee was there. Made settlement of his account at that time. I can give basis of settlement, the details of which were subsequently substantially carried out. Q. 91. Well, give us the basis. A. By the terms of the settlement Harding was to receive of the company certain of its securities at fixed values, to be agreed upon between the committee and Harding, in payment of his entire claim against the company. Values were fixed between Harding and myself at that interview upon the following securities then owned and held by the company:

The Westcott notes and mortgage for $52,500 and interest at....	$ 55,000
The Michael Smith mortgage at.....	18,000
The O. Huse mortgage at.....	2,000
The John F. Heaney mortgage at.....	6,000
The W. S. Waller mortgage at.....	9,000
M. O. Walker mortgage for $10,000 and interest simple, unsecured note $2,500, at.....	15,000
McCoy and Pratt's mortgage (which had previously been taken by Harding)	80,000
Total	$135,000

"This amount, with the Great Western Telegraph bonds, valued at $1,800, about covered his entire indebtedness, except the interest on the preferred debt, as provided in the resolutions, and the profit on the stock he had purchased."

Mr. Harding denies that this alleged settlement was effected between himself and Clark as thus testified to by Clark, or that any securities were then delivered to him, or that there was any settlement prior to the 30th August following. Whatever the facts may be in that regard, and so far as this issue in relation to the time and manner of the settlement is concerned, it will be considered hereafter. It appears on the 30th of August, 1875, there was a meeting of the board of directors, at which Mr. Harding presented his resignation as president, as before stated, and at which the following resolutions were adopted:

"Resolved, that the settlement made by the executive committee with Geo. F. Harding be approved with the following corrections, viz.: That the actual value of bonds and stock shall be allowed Mr. Harding, instead of the price at which the same were allowed; second, that Mr. Harding shall take $1,800 of telegraph bonds at par; third, that the interest account of said Harding shall be calculated correctly, and such amount shall be allowed him in place of the item as reported."

It appears next that at a second meeting of the directors, held, as the records show, on the 30th day of August, the following resolution was passed:

"Resolved, that the president and secretary of this company be directed to make the note of this company payable on demand after its date to Geo. F. Harding, for the sum of ($47,743.52) forty-seven thousand seven hundred and forty-three and fifty-two one-hundredths dollars, due to him for cash advanced to said company, and secure the same by the following

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collaterals, to wit: The notes of Geo. K. Clark, payable to the Globe Insurance Company, two in number, dated December 28, 1872, due five years after date, with interest at 8 per cent., payable annually, secured each by trust deed, one for each note, made by said Clark and wife to Sidney P. Walker, trustee, conveying certain premises therein described; also the note of said Clark payable to said company, of same date and tenor, secured by trust deed made by said Clark and wife conveying premises owned in fee by his wife to said trustee,—all three of said notes being for the sum of $5,000 each; also two notes made by said Clark to said company, dated March 11, 1873, payable five years after date, with 8 per cent. interest per annum,—one for the sum of $4,000, and the other for the sum of $8,000,—each secured by trust deeds, one for each note, conveying certain premises to Walker, as trustee; also a note of said Clark to said company, dated July 1, 1873, payable five years after date, with 8 per cent. interest, payable semiannually, for $4,000, secured by a trust deed conveying certain premises to said Walker, as trustee; also two notes of said Clark, made to said company, dated March 9, 1874, payable five years after date, with 8 per cent. interest, payable annually; one for $15,000 and one for $2,000, each secured by independent trust deeds, conveying certain premises to said Walker, as trustee; also a note of said Clark to his own order, dated August 13, 1874, payable five years after date, with interest at 8 per cent., payable semiannually, for $40,000, secured by a trust deed to Alex. McCoy, as trustee, and assigned and indorsed by said Clark; also eleven notes made by Elmer F. Westcott to Asbury F. Fawsett, for $47,772.73 each, due on or before three years from date, with interest at 8 per cent. per annum, and the mortgage securing the same on the premises therein described; also the note of Michael Smith to the Globe Insurance Company for $20,000, dated December 13, 1871, and payable on or before April 1, 1873, with interest at the rate of 8 per cent. per annum, payable annually, and the sale mortgage securing said note, $4,000, having been indorsed thereon; also the note of Obadiah Huse to said company for $2,000, dated March 25, 1873, five years after date, with 8 per cent. interest, payable annually, and the trust deed securing the same; also three $1,000 bonds of the Omaha & Southwestern Railroad Company and six $1,000 bonds of the Wisconsin Valley Railroad Company; also the note of W. S. Waller to Geo. K. Clark, dated September 16, 1873, for the sum of $8,500, payable one year after said date, with interest at 8 per cent. from date, and the trust deed securing the same; also the note of M. O. Walker, now deceased, in favor of said company, dated March 24, 1871, for the sum of $10,000, due five years after date, with interest at the rate of 6 per cent. per annum, payable annually, and the trust deed or mortgage securing the same; also the note of M. O. Walker for $2,500, to the order of said company, dated September 24, 1872, payable on or before August 1st after date."

These securities thus to be transferred as collateral to the demand note amounted on their face to over $200,000, and, as it will be observed, were to secure the payment of a note of about $47,700. The demand note was immediately executed, and the collaterals were delivered. It was at this time, as the defendant Harding claims, that a settlement was made. Just what items made up the amount of the demand note is not clear. The testimony of Clark is to the effect—and this is the claim of complainants—that the object of the several transactions before recited was to secure to Harding the payment of the entire amount of the so-called preferred claim and cash advance, and that, after crediting the company with the mortgages and securities alleged to have been turned out to him in settlement prior to the meeting of August 30, 1875, there was, on account of interest and some other items, a balance due him of about $37,000, which balance, for some reason unexplained by Clark, and apparently not understood by him, was ultimately

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fixed at $47,743.52; that for the purpose of perfecting his title to the securities alleged to have been previously delivered to Harding in settlement by a sale under the power that should be annexed to the demand note it was arranged that such a note should be given. In his testimony on this point Clark says:

"It was a subject that was talked there for quite a while,—canvassed very frequently between us. I really wanted to accomplish it; that is, if he wanted to better his title to his securities by a sale under the power in the demand note, I was willing he should do it. If he got into any litigation or trouble [which he seemed to anticipate], why, he wanted to be in a position where he could set up his moneyed claim against the company, and hold these securities until that was paid. That was the conversation between him and me."

All this Mr. Harding denies. His version of the transaction is as follows:

"There was a settlement made at that time. One of the first things done was for Mr. Walker to produce my account. He did produce an imperfect and incomplete account, amounting to $12,000 and over. It was on a small book, not on the books of the company. After producing the vouchers and discussing the matter, it was found that my account would have to be swelled from that amount to somewhere from $25,000 to $30,000, and the C., B. & Q. R. R. stock would swell the amount to about $35,000. Then there was interest computed upon my cash advances, which in all amounted to $42,000 or $43,000, I think. Then the amount of interest was counted over again, and computations made, and coupons collected, and the premiums on the bonds, all amounted to the sum of $47,000. I was willing to take their notes, so far as they were ready to give them to me, upon my cash advances, claiming that there was a larger sum still due me upon my cash advances alone. This was on August 30, 1875."

On the 31st day of August—the day after the demand note was made—Mr. Harding gave to the directors of the company the following notice:

"August 31, 1875.

"To the Board of Directors of the Globe Insurance Company: You will please take notice that as a stockholder, as a creditor, and as a party interested in the advances made under the resolutions of September, 1874, I protest against and object to the surrender and delivery to any individual of the securities, or any securities in lieu thereof, of those formerly given to the company or held by the company under the resolutions of September, 1874, holding and claiming that the honor and good faith of this company is pledged to retain the same until the terms of the contracts under which they were delivered shall have been satisfied; and I inform all parties in interest that I do not and will not waive any rights which I may have to look to said securities for the payment of any moneys due me.

"Yours truly, George F. Harding."

The demand note contained the usual form of sale found in collateral notes, and in October, 1875, Mr. Harding sold the collateral securities to one Hough, a lawyer in Chicago. The substance of Hough's testimony relating to the sale is this:

"Somewhere in the fall of 1875,—I should think in October,—he (Harding) asked me to purchase some securities. I am unable to state in detail what the securities were. Could not tell the amount precisely, but it was somewhere, I think, between $150,000 and $200,000. They were notes secured by mortgage. My recollection is that Geo. K. Clark figured more than any one else in these securities. One mortgage was by Mr. Smith. Don't recollect the amount of the Clark or Smith mortgages. Harding had the notes and mortgages in his office in the Kent Building. I had possession of the

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securities two or three months, perhaps. I should not say it was over three months. The circumstances under which I purchased were these: Harding told me he had some securities that he wanted to sell me, and he showed me the securities. I looked them over, and told him I had no money to purchase them, and he said I need not pay any money; he would take my note. I asked him if the securities were good, and he said they were. The note is destroyed. My recollection is that it amounted to something over $60,000. That is a mere impression upon my mind. I can't recollect more definite than that it was payable to Harding's order, and, I think, was due some six months after date. I sold the mortgages back to Mr. Harding. Neither of the sales (Harding to Hough or Hough to Harding) was public. Both were private sales. In payment he surrendered to me my note, and gave me $250; that is, he allowed it to me on a claim that he had against me. I don't recollect anything more that he said except that he wanted to buy those securities. It took place at his office. It was some time in the winter of 1875–76. Harding and I were officing in the same suite of rooms at the time I purchased; also at the same time I sold back the securities. I put up no collateral with my note. I understood that, if Mr. Harding wished to buy those securities back, that I would let him have them. Harding stated that he might want to purchase them back, and I said he could have them back if he wanted them. I don't think I should have purchased them and given the note if I had expected to keep the securities and meet the note, but I was abundantly secured in giving my note. It was the understanding on my part, that Harding was to purchase them back. He did not exhibit to me any collateral note under which he held them. I think he said he got the securities from the Globe Insurance Company. (Witness is shown the resolution of August 30, 1875, giving a list of the securities said to be collateral to the demand note, and recognizes the general character of them as the same with those he bought of Harding.)" Cross-examination: "Q. Didn't Mr. Harding, at the time of this sale, tell you that he could not and would not have any understanding with you whatever of any kind that would invalidate the sale, and could not and would not have any understanding with you, but that he wanted to make a sale of the property, and that it was a good purchase, and you were to hold the property? Wasn't that the understanding? Wasn't that the statement? A. I think there was some conversation substantially to that effect."

This sale to Hough and the sale back to Harding the complainants insist was a sham proceeding, by means of which Harding sought to strengthen his own title to the collateral securities, while Mr. Harding claims that it was a fair and valid sale, without any understanding at the time that he would buy the securities back. Difficulty arose, according to the testimony of Mr. Harding, in transferring the collaterals, as they did not bear the indorsement of the company. Thereupon Mr. Harding applied to Mr. U. P. Smith, then president of the company, for indorsement of the securities, and, as he hesitated to indorse them, Mr. Harding wrote him the following letter:

"Chicago, October 4, 1875.

"U. P. Smith, Esq., President of Globe: I respectfully request the indorsement of the notes and mortgages described in my demand note of August 30, 1875, and the guaranty as to such of said paper as I hope to get on without putting Globe indorsements upon. My object in this is, I wish my titles to the collaterals to be perfected. I have sold them all, and wish to deliver them to the vendee. As I have advised Mr. Clark and others, I will buy the Clark mortgages of the vendee, and will sell them to the Globe for the amount of said demand note, and I will give you an opportunity to pay for them by giving me the Globe paper with them as collateral, due in two, four, six, and eight months from September 30, 1875, as a condition of confirming the title of my vendee to said collaterals. I will, upon said contracts

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above described being made and carried out, give to said company a receipt in full for my advances under the agreement of September, 1874, containing the condition that the title of my vendee to said collaterals stands good and is unimpeachable.

"[Signed] Geo. F. Harding."

The securities were then indorsed, and upon their purchase from Hough Harding sold back to the company the Clark mortgages, taking from the company its four notes, all dated September 30, 1875, one for $6,940.38, one for $7,239.16, one for $12,609.99, and one for $23,485, due respectively in two, four, six, and eight months, and all aggregating $50,274.53; and says that he gave a release of the company's liability to him under the agreement of September, 1874. Following the alleged sale to Hough it appears by the secretary's record of the company that on the 12th day of October, 1875, there was a meeting of the executive and finance committee, at which the following resolution was passed:

"Resolved, that the secretary of this company give to George F. Harding a proper voucher to show the sale of the securities pledged to him on August 30, 1875, which sale was made to David L. Hough on the 9th day of October, 1875, is approved and consented to by this company on condition only that said Harding shall purchase back from said Hough the securities called the 'Clark mortgages,' and shall release the company from all liability to him under the agreements of September 11 and 30, 1874, and shall accept the notes of this company to be made to him for the following sums, to wit [enumerating the four notes last before mentioned]; said notes bearing interest at ten per cent. per annum after maturity, and to be paid when due at the expiration of the several periods as above stated; and shall resell said Clark mortgages for the total amount of said notes, taking said Clark mortgages as collateral security; and the said secretary and president of this company are hereby authorized and empowered to make said notes to said Harding, and also the several parts of the above transaction."

Then there appears on the secretary's book the record of a meeting of the directors held October 13th, reciting in detail the giving of the demand note in obedience to the resolution of August 30th, with the collaterals mentioned in that resolution; a report by the secretary that by order of the executive committee dated October 12, 1875, he had signed a paper approving of the sale by Harding to Hough; and a report by the president and secretary that they had negotiated the purchase from Harding of the Clark securities for the sum of $50,274.53, being the amount of purchase, with interest added to maturity of the notes which were given for the purchase; and the record then proceeds:

"Now, therefore, it is moved and seconded that the above report of the action of the executive committee of this board and also of the president and secretary be accepted, and that the same is hereby fully approved."

The company not paying the four notes given for the Clark securities, those securities were sold for the sum of $20,635.07, Mr. Harding being the purchaser. Thus he acquired by virtue of this transaction, and by virtue of the proceedings in connection with the demand note, the entire body of securities which it is sought by the present bill to compel him to surrender and account for for the benefit of policy holders who are now unpaid creditors of the Globe Insurance Company.

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Immaterial Matters.

In considering the case in its legal bearings and in the light only of material facts, it is evident that there may be eliminated therefrom a number of matters upon which considerable testimony has been taken. Among other things, it is disclosed that in the course of proceedings taken by Mr. Harding in connection with his withdrawal from the company, and to secure an adjustment of his supposed rights, controversies arose between himself and McCoy and Pratt, which have been made the subject of much discussion in this investigation. It was probably unavoidable that in developing the details of the various transactions involved this should be somewhat prominently brought out, but I regard the difficulties which arose between the parties named as quite extraneous to the issues here to be settled, except as the relations which were engendered between them may affect their credibility as witnesses. Again, there is much testimony in the case relative to the so-called Fawsett mortgage, which I understand to be the South Chicago Land & Building Association mortgage. From what was said upon the argument in relation to this mortgage and the litigation between Fawsett and Harding concerning it that has occurred since the present bill was filed, I conclude that the controversy between those parties touching the ownership of that mortgage has now no relevancy to the present contention. Further, it appears that on the 5th day of March, 1876, the insurance company gave to the defendant Harding its note for $7,640.75, with certain notes and trust deeds, executed by Dewey and Lay as collateral security. The items of which this note was made up appear in an account annexed to the original answer, marked "Exhibit 4"; and it is to be further remarked that the debited part of the same items appear under date of March 5, 1876, in the defendant's corrected account as shown in his amended answer. Reference is only made to this note of $7,640.75 and to the items of which it was composed for the purpose of observing that no claim is made by complainants on account of them nor to the Dewey and Lay securities, and this note and the securities may be regarded as out of the case.

The Bradner, Smith & Co. Decree.

The question first encountered on the threshold of this case is, are complainants' rights barred by the proceedings in the suit of Bradner, Smith & Co. against the Globe Insurance Company and others, which was commenced and prosecuted in the state court in 1876? The bill in the case at bar was filed in this court May 5, 1876. The original complainants therein were Cynthia C. Hart and John S. Hart, judgment creditors of the insurance company, and the defendants were the Globe Insurance Company, the Firemen's Insurance Company, George F. Harding, and V. A. Turpin. The return of the marshal shows service of the subpœna of the Globe Insurance Company, George F. Harding, and the Firemen's Insurance Company May 13, 1876, and on V. A. Turpin May 24, 1876.

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All of the defendants, however, except Turpin, appeared and answered the bill on the 9th day of May, 1876, so that on that day this court acquired jurisdiction over the answering defendants. On the same 9th day of May this court appointed Robert E. Jenkins receiver of the insurance company, and on the 12th day of May, 1876, in obedience to the order of the court, the company executed to the receiver an assignment of all its property and effects. On the 13th day of May, 1876, the Erie & Western Transportation Company intervened as a judgment creditor of the insurance company, and was made a party to the suit. On or about the 2d day of October, 1876, leave was also granted to Jenkins, as assignee in bankruptcy of the insurance company, to intervene in this suit, and on the 15th day of July, 1878, an order was entered making him a co-complainant therein. On the 5th day of January, 1877, the suit was dismissed as to the Firemen's Insurance Company, and on the 15th day of February, 1877, the defendant Harding filed an amended and supplemental answer to the bill. This was the state of the record in the case at bar, so that in 1876 the parties thereto were Cynthia C. Hart and John S. Hart, complainants, the Globe Insurance Company, the Firemen's Insurance Company, George F. Harding, and V. A. Turpin, defendants, Robert E. Jenkins, receiver, and the Erie & Western Transportation Company, intervening judgment creditor. On the 3d day of May, 1876, Bradner, Smith & Co., who were simple contract creditors of the insurance company, never having obtained judgment, filed in the circuit court of Cook county a bill which was in the nature of a creditors' bill against the Globe Insurance Company. Their claim, as set out in the bill, was one arising upon a loss by fire of property insured by the insurance company, which was the sole defendant in the cause. The Globe Insurance Company entered its appearance on the 4th day of May. On the 8th of May the complainants in the cause asked leave to file an amended bill making new parties defendant, and an order was on that day entered granting leave to file such amended bill as of May 5th, and an amended bill was filed as of the last-named date making George F. Harding, the Firemen's Insurance Company, and V. A. Turpin codefendants in the suit with the Globe Insurance Company; and Mr. Harding, by W. A. Barnes, his attorney, and the Firemen's Insurance Company, accepted service of the summons issued on the amended bill as of the 5th day of May.

At this stage of the proceedings the apparent object of the suit was to reach the property and assets of the Globe Insurance Company in its possession and in the possession of the other defendants, and to obtain a decree that the same be applied in satisfaction of Bradner, Smith & Co.'s demand. On the 8th day of May the complainants in that suit moved for the appointment of a receiver of the Globe Insurance Company. On the same day the Erie & Western Transportation Company entered its appearance for the sole and only purpose of opposing said motion. The motion was overruled. On the 23d day of May, 1876, Harding and the Firemen's Insurance Company filed answers to the original and amended bills, which simply denied the allegations therein, and alleged the facts

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of the case to be as set forth in their several cross bills filed on the same day. The defendants in the cross bill of Mr. Harding were Bradner, Smith & Co., the Globe Insurance Company, Isaac Crosby, First National Bank of Chicago, Treasurer of the State of Mississippi, the Firemen's Insurance Company, V. A. Turpin, Robert E. Jenkins, receiver of the Globe Insurance Company, and Frank A. Follansbee, receiver of the Mercantile Insurance Company. The matters set up in this cross bill were substantially such as are interposed as a defense in the case at bar, and affirmative relief against the Globe Insurance Company was prayed. On the 27th of May, 1876, Bradner, Smith & Co. disposed of their claim against the insurance company, upon which the suit was founded, and received on account thereof $100. Their interest in the litigation then terminated. The assignment was executed in blank, and the transaction was conducted by J. C. Latimer, who was the solicitor of record for Bradner, Smith & Co. in the bill filed by them against the insurance company. Latimer testifies that he presented the assignment to Smith for execution, and paid him $100, which he received for the purpose from Barnes, who, I infer, was the same person who, as attorney for Mr. Harding, accepted service of the summons that was issued upon the amended bill filed by Bradner, Smith & Co. against the Globe Insurance Company, Mr. Harding, and others. Latimer further testifies that Barnes also paid him attorney's fees in addition to the $100, on condition that the suit could be prosecuted in the name of Bradner, Smith & Co. to a decree in their favor; and it clearly appears that thereafter they incurred no expense in the suit and realized no benefit therefrom. On the 7th day of June, the Globe Insurance Company filed nunc pro tunc, as of June 1st, its answer to the original and amended bills of Bradner, Smith & Co., which consisted of a denial of the allegations in the original bill, and also a denial that the complainants were entitled to the relief prayed by them either in their original or amended bill. On the 21st day of June Mr. Harding filed an amendment to his cross bill, correcting and amending the latter in various particulars, and among other things striking out the names of Isaac Crosby, First National Bank of Chicago, Treasurer of the State of Mississippi, V. A. Turpin, Robert E. Jenkins, receiver of the Globe Insurance Company, and Frank H. Follansbee, receiver of the Mercantile Insurance Company, and the Firemen's Insurance Company. Thereafter the defendants in that bill were Bradner, Smith & Co., the Globe Insurance Company, and the Firemen's Insurance Company. On the 31st day of May the Firemen's Insurance Company filed its cross bill making the same parties defendants therein as were originally named in the cross bill of Mr. Harding, in which cross bill it was alleged that the Firemen's Insurance Company had contracted to reinsure certain risks on policies issued by the Globe Insurance Company, in consideration of the payment to it of certain sums of money by the last-named company; the payment of which was secured by certain notes and collaterals delivered to the reinsurer; and the prayer of the cross bill was, among other things, that the validity of said contract of reinsurance might be determined,

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and that the rights of the complainant in said cross bill in and to such assets as it claimed by virtue of the contract of reinsurance might be confirmed. On the 21st day of June this cross bill of the Firemen's Insurance Company was amended by striking out the names of the same persons as defendants therein as were struck out of the cross bill of Mr. Harding, including Robert E. Jenkins, receiver of the Globe Insurance Company. Answers to the cross bill of Mr. Harding, denying its allegations, were duly filed by the Globe Insurance Company and the Firemen's Insurance Company. Mr. Harding and the Globe Insurance Company also answered the cross bill of the Firemen's Insurance Company, denying the allegations thereof, and a similar answer was also filed in the name of Bradner, Smith & Co. Final issue was joined by replications to the various answers to the original and cross bills, and a decree was entered on the 22d day of June, 1876. That decree was in favor of Bradner, Smith & Co. for the sum of $987.77, and in favor of Mr. Harding, confirming his transactions with the Globe Insurance Company, and adjudging that there was still due to him from that company $32,512.65, and that upon nonpayment of that sum, the securities referred to in his cross bill be sold by a master in chancery, at public auction, to the highest bidder. The decree also confirmed the contract of reinsurance made with the Firemen's Insurance Company, and adjudged that it was entitled to be paid $44,000 on account of such reinsurance, and to hold the securities transferred to it by the Globe Insurance Company to secure the payment of said sum. On the 1st day of July, 1876, Robert E. Jenkins, receiver of the Globe Insurance Company, moved to vacate this decree, but on the 8th day of the same month he withdrew his motion. On the 12th day of October, 1876, a further decree was entered, directing a sale of the securities held by the Firemen's Insurance Company, and appointing George Willard receiver of the assets and effects of the Globe Insurance Company. On the 16th day of October, 1876, the master appointed to make sale of the securities referred to in Mr. Harding's cross bill, consisting of certain of the Clark mortgages amounting to $32,000, reported that he had sold the same to Mr. Harding for the sum of $10,000. On the 16th day of November, 1876, the master also reported the sale of the property and securities mentioned in the decree of October 12th, from which report it appears the aggregate amount realized from said sale was $805, and that Mr. Harding was the purchaser of most of the securities and property. Subsequently final orders were made confirming these sales and directing delivery of the securities and property sold by the master, to the purchaser.

Various points are urged in support of and against the claim that all matters involved in the case at bar were duly adjudicated in the Bradner & Smith case, and that the present complainants, including all other creditors of the Globe Insurance Company and their representatives, are bound by the proceedings in that case. It is true that this court acquired jurisdiction of the defendants named in complainants' bill on the 9th day of May, 1876, and that the defendants in the amended bill of Bradner, Smith & Co. be-

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came parties to that case, certainly on the 8th, and perhaps on the 5th, day of May. But, admitting this to be the state of the record, and saying nothing about other objections urged against the proceedings referred to, I regard the fact that neither the complainants in the case at bar nor any of the creditors of the Globe Insurance Company, except Bradner, Smith & Co., Mr. Harding, and the Firemen's Insurance Company, nor the representatives of the creditors, were parties or privies to the Bradner, Smith & Co. case, as a conclusive answer to the defense here made that the present suit is barred by the proceedings and decrees in that case. Any other conclusion is, to my mind, unsustainable upon any correct principles of law applicable to the question. The Harts, the great body of general creditors of the Globe Insurance Company, and the receiver of the company appointed by this court were strangers to the litigation in the state court. Even Bradner, Smith & Co., four days after Mr. Harding filed his cross bill, ceased to have any further interest in that litigation, and it is patent that thereafter the real parties to that suit were Mr. Harding, the Firemen's Insurance Company, and the Globe Insurance Company. Mr. Jenkins was appointed receiver by this court in the case at bar on the 9th day of May. The appointment of a receiver in the Bradner & Smith case was refused by the state court until October 12, 1876, when George Willard was appointed such receiver. The receiver appointed by this court in this cause was never brought in as a party to the suit in the state court; and before all the decrees were entered in the last-named suit the Globe Insurance Company was in bankruptcy, and the assignee, Mr. Jenkins, who subsequently became a co-complainant in the case at bar, was not made a party to that suit. It will not do to say that the bill of Bradner, Smith & Co alleged that it was filed in behalf of all the creditors of the Globe Insurance Company, and therefore that they became bound by the proceedings in that case. Parties cannot be bound or tied up in their rights in that way. Nor will it do to say that the parties to the present suit might have come into the suit in the state court. They were not obliged to do so; and, if the parties to that litigation were seeking an adjudication that should be conclusive against the world, it was their duty to make all parties in interest parties to the suit. It is true that the record in the Bradner, Smith & Co. case shows that the Erie & Western Transportation Company at one time intervened for the sole purpose of resisting the appointment of a receiver by the state court, and that, after decree passed, Mr. Jenkins, as receiver, intervened by motion to vacate the decree. But the latter motion was withdrawn, and neither of these proceedings on the part of the transportation company and Jenkins connected them with the suit, so as to bind them as parties privy thereto. It is evident also that the real subject-matter of the Bradner & Smith case, which formed the substantial basis of the decrees which were ultimately entered, was introduced into the case by the cross bills of Mr. Harding and the Firemen's Insurance Company; and these cross bills were filed a considerable time after those parties had answered the bill of complainants in the case at

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bar, by which the same subject-matter was here brought into controversy. So that it is perhaps a serious question whether this court did not first take cognizance of the real controversy between the parties which the state court subsequently undertook to adjudicate. Further, an examination of the record in the Bradner & Smith case shows, I think, that the decree in that case did not assume to reach a large mass of the securities in controversy in the case at bar. That decree could only embrace such matters as were germane to the issues raised by the bill and cross bills and the answers thereto, and those issues, I think, only legitimately involved the Clark mortgages and such securities and property of the Globe Insurance Company as were held by the Firemen's Insurance Company. Without considering any other points made involving the validity of the proceedings in the Bradner & Smith case than such as control my decision of the question, I am of the opinion that those proceedings and the decree rendered in that case ought not to be adjudged a bar to the relief sought by complainants in the present bill.

Secretary's Records.

As a preliminary matter it should be remarked that the correctness of the secretary's records touching various proceedings of the board of directors and the finance committee has been quite seriously disputed by some of the witnesses. This dispute, on the one hand, involves a denial on the part of Mr. Harding that the record correctly sets forth the amount of his advances under the resolutions of September 11th, and, on the other hand, it involves the accuracy of the proceedings, as recorded, relative to the giving of the demand note, the alleged approval and confirmation of the sale to Hough, and the transaction concerning the resale of the Clark mortgages by Harding to the company. And it is claimed in behalf of the complainants that the record of the latter proceedings is fictitious and false, and was made up without the knowledge of the members of the board, whom the record states participated therein; and that the intention was to fabricate a record which should, on its face, attempt to give regularity to proceedings between Harding and some of the officers of the company, which were in fact, as it is claimed, illegal and irregular. But I think the testimony is hardly sufficient to impeach the records. It is true Mr. Pratt says he did not offer the resolution in relation to giving Harding a demand note, and other members of the board have no recollection of proceedings relative thereto, and of the recorded action of the board touching the Hough sale, and the resale to the company of the Clark mortgages. But some of the witnesses who thus dispute the correctness of the records, admit that there was talk in the board, or among its members, about giving a demand note, and that it was understood that such a note was to be given; and it is to be borne in mind that a considerable time has elapsed since the transaction in question, and that, of necessity, the alleged nonexistence of the disputed proceedings rests in the recollection of the witnesses, which, after such lapse of time, may be unreliable. The

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alleged proceedings appear to have been recorded in the usual manner and form by the proper officer, and, after careful examination of the records and evidence, I am not convinced that the records have been impeached, and they will be regarded throughout as evidence of the transactions between Mr. Harding and the board. According to the paging of the book of records, it appears that some of the leaves are missing, and it was claimed by complainants' counsel that this was strong evidence of improper tampering with the book. But there is no proof to show whether the missing leaves were intentionally or accidentally removed, nor by whom, nor is it shown that they were in the book when its use as a book of record was begun, and on the whole I think there is an entire failure to show that the imperfection of the record in the particular referred to is chargeable to the defendant.

Effect of Resolutions of September 11 and 30, 1874.

It is too clear for argument that the money and securities put into the treasury of the company and made part of its capital by Clark and Walker and Harding, McCoy & Pratt under the resolutions of September 11 and 30, 1874, were pledged beyond recall, if the situation of the company should so require, to the payment of indebtedness to policy holders. The object of those advances was to put the company on a sound financial basis, so that it could hold itself out to the world as able to meet its engagements with those who should thereafter trust to the security against loss which its policies of insurance might afford. The resolutions of September 11th declared that the assets required to overcome impairment and to properly conduct the business should be held by the company, subject to the payment of all indebtedness of the company to policy holders; and the resolutions of September 30th asserted that the securities received from Clark and Walker and Harding, McCoy & Pratt, amounting to $144,918.76, were accepted and held in conformity with the resolutions of September 11th. Again, in the supplementary resolutions of October 10th it was declared that nothing therein contained should be held to modify or change the fundamental fact that the assets advanced to remedy impairment should be the assets of the company, and it was therein resolved that they must always be held to be the property of the company, free from any liens or claims thereon, and irrevocably pledged to the payment of all the creditors of the company. Mr. Harding participated in these proceedings. He, of course, understood the conditions under which he and his associates made their advances of money and securities; and we find him as late as August 31, 1875, as an alleged creditor of the company, by letter to the directors, invoking the rule of action which was plainly required by the resolutions of September, 1874. It is true that the resolutions of September 11th contemplated the ultimate return of the advances made under the resolutions to the parties making them. But it was meant and understood that such return could be made only in case the assets so advanced were not required to meet the obligations of the company. It is clear, therefore, that when the com-

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pany fell into a condition of insolvency neither Clark and Walker, nor Harding, McCoy & Pratt, nor either of them, could, by any arrangement whatever with the company, withdraw the moneys and securities put in under the resolutions, nor could they withdraw other securities in place of those they originally contributed, if such withdrawal would weaken the power of the company to meet its liabilities to policy holders, without violating the spirit of the resolutions of September, 1874.

The Meaning and Legal Effect of the Transactions in Dispute.

Now the great question in the case is, what were the real meaning and purpose of the transactions which took place between the defendant Harding and the company in July and August, 1875, and what was, in fact, accomplished thereby? The court can have no doubt, in the light of all the facts and circumstances developed by the evidence, that before and at the time of the meeting of the directors July 29, 1875, Mr. Harding regarded the situation of the company as precarious, and believed that his interests were in jeopardy. It is true that he says the books of the company were so kept that no one could tell its condition. But Walker, the secretary, testifies that they were purposely thus kept to prevent interference by state officials; and, as Mr. Harding was president of the company, and a member of the finance committee, it may be a question whether, under the circumstances, he was not in law chargeable with knowledge of the company's affairs and situation. However that may be, we find that Mr. Harding says in his testimony that after his return from the East in July, 1875, he entered upon an investigation of the affairs of the company, and endeavored to devise ways and means by which the company might continue its business. He says he then thought the stock was worth about 25 cents on a dollar, and it is shown that his investigation of the company's condition, however limited it may have been, was occasioned by the alarm excited in his mind by conversations with Walker while they were upon their eastern trip. Failure to succeed in any measure for the relief of the company in its extremity was followed by the contract with Clark and Walker of July 24th. This was the first step in proceedings then inaugurated for the protection of his interest, and was undoubtedly prompted by the apprehension, if not belief, that the loss of his entire investment was threatened. During the succeeding month of August he certainly knew that the company was in a crippled condition, and believed it to be insolvent, for this is established by his own testimony. By the contract of July 24th and the assignment concurrently executed, Mr. Harding, as we have seen, disposed of his stock, and acquired in return therefor all of Clark and Walker's interest in the preferred debt. This was followed by the meeting of the directors of July 29th, which provided for the return of the moneys and securities advanced under the resolutions of September 11 and 30, 1874. Then came the meeting of the executive and finance committee of August 12, 1875, when a subcommittee, consisting of Clark and Kimball, was appointed "to confer with Mr. Harding in regard to

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disposing of preferred debt and his account." Mr. Harding was then a member of the finance committee, and was yet president of the company. As before stated, it is claimed by the complainants that a settlement in full was actually consummated between Mr. Harding and Clark, after the special committee was appointed, and before the 30th of August; that by this settlement Harding was to receive from the company certain of the securities here in question at fixed values, amounting to $135,000, in payment of his entire claim; and that nothing thereafter remained to be done but to secure the ratification of the company. All this is denied by Mr. Harding. It must be admitted that the resolution passed by the directors at their meeting of August 30th, whereby they resolved that the settlement made by the executive committee with Mr. Harding be approved with certain corrections, tends to corroborate with not a little force the claim of complainants that a settlement had been previously agreed upon. But, regarding it as a doubtful question, it is clear that the settlement which was ultimately consummated between Mr. Harding and the company was set on foot when the executive and finance committee took action on the subject; that negotiations in detail were carried forward by Mr. Harding and Clark, and that these negotiations contemplated not only security to Mr. Harding on account of his cash advances, but also for his interest in the so-called preferred debt; and after much consideration of the case in all its aspects it has become my conviction that the various steps thereafter taken, including the giving of the demand note with the accompanying securities, the sale of the securities to Hough, the ratification of that sale by the company, the repurchase of the securites by Harding, the sale back to the company by him of the Clark mortgages, and the execution to him of the company's notes therefor, the record proceedings of the board of directors in relation to these transactions, and the ultimate purchase of the Clark mortgages by Mr. Harding under the power of sale which was annexed to the notes, constituted a series of acts whereby, so far as was possible, Mr. Harding should obtain security on account of his entire claim against the company, which consisted of his interest in the preferred debt and his cash advances, and by means of which he should become vested with the title to the entire mass of securities which it is sought by the present bill to reach for the benefit of the general creditors. It is to be observed that in the negotiations which preceded the execution of the demand note it had been proposed that Mr. Harding should take from the company a large part of the same securities which he ultimately received as collateral to the demand note. Mr. Harding testifies that during those negotiations he thought it questionable whether he could take those securities from the company, and hold them in the manner proposed, and I think the evidence as a whole sustains the conclusion that the immediate object of the demand note was to give the transaction such outward form and character as would enable Mr. Harding, in the most effectual manner possible under the circumstances, to hold the securities which were delivered to him as collateral to the note. Mr. Harding drew the resolution of August

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30th in regard to the demand note. He asked that the record should show such a resolution, and the directors asked him to prepare it. The face amount of the securities was greatly in excess of the note. In order to get the demand note, Mr. Harding testifies that he promised, in case the company did not pay it, and he should sell the collaterals, he would make with the company such a contract as was subsequently expressed in his letter of October 4, 1875, to U. P. Smith, then president of the company, which was in part a contract to sell the Clark mortgages back to the company, and give it a receipt in full for his advances under the resolutions of September, 1874. In form the demand note was given for Mr. Harding's cash advances outside the resolutions, but I cannot doubt that it was intended that the securities transferred as collateral should be sufficient, at least, in amount to cover and secure his interest in the preferred debt. The transactions which follow the giving of the demand note tend to strengthen this view.

The Hough Sale.

Ostensibly the transaction between Mr. Harding and Hough was a sale of the securities and a transfer of the title to Hough, but the evidence shows that it was in fact only a sale in form. The amount of the securities was large,—Hough says between $150,000 and $200,000. Hough had no money with which to buy them, and states that he so told Harding. Still Harding appears to have been urgent that he should take them, and finally Hough gave his unsecured note for $60,000, and took possession of the securities. The parties were occupying offices in the same suite of rooms. The alleged sale, ostensibly under the power contained in the demand note, was private, and it is very clear that the transaction was not intended to be a permanent transfer. It is true Hough testifies that there was at the time some conversation to the effect that the parties were not to have any understanding that would invalidate the sale, and to the further effect that Harding wanted to sell, and that Hough was to hold the securities. But he also testifies very decisively that he understood that, if Mr. Harding wished to buy the securities back, he could do so, and that Harding stated at the time that he might want to purchase them back, and that Hough replied that he could have them back if he wanted them. Further, Hough testifies directly that he does not think he should have made the purchase and given his note if he had expected to keep the securities and meet his note, but that he was abundantly secured in giving the note. Then what followed? Hough held the securities for two or three months, then delivered them back to Harding, his $60,000 note was destroyed, and $250 was allowed him as a sort of payment in the transaction on a claim that Harding held against him. The real meaning of all this is not doubtful. It was form, not substance. To a court of equity, whose duty it is to look into the real meaning of transactions when they become the subject of investigation, it is clear that this was but a device by means of which it was sought to strengthen Mr. Harding's title to the securities, and it cannot, in my judgment, be held to have improved his title. His position

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with reference to legal rights and liability was not changed by anything which transpired between himself and Hough.

Sale of Clark Mortgages.

It is evident from Mr. Harding's letter to U. P. Smith of October 4, 1875, that he did not then regard his title to the securities as perfect, and he therein formally proposes, according to what was undoubtedly the previous understanding, to sell the Clark mortgages to the company for the amount of the demand note, and take new notes from the company, to be due in two, four, six, and eight months from September 30, 1875, as a condition of confirming the title of his vendee to the collaterals. And upon such contract being carried out he proposed to give to the company a receipt in full for his advances under the agreement of September, 1874, containing the condition that the title of his vendee to the collaterals should stand good and unimpeachable. This arrangement was, in effect, carried out. The Clark mortgages were sold back to the company, and it gave to Mr. Harding therefor its notes, aggregating in amount $50,274.53, with the Clark mortgages as security for their payment when due, and he released the company from all liability under the agreement of September, 1874. It is quite incredible that the parties supposed, in the then condition of the company, that those notes could be paid at maturity. They were not paid, and the collateral mortgages were sold to Mr. Harding under the power of sale annexed to the notes. By this form of transaction Mr. Harding acquired the ultimate title to the Clark mortgages, and by his alleged repurchase from Hough he acquired his ultimate title to the other securities in question, and to that extent his claims against the company were satisfied, and the company was discharged from its agreement of September, 1874, to return to him the advances which he had made under the resolutions of that date. Unless, therefore, other grounds of defense than such as have been heretofore indicated are established, I am of the opinion that to the extent of Mr. Harding's interest in the so-called preferred account, he cannot hold the securities in question against the claims of general creditors of the company.

As to Fraud and Misrepresentation of Clark and Walker.

But it is insisted by Mr. Harding that he was induced by misrepresentations and fraud to become a stockholder in this company, and to make advances of money under the resolutions of September, 1874; that on discovery of the alleged fraud he had a right to rescind all contracts under which he acquired stock and made advances; and that his agreement with Clark and Walker, of date July 24, 1875, in connection with the resolutions of the board of July 29, 1875, was a valid rescission, by virtue of which he became entitled to the return or to a resale to him of his original securities or other securities sufficient to make him good. Limiting the consideration of this point to the purchases of stock and to the advances covered by the resolutions of September, 1874, and saying nothing about the advances made outside those resolutions, there are,

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in my opinion, several conclusive reasons why the supposed right of rescission could not be exercised against the policy holders and creditors of the company. And first, as before observed, the contract of July 28, 1874, under which the defendant Harding made his original purchases of stock, was made with Clark and Walker individually. It is true that they were officers of the company at that time, but they nevertheless contracted, and Harding dealt with them, in their individual capacities, and not otherwise. This is apparent on the face of the contract, and for any fraud practiced by them in that transaction they, and not the company, were responsible. The company did not sell the stock. Clark and Walker sold it; and, even if the defendant had brought himself within the rule that requires promptness in rescinding a contract on the ground of fraud, I could not assent to the proposition that he could rescind this contract, and reclaim the money he paid for stock thus acquired to the prejudice of policy holders and creditors of the company. Moreover, I am constrained to hold that Mr. Harding did not act with the promptness that would enable him to rescind or cancel his purchases of stock, and this observation is equally applicable to the advances of money made under the resolutions of September, 1874. I am not forgetful of the fact that Mr. Harding insists that he did not discover the alleged fraud until August, 1875, and that, therefore, the attempted rescission was seasonably made. But he was president of the company from August 25, 1874, until August 30, 1875. He participated in its affairs as its principal officer and as a member of the finance committee, and, notwithstanding the claim that he was all of the time ignorant of the condition of the company and of the manner in which its business was being conducted and of the value of its securities, I cannot, in view of his relations to the company, regard his claim in this behalf as tenable. He certainly had opportunity to learn all those facts of which he now alleges he was ignorant, and as president of the corporation he had particular facilities for acquiring the necessary knowledge; and if he did not avail himself of those opportunities and facilities the law must impute to him that negligence which estops him now to assert a right to rescind the contracts in question on the ground of fraud not discovered until the attempted rescission was made in 1875. He knew when he went into the company that its capital had been impaired. He knew that one of the objects of the reorganization of the company after he and his associates became stockholders was to remedy that impairment. It is true that Mr. Harding alleges that one of the alleged fraudulent representations made to him was that only $60,000 was required to put the company upon a sound basis, but it appears that concurrently with advancements of money made by Clark and Walker and Harding, McCoy & Pratt, amounting to over $144,000, the board of directors, of which Mr. Harding was then president, by resolution declared that $150,000 was needed to relieve the company from previous impairment of capital, and all the parties appear to have proceeded upon that understanding; and thereafter, and with that knowledge, Mr. Harding continued his connection with the company, and it cannot be successfully denied

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that he was an active participant in the efforts subsequently made, and which he must have known it was necessary to make, to maintain the company as a solvent corporation entitled to public confidence. Moreover, I do not find from the testimony, that at the time of his transactions with the company in August, 1875, he then asserted to the company his right to rescind contracts previously made on the ground of fraud. Indeed, it appears to have been Mr. Harding's view, when negotiations were in progress looking to a direct surrender of securities in payment of his share of the preferred debt, that the company's right to make such surrender and his right to receive the securities were questionable. Upon the general question under consideration, the cases of Ogilvie v. Insurance Co., 22 How. 380, 16 L. Ed. 349, and Upton v. Tribilcock, 91 U. S. 53, 23 L. Ed. 203, are instructive, and not without force. I have examined the cases cited on the argument in support of the claim made by the defendant on this branch of the case. In Bank v. Addie, L. R. 1 H. L. Sc. 145, it was held that, where a person has been drawn into a contract to purchase shares by the fraudulent misrepresentations of directors, and where the directors, in the name of the company, seek to enforce such a contract, or where the person who has been deceived institutes a suit to rescind it, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract. In this case the bank owned the shares of stock that were sold. The purchase was made on the faith of reports made by the manager of the bank, who caused the shares thus owned by the bank to be sold upon fraudulent representations made by an authorized subagent. The bank sought to enforce the contract to purchase the shares. The case in its essential facts is plainly distinguishable from the case at bar. In the case of Mining Co. v. Smith, L. R. 4 H. L. 64, the directors in their official capacity issued a prospectus concerning an American mine, which contained false and fraudulent representations, and the respondent purchased from the company shares on the faith of the prospectus; and upon such a state of facts it was held that he should be relieved from liability upon his purchase. Wright's Case and In re London & Mediterranean Bank, 7 Ch. App. 55, were of the same nature. These cases are so dissimilar in their facts to the case at bar that they cannot be held controlling upon the question as it is here presented. If I correctly understood the learned counsel for the defendant, he contended that the case of Upton v. Tribilcock, supra, sustained the view here argued that the alleged fraud of Clark and Walker in selling the stock to Harding gave to the latter the right to rescind his contracts of purchase, without regard to the rights of the general creditors of the company. I am unable to concur with counsel in that conclusion. There was a strong dissent in that case, and the views of the dissenting justices, so far as they were expressed, lend some support to the contention of the defendant here upon this point. But the principal opinion, which is, of course, to be accepted as the law of the case, as I understand it, supports the views I have expressed upon this question.

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As to Pledge of Securities to Harding Under Resolutions of September, 1874.

Concerning the claim that the agreement created by the resolutions of September, 1874, constituted a pledge of securities in favor of all who advanced those securities on the faith of that agreement, it may be said that this claim was undoubtedly well founded as between the company and the parties who made the advances; but it was not a pledge that could be enforced to the prejudice of policy holders and creditors, especially in view of the fact that by virtue of the resolutions the moneys and securities advanced became part of the assets of the company, subject to the payment of all indebtedness of the company to policy holders. Thereby the pledge in favor of creditors became paramount to that in favor of the parties who made the advances. Having determined that to the extent of Mr. Harding's interest in the preferred account he cannot hold the securities in question or their proceeds against other creditors of the company, it becomes necessary to inquire—First, what was the amount of money advanced by him under the resolutions of 1874; and, secondly, what was his entire interest in the so-called preferred account on the 30th day of August, 1875?

Amount Advanced by Harding Under Resolutions.

It is claimed by the complainants that Mr. Harding's individual share of the advances covered by the resolutions of September, 1874, was $51,718.75, which includes $25,000 known as the "Monmouth National Bank Call Loan." The defendant denies that this item of cash was put in under the resolutions, or that it ever was part of the so-called preferred debt, and it appears in his account against the company for subsequent advances made outside the resolutions, under date of February 4, 1875. That Mr. Harding owned two-fifths of the Union National Bank stock, $3,000, and two-fifths of the telegraph bonds, $1,800, put in under the resolutions, there is no question. Then it appears from the records that the sum of $46,918.75 was advanced in cash, and it cannot be claimed, and is not claimed, that McCoy and Pratt made any part of this cash advance. It all came from Mr. Harding. The three items of $3,000, $1,800, and $46,918.75 make the before-mentioned aggregate of $51,718.75, and, rightfully or wrongfully, the Monmouth Bank loan of $25,000 is part of the $46,918.75. Now, is Mr. Harding right in his claim, or is he now in position to claim that that item should not be treated as part of the $46,918.75, and as advanced under the resolutions? It is not clear when the $25,000 was paid to the company. The circumstances indicate that it was paid in at an earlier date than that under which it is charged in Mr. Harding's account. Indeed, it must have been paid a considerable time before November 3, 1874, because it is shown that he was paid interest thereon by the company to the amount of $430.50 on that day. The testimony tends to show that the original draft of the resolutions of September 30th was not filled up as to amounts when passed, and probably because all the advances then intended to be made had

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not yet been made. The $46,918.76 is named in the recorded resolutions as advanced in cash. As before stated, there is no doubt it included the $25,000 in question. Now, as the resolutions in effect declare that that amount was advanced to remedy the impairment of capital, and was received under the resolutions, is it permissible for Mr. Harding, as against policy holders whom it was intended to protect by the resolutions, now to assert that in fact that money was not advanced for the purpose declared in the resolutions? I think not. It seems to me that he is now estopped so to do. The resolutions were adopted at a meeting of the board at which he presided. The original draft was filled up as to amounts before it was placed upon the secretary's record. That record appears to be complete, and is signed by the secretary. The testimony of both Walker and Clark tends to show that the $25,000 was paid in under the resolutions. It seems to have been so understood at the time by both of those parties. It is true that there is other testimony to the effect that Mr. Harding, at some time subsequent, insisted that the amounts as stated in the resolutions were incorrect, and that the Monmouth Bank loan ought not to have been included therein. But the resolutions were suffered to remain unchanged, and all the parties appear to have subsequently acted thereon. If the resolutions were wrong, they should have been corrected at the time, and should not have been permitted to remain as the basis of the company's future action. It is stated in the testimony on this subject offered in behalf of the defendant, that the resolutions of September 30th wherein they name amounts were subsequently corrected, but I am not able to find a record of any such correction. Of course, no improper increase of the amount advanced by Mr. Harding under the resolutions should be made or permitted; and if the records showed that such correction of the resolutions was made as would place the $25,000 in question outside the resolutions, I should not hesitate to allow defendant's claim upon this point. That the $25,000 was in fact at the time classed with the advances under the resolutions, and was so treated by Walker as well as Clark, there can be no doubt. Even Exhibit Z, which is the best evidence produced of the basis on which the final settlement was made, declares that the whole amount received under the resolutions of September 30, 1874, as per record, was $144,918.74; and the acceptance of this amount as correct necessarily includes the Monmouth Bank loan. The testimony quite strongly shows that Mr. Harding permitted other parties to arrange the so-called preferred debt account, and without perhaps fully understanding at the time of what items the aggregate was composed; and I am constrained to think that he must be held bound by what was done at the time by the record as it has ever since been permitted to stand. The resolutions of October 11, 1874, provided that no interest should be paid as stipulated in the second resolution of the series adopted September 11th, except out of the surplus earnings of the company, and it is claimed that on November 3, 1874, interest to the amount of $430.50 was paid to Mr. Harding by the company on the Monmouth Bank loan; and this is urged as

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a circumstance tending to show that the amount of that loan was not advanced under the resolutions. But this item of interest appears to be charged to Mr. Harding on the debit side of his account with the company, appearing on the "memorandum pass book" in evidence, and giving to the circumstance that this payment of interest was made as claimed, its proper weight. I do not deem it sufficiently potent to overcome the facts that the item in question was otherwise dealt with as advanced under the resolutions, that it was included in the amount declared by the records of the board to have been so advanced, that it was thereby made part of the basis upon which the company proceeded in its business, and that the record as thus originally established was never changed.

Harding's Interest in the Preferred Account.

The next question is, what was Mr. Harding's entire interest in the so-called preferred account on the 30th day of August, 1875? And I have no hesitation in holding that the principal of his claim under the account was $101,718.75. His individual advances under the resolutions, as has just been determined, amounted to $51,718.75. Then under the contract with Clark and Walker of July 24, 1875, he transferred to them his $75,000 of stock, and took from them an assignment of the moneys and securities which Harding, McCoy & Pratt had paid to Clark and Walker on account of their original purchase of stock, amounting to $75,000, and which were treated in the contract of July 24th and in the last-mentioned assignment as advanced to the company under resolutions of September, 1874. But in fact, as shown by the resolutions, Clark and Walker put in but $65,000, and this was their actual interest in the preferred debt, and must be regarded as the interest in fact transferred to Harding by Clark and Walker in exchange for the former's stock. Adding, then, the $65,000 to the $51,718.75, and we have an aggregate of $116,718.75. But this did not ultimately represent Harding's interest in the preferred debt on August 30, 1875, because, as appears by the contract with McCoy and Pratt of August 9, 1875, made after the contract of Harding with Clark and Walker, McCoy and Pratt claimed the right to exchange $15,000 of common stock of the company for $15,000 of the securities put in under the resolutions by Clark and Walker, which right was, by the settlement then made, in effect allowed; and when this $15,000 is deducted from $116,718.75 there is left $101,718.75 as the defendant Harding's interest in the preferred account. The same result was reached in a somewhat different form in the contract of settlement with McCoy and Pratt, by which, in satisfaction of their share of the securities put in under the resolutions, and of their right to exchange common stock for securities advanced by Clark and Walker, $43,200 were allowed them in securities and cash; which amount, deducted from $144,918.76, the whole amount put in under the resolutions of 1874, leaves $101,718.76; and this, it will be noticed, is stated in Exhibit Z, in evidence, as the principal of Mr. Harding's claim under the preferred account, added to which, as appears in that exhibit, is the interest thereon, $15,121.79, making a total of $116,840.55; and to

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this extent and amount I hold that the securities in question or their proceeds may be reached by complainants for the benefit of creditors, subject, however, to a further ascertainment of facts as to the amount and character of creditors' claims entitled to share in said securities or their proceeds.

Amount of Harding's Cash Advances Outside the Resolutions.

That Mr. Harding made large advances of money to the company outside of the resolutions of 1874 must be admitted, but the amount of those advances is a much-controverted question. According to his account, appended to the amended answer, the amount of the principal of those advances prior to August 30, 1875, was over $175,701.83. He allows in the account certain credits amounting to $72,018.75, which would leave a balance of $103,688.08. This, however, leaves in the account, and as part of such advances, the Monmouth Bank loan, amounting to $25,000, which, as I have held, must be regarded as representing part of his interest in the preferred debt, and therefore should not be included in the advances outside the resolutions. Then the account contains also an item of $24,500 cash value of railroad bonds, of which it is shown that $21,918.76 was originally advanced under the resolutions of 1874, for it is part of the item of $46,918.76 named in the resolutions of September 30th as advanced by Harding, McCoy & Pratt. The $25,000 and the $21,918.76, making in the aggregate $46,918.76, should, therefore, not be included in the advances outside the resolutions, and should be deducted from the before-mentioned amount of $103,683.08; and, when so deducted, the balance is $56,764.32. There is serious controversy over the items in Mr. Harding's account which are part of the last-mentioned sum, it being claimed by the complainants that some of the largest of those items consist of moneys used by Mr. Harding in the purchase of additional stock of the company. It appears that no accurate account was kept of Mr. Harding's advances as the advances were made. The account which he now presents I understand to have been prepared after this bill was filed, and from the best data at his command, but not from the memoranda made when the moneys were advanced. Certain checks drawn by Mr. Harding in favor of the company are produced, which, of course, are evidence that he made advances, but the exact amount of the advances is still left in doubt, unless his present account is accepted without qualification. It is evident that at the time of the action of the board of directors on the 30th of August, 1875, with reference to a settlement with Mr. Harding, none of the parties were able to state the exact amount of his cash advances. Some incomplete memoranda were furnished, showing a cash balance in favor of Harding of from $9,000 to $12,000, and there is testimony in the case to the effect that it became necessary to make various additions to the amount at first supposed to represent the cash balance; but all the testimony of this character is manifestly unsatisfactory. After much examination of the evidence, I have come to the conclusion that Exhibit Z should be accepted as furnishing the basis for a conclusion upon

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this question. It is a statement of account made at the time of the final adjustment in August, 1875. It was prepared by the secretary, Mr. Walker, and I can have little doubt was made the basis of final action by all the parties in interest. It shows that Mr. Harding's balance of cash account against the company was then regarded as $38,376. It is suggested on the part of the defendant that this statement of account contains only items of advances to June 24, 1875, and that, as appears by the account now submitted by Mr. Harding, he made advances down to and including August 30, 1875, and it is argued, therefore, that Exhibit Z cannot be correct. But there are evidently errors of date in Mr. Harding's present account, and it is to be noticed that, although some of the items in that account are dated August 30, 1875, the same items are in Exhibit Z, the credit side of which, so far as it covers Harding's advances, closes June 24, 1875. This shows that in preparing Exhibit Z the intention and effort were to bring the account down to the time of the final settlement. Then, as before stated, the amount of Mr. Harding's cash balance on account of advances is declared in Exhibit Z to have been at that time $38,376. This does not equal the amount of the demand note, which was $47,743.52, the difference being $9,367.52. But the evidence shows that computations and recomputations of interest were made, and that the premium on bonds was added, so that it is not unreasonable to conclude that the parties at that time, for the purpose of the ultimate settlement, adopted the amount of the demand note as the amount to which the defendant Harding was entitled on account of cash advances and interest. And it is my conclusion that, in view of what then transpired, those advances should be held not to have exceeded, on the 30th of August, 1875, $47,743.52. It is urged by the defendant that these advances should include $10,000, part of the original $25,000 paid by Harding, McCoy & Pratt for their stock; but I think this claim is not well founded. Whether that $10,000 went into the so-called preferred account or not, it was money paid by Harding, or Harding, McCoy & Pratt, for stock on their original purchase, and I do not think it can be legitimately given a place as part of the cash advances.

Rights of Parties with Reference to Harding's Cash Advances.

Can the defendant Harding hold the securities in question under the settlement of August 30, 1875, in payment of his cash advances, or as security therefor? This question was urged by complainants' counsel with the evident understanding that, if this branch of the case should be decided adversely to the defendant, the rights of the parties, so far as the defendant's cash advances were concerned, would be finally determined. I am constrained to say, however, that, even if the question before stated be answered in the negative, there may still remain not only the inquiry whether Mr. Harding in that case would not be entitled to share pro rata with other creditors in the securities, or their proceeds, to the extent of his cash advances, but the further question whether, on marshaling all claims against the company, he would not be entitled to be

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paid his advances in full from the assets of the company, in preference to policy holders, without regard to any previous attempted settlement. Without, at this stage, pursuing these suggestions, I proceed to consider the question first stated. That Mr. Harding and his co-directors to the time when he ceased to be an officer and director of this insurance company, in a strong sense, held the position of trustee of the assets of the company for the benefit of its creditors, cannot be successfully disputed. 2 Story, Eq. Jur. 1252; Bliss v. Matteson, 45 N. Y. 22; Bartlett v. Drew, 57 N. Y. 587. "The directors of a corporation stand in confidential relations to its creditors, towards whom they are bound to act with perfect fairness. They are at least quasi trustees for the creditors, and where the corporation is insolvent good faith forbids that the directors should use their position to save themselves or one of their number at the expense of the other creditors." Coons v. Tome (C. C.) 9 Fed. 534. "The directors of an insolvent corporation, while it is under their management, hold the position of trustees of its assets for the benefit of its creditors, and, if themselves creditors, cannot secure to themselves any preference or advantage over the other creditors." Bradley v. Farwell, 1 Holmes, 433, Fed. Cas. No. 1,779. "The managers and officers of a company where capital is contributed in shares are, in a very legitimate sense, trustees alike for its stockholders and its creditors, though they may not be trustees technically and in form." Jackson v. Ludeling, 21 Wall. 616, 22 L. Ed. 492. See, also, Drury v. Cross, 7 Wall. 299, 19 L. Ed. 40, and Koehler v. Iron Co., 2 Black, 720, 17 L. Ed. 339, for recognition of the same general principle. Undoubtedly an insolvent debtor, whether a corporation or individual, may at common law prefer one of its creditors. Bradley v. Farwell, supra; Drury v. Cross, supra. But this is a principle only applicable to transactions which in no manner involve advantages secured in whole or in part by virtue of a fiduciary relation. To further point out the relations which Mr. Harding bore to this company when the settlement between them was negotiated, and the circumstances of the transaction, would be to repeat much that has been stated. There is no doubt whatever that the advances of money represented by the demand note in evidence were made by Mr. Harding in good faith, and at times when the exigencies of the company demanded that its resources be strengthened. There is no doubt that on the 30th day of August, 1875, there was an actual and valid indebtedness owing by the company to Mr. Harding on account of these advances. Nevertheless the law forbade Mr. Harding and his co-directors, at a time when they knew the company was in extremis, and when his relations to the company were such as to enable him to exercise his power as a member of the corporation for his own protection, to appropriate the assets of the company to the payment of his individual demands, in the manner in which such appropriation was attempted here, however honest and just those demands were. In such circumstances the only safe and true position he could take was that of a creditor, who, in the ultimate distribution of the assets of the corporation, might insist upon

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a preference so far as his advances were concerned, and, if need be, make his lawful appeal to the courts for the establishment of such rights as equity might permit him to assert. As has been heretofore observed, while yet Mr. Harding held the position of an officer and director of this company, and at a time when he knew the company was insolvent, measures were set on foot for his individual protection and security. His associates in the management co-operated with him in the accomplishment of this object. The initiatory steps were taken a considerable period before he retired from the presidency of the company. That he took toward the company the position of an adversary, I think can make no difference. As between himself and the company, he may have asserted hostile demands against the company, but as to general creditors the law must treat the combined action of the directors of the corporation in the transaction as collusive. It is true that the resolutions in relation to the demand note were not passed, and the note was not executed, and the securities were not delivered, until after Mr. Harding had resigned as president. But all this transpired at one and the same meeting. It is evident that the resignation was tendered in view of the culminating act, which had been preceded by a series of steps which led up to it, and which had all taken place while Mr. Harding held a trust position in the company. Even admitting that a settlement had not been fully consummated before Mr. Harding's resignation, yet the negotiations had been substantially concluded before that event, and there was little left to do on the 30th of August but to provide for details and complete the transaction by execution of the note and delivery of the securities. I do not think the resignation, in view of all the circumstances, can be regarded as effectual to so far relieve Mr. Harding of his relation of trust to the assets of the corporation as to enable him thus to secure a personal advantage. As we have seen from references to the records already made, the executive and finance committee of the company on the 12th day of August, 1875, took formal action on the subject of a settlement with Mr. Harding by appointing a special committee to confer with him "in regard to disposing of preferred debt and his account," and Mr. Harding participated in the proceedings of this meeting; and at the meeting of the board on August 30th, when Mr. Harding resigned as president, it was resolved that the settlement made with him be approved, with certain corrections, thereby implying that the terms of a settlement had been previously agreed upon, and only needed formal ratification. The evidence shows, as before stated, that Mr. Harding, desiring that the records would show a resolution authorizing the demand note, at the suggestion of the directors drew the resolution, and the demand note was executed and the securities were delivered on that day. It may be true that in a certain sense Mr. Harding was occupying a position antagonistic to the company, but it seems very plain that the transaction consummated on the 30th of August was brought about by the active co-operation of the directors of the company, and I am unable to avoid the conclusion that the influence and power of Mr.

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Harding before he terminated his connection with the company were potent in the accomplishment of the desired object. Cases in England and this country in which the principle of law here applicable was enforced are numerous, yet, of course, as cases differ in their particular facts and circumstances, no one of them that I have examined is exactly like the present. In Koehler v. Iron Co., 2 Black, 715, 17 L. Ed. 339; in Drury v. Cross, 7 Wall. 299, 19 L. Ed. 40; and in Jackson v. Ludeling, 21 Wall. 616, 22 L. Ed. 492,—the general principle is recognized and enforced that the managers of a corporation have no right to enter into or participate in a combination or agreement to promote their own advantage at the expense of the company, its stockholders, or its creditors. See, also, Ex parte James, 8 Ves. 337; Ex parte Lacy, 6 Ves. 625; Fox v. Mackreth, 1 White & T. Lead. Cas. Eq. pt. 1, *151; 12 Wkly. Rep. (V. C. W.) 510. Bradley v. Farwell, 1 Holmes, 433, Fed. Cas. No. 1,779, decided by Judge Shepley, is an instructive and well-considered case. In the opinion of the court it is, among other things, said:

"Courts of equity were established for the purpose, among others, of enforcing the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law. Such courts will not permit trustees, in the exercise of the powers of their trust, or in dealing with the trust estate, to obtain any benefit or advantage for themselves to the injury or prejudice of those for whom they are acting in the fiduciary relation, or to protect, indemnify, or pay themselves at the expense of those who are similarly situated in relation to the fund. * * * The fiduciary relation between the directors and the creditors being established, and the fact that the trustees in dealing with the trust fund have secured to themselves a benefit or advantage to themselves as creditors over and above the other creditors, taints the transaction, and invokes the aid of a court of equity to see to the right execution of the trust. Not that the trustees cannot prefer one creditor to the others at common law, * * * but that, in equity, a trustee cannot contract with himself as he may with third parties. If he exercises in his own favor the powers he may rightfully exercise in favor of another, the court does not stop to inquire whether he gained or lost. It is enough that the beneficiary is dissatisfied with the transaction for the court to set the transaction aside, without requiring the beneficiary to prove actual loss or actual fraud. * * * Especially in the case of insolvent corporations are the acts of the managing officers to be free from the imputation of having been influenced by the consideration of any interests adverse to those they are bound only to regard. Standing in a fiduciary relation, as it were, at the bedside of a dying patient, if they are subsequently found in possession of a portion of his effects, they must show title by a conveyance untainted by the exercise of that power which the trust relation gave them to influence the disposition made by the decedent of his property in their favor and to the prejudice of others having equal claims to the inheritance."

Without further prolonging the discussion upon the question under consideration, I am of the opinion that Mr. Harding cannot, by virtue of the settlement consummated on the 30th of August, 1875, hold the securities in question, or the proceeds thereof, in payment of his advances represented by the demand note. It will remain, however, an open question, to be determined on marshaling and distribution of the assets of the company, what may be the rights of Mr. Harding, so far as his cash advances are concerned, as between himself and general creditors, the attempted settlement

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with the company being now held unsustainable in equity; and that question, which I regard an important one, will be reserved for future consideration at the proper time.

As to Alleged Pledge of Securities to Harding for Cash Advances.

It was part of the contention in behalf of the defendant Harding that he held the securities in question in pledge to secure him for his advances of money to the company. In the light of the testimony, and considering the relations of Mr. Harding to the company, it is very doubtful whether such a pledge of the securities was made as would enable him to hold them against the claims of other creditors, or as would strengthen his title under the settlement that was finally made. I am certainly not prepared to hold that the settlement can be upheld by virtue of what is claimed to have been such previous pledge. In what manner the rights and position of Mr. Harding as a creditor asserting a preference to the extent of his cash advances may be strengthened or affected by the supposed pledge of securities is a question that may arise hereafter, and which I do not now decide.

The Claim of $27,000.

The further claim made against the defendant Harding of $27,500 I shall disallow. To entitle the complainants to a decree for that sum as a demand against him, the proof should be as clear as in an action at law for money had and received. The testimony on the subject is confused and unsatisfactory. Of course, if Mr. Harding originally got the money on the paper of the insurance company for his personal accommodation, and if the company ultimately paid the debt, and Mr. Harding was never charged with it, then he should account for the amount he thus personally realized. It seems to be conceded that the insurance company took up the paper at the bank, and that this was done after the settlement on the 30th August, 1875. But I am not satisfied that this item was not taken into consideration in the settlement. It is charged against Mr. Harding in the so-called "little red book." All that Clark appears to positively know of the transaction is that the $27,500 was paid to the bank after the settlement. Other than that he seems to know nothing with certainty about the item, although he thinks it was omitted in the estimate or account made at the time of settlement, and of the account he knew nothing except what was told him. The entry of the $27,500 was made in the little red book under date of December, 1874, and of the same date is a charge against Mr. Harding in Exhibit Z of $12,923.75, which, the proofs rather indicate, was such part of the $27,500 as was regarded at the time of the settlement chargeable to Mr. Harding. Mr. Harding testifies that this matter entered into the settlement of August 30, 1875; that the only charge against him growing out of the Union National Bank loan was $12,923.75; and that it was so understood at the time, and was charged to him accordingly. I am not free from doubt as to all the facts of the transaction, but, after considering such testimony as we have on the subject, my mind

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inclines to the conclusion that the item in question entered into the settlement of August 30, 1875.

Extent of the Defendant's Liability.

Counsel for the complainants take the ground in their brief that Mr. Harding, to the extent that he is liable to the creditors of the insurance company, should be charged with the amount of the so-called "Westcott securities" at their face, and without regard to their actual value. This is on the theory that he absolutely agreed to take those securities at their face value. I am of a different opinion, and shall hold him chargeable to the extent that he is required to account with the actual value of the securities to be hereafter ascertained, or the proceeds of such of the securities as have been converted into money.

Objections to Testimony.

Specific objections have been made to the testimony of J. C. Latimer and C. M. Smith on the ground that it is not competent under any issue in the case. I have not considered that testimony with reference to the claim that there was fraud and collusion in the prosecution of the Bradner, Smith & Co. case, but only as showing the termination of Bradner, Smith & Co.'s interest in the suit, and for the purpose of showing that fact. I think it is competent. The objections to the testimony of Webster, Kimball, Wilmarth, and Jenkins are overruled.

Proof of Losses.

The proofs that have been presented as to the indebtedness of the company and as to the extent of losses sustained by policy holders, the validity of their claims, and the different classes of creditors entitled to share in the assets of the company are not such as to enable the court to make a final disposition of those questions, and the case will have to be sent to a master for ascertainment of further facts before final decree.

Character and Form of Decree.

An interlocutory decree will now be entered adjudging the settlement between Mr. Harding and the company under which the securities in question were delivered to him invalid to the extent of the valid claims of other bona fide creditors of the company, and inefficacious to vest the title thereto in him as against such creditors, and requiring him to account for the value of such securities; this decree to cover such settlement not only so far as it embraced his interest in the preferred debt, amounting to $116,840.55, but also to the extent of his cash advances, amounting to $47,743.52; and the case will be referred to Henry W. Bishop, as master, to ascertain and report:

First. What was the actual value of the securities in question on the 30th day of August, 1875, stating separately the value of each specific security on that day; and also what sum or sums of money, if any, as the proceeds of said securities, or any of them, Mr. Hard-

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ing may have realized therefrom, with the dates when such sums were so realized. The master will also report any enhancement or depreciation in value of any of the securities not converted into money that may have occurred subsequent to August 30, 1875.

Second. The master will also ascertain and report the amount, character, and validity of the existing and unpaid claims of policy holders and other creditors of the company, including losses occurring prior to August 30th, and September 30, 1875, and now unsettled, also losses under policies issued prior to August 30, 1875, and occurring after that date, and losses under policies issued prior to September 30, 1875, and occurring since that date.

Third. To ascertain and report what assets the Globe Insurance Company had, if any, at the time it ceased to do business, other than the securities in question, and what disposition has been made of the same.

Fourth. To ascertain and report what amount or amounts of money Mr. Harding advanced to the company, if any, at the time of the alleged settlement. As it is claimed that further advances were at that time made by him, it is deemed proper that the proposed reference should cover that question.

The master will be at liberty, in prosecuting said reference, to make use of all competent testimony heretofore taken and now in the case, and to take such further and additional testimony as the parties may desire and as he may deem essential to a full development of the facts for the ascertainment of which this reference is intended.

The question of Mr. Harding's ultimate rights, if any, to a preferential payment from the assets of the company of the amount of his cash advances as a creditor of the company, irrespective of the settlement now decreed to be invalid, and also the question to what extent, if at all, the rights and position of Mr. Harding as a creditor asserting a preference to the extent of his cash advances may be affected by the manner in which the securities of the company were dealt with at the time the advances were made, are reserved for consideration on the coming in of the master's report, and the decree may so specifically state.

UNION PAC. R. CO. et al. v. ALEXANDER et al.

(Circuit Court, D. Colorado. December 30, 1901.)

No. 4,251.

1. JURISDICTION OF FEDERAL COURTS—SUITS AGAINST STATE.

The eleventh constitutional amendment does not exclude from the jurisdiction of a federal court a suit against individuals holding official positions under a state to prevent them, under color of an unconstitutional statute, from committing by some positive act a wrong or trespass in which the plaintiff has a legal interest.[1]

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[1] Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.

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2. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.
A bill by railroad companies to enjoin a board, created by a state statute alleged to be unconstitutional, from assessing the property of complainants for taxation, states a cause of action of equitable cognizance.

3. FEDERAL COURTS—DETERMINING VALIDITY OF STATE STATUTES.
While a federal court will not willingly pronounce a state statute unconstitutional in advance of a decision thereon by the supreme court of the state, it cannot avoid the duty of determining the validity of an act where the question is properly presented for its decision.

4. TAXATION—ASSESSMENT—POWERS OF COUNTY ASSESSORS UNDER COLORADO CONSTITUTION.
Under the constitution of Colorado, which creates the office of county assessor, but without specifying his duties, his powers are limited to the performance of the well-understood duties incident to such office, which consist of the assessment of the taxable property within his county. He has no power to act outside the county of which he is an officer, nor can he be vested with such power by the legislature.

5. SAME—TAXATION OF RAILROAD PROPERTY—VALIDITY OF COLORADO STATUTE.
The act of legislature of Colorado of 1901, which requires all the county assessors of the state to meet annually, and elect from their number a "state board of assessors," which shall assess for taxation all of the property in the state owned, used, or controlled by railroad or telegraph companies, etc., is unconstitutional and void, since the assessors, as such, have no power to make assessments outside their respective counties, and the constitution empowers the legislature to create new officers only for counties, townships, or municipalities.

In Equity. On motion for preliminary injunction.

This case was brought by the Union Pacific Railroad Company and by the Atchison, Topeka & Santa Fé Railway Company, both companies engaged in operating railroad lines passing through several counties of the state, under and by virtue of the laws of the state of Colorado; and by the complainant the Pullman Company, as owner of railroad cars which are run over the lines of railroad of nearly all of the railroad companies of the state. These complainants say that prior to April 1, 1901, they have paid all the taxes levied against their property assessed under the provisions of the revenue law of 1891. This law provided that the various railroad companies doing business in the state of Colorado should furnish to the state board of equalization a sworn statement showing in detail the respective property owned, operated, or controlled by each of the railroad companies in the state, as well as the proportion and value of the property owned by them in each county. This statement was to be made to the said board of equalization prior to the 15th day of March, 1901. It then became the duty of the board to assess the property of these complainants for the purpose of taxation for the year 1901, and to also assess the property of the other railroad corporations in the state for a similar purpose. As a means to that end, it became the duty of the state board of equalization to transmit, prior to the 1st day of May, 1901, to each county clerk of each county through which the tracks of these complainant companies ran, a statement showing the main track of such railway, its assessed value per mile, and to fix a pro rata distribution per mile of the assessed value for each county of the state through which the railroad ran. The state board of equalization refused to make any assessment because of an enactment of the general assembly of the state of Colorado, known as "House Bill No. 1," passed the 1st day of April, 1901, and which the board claims deprived them of the right to make such an assessment. Thereupon these complainants, in conjunction with several other railroad companies, began in a state court a suit for mandamus, setting up the claim that the law of 1891 made it the duty of the state board of equalization to assess their properties, the refusal of the board to assess their properties, and the reasons given for such refusal. In the suit for mandamus complainants claimed that house bill No. 1 was not

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legally or constitutionally passed, and upon the hearing of the complaint and answer the state court issued a peremptory writ of mandamus commanding the board of equalization to meet, and proceed to assess the properties of the railroad and other companies under the law of 1891. Section 88 of said house bill No. 1 provides that all the county assessors of the state shall meet at the capitol, and compare their assessments, and if, upon comparison, any class of property is too high or too low, they shall correct the same; and, further: "It shall be the duty of the assessors of the state at such annual meeting to elect of their number thirteen assessors who shall constitute a board known as the 'State Board of Assessors;'" section 88a further providing for this board of assessors meeting in August of each year for the purpose "to assess all the property of this state owned, used, or controlled by railway companies, telegraph, telephone, and sleeping or other palace car companies." In the present suit the complainants claim that the constitution of the state sets forth the duty of the county assessors to assess in their several and respective counties the taxable property in each county, and that the legislative assembly had no power to authorize any county assessor to assess property except that situated within the county for which he was elected assessor. The bill prays for an injunction restraining the respondents from transmitting to the county clerks of the state any statement of assessment made under the provisions of the revenue act of 1901.

Willard Teller and Clayton C. Dorley, for complainant Union Pac. R. Co.

Rogers, Cuthbert & Ellis, for complainant Pullman Co.

Charles E. Gast and Henry T. Rogers, for complainant Atchison, T. & S. F. Ry. Co.

RINER, District Judge. This case is before the court upon the application of complainants for a temporary injunction. The case involves important questions, and was argued with distinguished ability upon both sides. The court wishes to acknowledge its indebtedness to counsel for valuable assistance in the investigation of the questions presented for determination. It was intimated at the conclusion of the argument that it was a matter of importance to all parties concerned that a speedy decision be announced in the case. In order to comply with this suggestion, I cannot take the time necessary to notice at length, in the form of a written opinion, the several propositions so ably discussed at the argument. I have, however, carefully considered the arguments of counsel, both oral and by brief, and in the course of my investigations have examined all of the authorities cited, and have reached a conclusion which I will briefly announce.

The jurisdiction of the court is challenged, and this is the first question to be considered. The bill in this case, upon its face, contains the necessary allegations of diverse citizenship, etc., to give this court jurisdiction. Is the state really, though not nominally, a defendant, thus bringing the case within the eleventh amendment to the constitution of the United States, which prohibits this court from taking jurisidction, not only in suits brought against the state by name, but also suits brought against its officers, agents, and representatives, where the state, though not named as a defendant, is the real party against which relief is asked and the judgment will operate? The object and purpose of that amendment was to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at

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the instance of private parties. In other words, it takes away from the individual the power to bring a state of the Union, invested with the sovereignty not delegated to the United States, into court as a defendant to answer his complaint, and this whether he be a citizen of another state or an alien. The reason is that the course of a state's public policy and the administration of its public affairs should not be subject to and controlled by the mandates of judicial tribunals without its consent, and in favor of individual interests. Therefore it is that the supreme court of the United States has held that the amendment covers not only suits brought against the state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is nevertheless the real party against which in fact the relief is asked, and against which the decree effectively operates. This provision of the constitution, however, does not take away from the citizen the right to bring a suit in the federal court against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs; nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by injunction or otherwise, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. The rule is perfectly well settled that in the construction of the constitution and laws of a state the federal court will follow the decisions of the highest courts of the state, unless they conflict with or impair the efficacy of some principle of the federal constitution, of a federal statute, or a rule of general commercial law. The reason for this rule is that it avoids confusion and disorder, and avoids making the claims and rights of suitors depend, not upon settled law, but upon the contingency of litigation respecting them being before a state or a federal court. Conflicts of this sort are certainly to be avoided, if possible; and this can best be done by leaving the courts of one sovereignty within their legitimate sphere to be independent of those of another, each respecting the adjudications of the other on subjects properly within its jurisdiction. There is a wide difference between a suit against individuals holding official positions under a state to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officials of a state merely to test the constitutionality of a state statute in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In this case no act of political administration is challenged, no contract of the state is involved, and no judgment can be rendered which affects it as a corporate entity. It is affected and interested only as it is interested and affected by the welfare of its citizens. The legislation involved is governmental in its nature, not contractual. No obligation that the state has entered into, no contract or promise that it has made is questioned. The bill rests solely upon the proposition that the property rights of the complainants are involved by the threatened actions of the defendants, and this is a judicial inquiry to see whether they have authority for their actions,—whether the law

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upon which they rely is valid and constitutional, or sufficient to justify the action which they are taking. It was insisted at the argument that the complainants had an adequate remedy at law, and therefore a court of equity had no jurisdiction. The rule, as I understand it, is that the jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances. Within this rule, I think, the bill states a case of equitable cognizance, and the conclusion reached is that the court has jurisdiction.

This brings us to the consideration of the second question, viz.: Does the act of the legislature in controversy in this case conflict with the provisions of the constitution of the state? It was insisted at the argument that the federal courts will not willingly pronounce, in advance of the state courts, an act unconstitutional. This is quite true, but it is conceded in one of the briefs handed to me by defendants' counsel that the supreme court has not passed upon the constitutionality of this act, and in the language of Chief Justice Marshall in the case of Cohen v. Virginia, 6 Wheat. 264, 5 L. Ed. 257, the judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The constitution of the state of Colorado authorizes the election of a governor, lieutenant governor, secretary of state, state treasurer, state auditor, attorney general, and a superintendent of public instruction, and these officers constitute the executive department. It further provides that they shall keep the public records, books, and papers, and perform such duties as are prescribed by the constitution or by law. It also makes provision for the election of certain county officers, such as county commissioners, clerk (who shall be ex officio recorder of deeds), sheriff, coroner, treasurer, superintendent of schools, surveyor, and county assessor, in each county. These county officers are elected every alternate year. A vacancy occurring in the board of county commissioners of a county is to be filled by appointment by the governor, and a vacancy occurring in any other county office is to be filled by the board of county commissioners of the county wherein the vacancy occurs. Section 12 of article 14 of the constitution provides:

"The general assembly shall provide for the election or appointment of such other county, township, or municipal officers as public convenience may require, and their terms of office shall be as prescribed by law, not in any case to exceed two years."

The constitution further provides that the governor, auditor, treasurer, secretary of state, and attorney general shall constitute a state board of equalization, and that the county commissioners of each county shall constitute a board of equalization for the county in which they are elected. It is made the duty of the state board of equalization to adjust and equalize the values of real and personal

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property among the several counties of the state, and it is made the duty of the county board of equalization to adjust and equalize the valuation of real and personal property within their respective counties. The boards are further required to perform such other duties as may be prescribed by law. By an act of the legislature of Colorado passed in 1877 power was conferred upon the state board of equalization to assess railroad property within the state, and this was held by the supreme court of the state to be a valid exercise of legislative power, because of the constitutional provision that the board may perform "such other duties as may be prescribed by law," and that its effect was to take away from the county assessors the right to assess this class of property within their respective counties. The act under consideration attempts to transfer the power of assessing this class of property from the state board of equalization to what is termed in the act a "state board of assessors"; this board to be composed of 13 assessors, to be selected from the assessors of the several counties in the state, of which, I think there are 56 or 57. The act provides that the assessors of each of the several counties in the state of Colorado shall on the first Tuesday of August in each year meet at the capitol, and elect 13 assessors out of their number, who shall constitute a board known as the "State Board of Assessors." It further provides that the board so selected shall organize and convene immediately upon their election, and proceed to assess all the property in this state owned and controlled by railroad companies, telegraph, telephone, and sleeping or other palace car companies, except real estate owned by any railroad company not used for the convenient and proper operation of its railway. This property is to be assessed in the same manner as other real estate in the county where the same is situated. The manner of choosing the 13 who constitute the board is as follows: The counties of the state are divided into classes. Those of the first class are to elect one assessor, those of the second class two, those of the third class three, those of the fourth class five, and those of the fifth class two. They are to be chosen by vote of the assessors from their respective classes out of the counties from which they were elected. While the constitution does not define in express terms what the duties of an assessor shall be, yet those duties are well understood. He is to assess the taxable property within his county, and I think it is perfectly well settled that beyond that he has no power to act, unless such power is expressly conferred. Being a constitutional officer, his powers are such as are defined by the constitution, or such as are necessarily incident to the duties of his office. No authority is conferred by the constitution upon assessors to perform duties other than the duties of county assessors. These duties he must perform within his county, and must assess all of the taxable property in his county, unless that power is taken away and lodged elsewhere by virtue of some legislation enacted under express authority of the constitution. The only power so conferred is that which authorizes the state and county boards of equalization to perform such other duties as may be prescribed by law. I find no authority whatever in the constitution empowering an assessor to perform the duties of his office outside of

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the county for which he was elected, and I conclude that the legislature was wholly without power or authority to clothe the assessors of the state as a body with the right to select and appoint 13 of their number to do an act which they could not do by virtue of their office as county assessors under the provisions of the constitution. Having reached this conclusion, it becomes unnecessary to notice the other question discussed.

A preliminary injunction will issue in accordance with the terms of the restraining order. The complainants will be required to give a bond within four days in the sum of $25,000 to answer all damages which the defendants or the persons injured by the order may sustain if it shall be finally decided that the order was improperly issued.

SNOW v. NELSON.

(Circuit Court, D. Nevada. January 20, 1902.)

No. 704.

1. MINES—CONTRACTS OF SALE—TIME OF PAYMENT—ESSENCE OF CONTRACT—WRITTEN MEMORANDUM—STATUTE OF FRAUDS.
   Where the written memorandum of an oral contract of sale of mining property is not certain as to the time when the first payment is to be made, it is insufficient to take the contract out of the statute of frauds, time being of the essence of contracts relating to such properties.
2. SAME—CHANGE OF TERMS OF THE MEMORANDUM.
   Where a written memorandum is made of an oral contract for the sale of real property, and the terms of the contract are afterwards changed by oral agreement of the parties, the whole thereupon becomes an oral contract.
3. SAME—OPTION TO PURCHASE—WHEN NOT ASSIGNABLE.
   Where an option, not assignable in terms, to purchase mining property, is given to one who represents himself to be the agent and acting for a party known to the owner, and to whom he desires to sell, such option is not assignable.
4. SAME—WITHDRAWAL OF OPTION.
   Where a mine owner gives an option to purchase his mines, he may withdraw such option at any time before its acceptance.

Trenmor Coffin and James A. Williams, for plaintiff.
M. S. Bonnifield and Wm. H. King, for defendant.

HAWLEY, District Judge (orally). This is a suit for the specific enforcement of a contract for the sale of certain copper mining claims situate in Humboldt county, Nev. It is, among other things, alleged in the amended bill of complaint: That on May 15, 1899, one W. H. Edwards entered into an oral or verbal agreement with the defendant J. A. Nelson for the purchase of certain mining claims for the sum of $12,000,—$200 to be paid by Edwards to Nelson upon the execution and delivery by Nelson of a bond and lease for said claims to Edwards and upon the execution and delivery by Nelson of a deed for the claims, delivered into escrow, $800 six months from said date, and $11,000 within fifteen months from said date. That said Edwards agreed to do the unfinished location work on

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said claims as provided by the laws of the state of Nevada. That afterward Nelson agreed to do said unfinished location work for $175. That a deed was to be executed and placed in escrow and delivered to Edwards or his assigns upon the final payment of said $12,000. That pursuant to said agreement defendant Nelson made, executed, and delivered to Edwards the following memorandum thereof, to wit:

"Jackson Creek, Humboldt County, Nev., May 15th, 1899.

"This is to certify that I, J. A. Nelson, do hereby agree to lease and bond to W. H. Edwards the following described mining claims: The 'Olympia,' the 'Humboldt,' the 'Tiger,' the 'Alta,' the 'Grand,' the 'Deer Spring,' the 'Lucky,' the 'Crown Point,' all situated in the Jackson Mountains, on the north side of Jackson Creek canyon; also three claims in Black Rock Mountains, namely, the 'Copper Nugget,' the 'Crescent,' the 'Black Jack,' all three situated in Humboldt county, north of Battle creek,—for the sum of $12,000.00; two hundred dollars cash when the lease and bond is accepted and the deed is put in escrow, eight hundred dollars in six months from date, the balance within fifteen months from date. All location work to be done by J. A. Nelson, and recorded with the records at the recorder's office, in Winnemucca, Nevada; the unfinished location work to be done by me, W. H. Edwards, providing the company accepts the proposition in proper time.

"J. A. Nelson.

"Witness: P. M. O'Brien."

That the proof of the acknowledgment of said memorandum was thereafter duly made, and the said memorandum was on the 21st day of May duly recorded in the recorder's office of Humboldt county. That the proviso contained in the last two lines of said agreement referred to James A. Williams, Charles Dupont, and J. W. Langley, said Edwards' associates at Salt Lake City, and furnishing him money for expenses on a certain mining venture in the state of Nevada. That the said associates accepted the proposition immediately, and confirmed the making of the said contract by Edwards. That Williams, Dupont, and Langley duly assigned and released to the plaintiff all their right, title, and interest in said contract and in all the property therein described before the bringing of this suit, and the plaintiff is now the owner and holder thereof. The written memorandum is not the contract, but it is evidence of it. No lease, bond, or deed was ever executed by the defendant.

Is the alleged contract enforceable? Is the written memorandum signed by Nelson sufficient to take the case out of the statute of frauds of this state (sections 2696, 2700, Cutting's Comp. Ann. Laws)? The law requires that the note or memorandum must contain the essentials of the contract as completed. Browne, St. Frauds, § 371a; Pom. Cont. § 86. It must contain the terms of the contract, and must be so reasonable, certain, and definite in itself that the contract can be made out without requiring additional proof in parol. 1 Reed, St. Frauds, § 392. It must "contain such words as will enable the court, without danger of mistake, to declare the meaning of the parties. It must obviate the necessity of going to oral testimony and relying on treacherous memory as to what the contract itself was." Scarritt v. Episcopal Church, 7 Mo. App. 174, 178. It must appear that there was a "clear accession on both

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sides to one and the same set of terms," that the minds of the parties met at every point, and that nothing was left open for future arrangement. Langellier v. Schaefer, 36 Minn. 361, 31 N. W. 690; Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665. The general proposition as to the form of such memoranda is expressed in Wood, Frauds, § 345, as follows:

"If the memorandum contains all the essential elements of a contract, the form in which it is written is of no account, as any instrument, however informal, or bunglingly constructed, which describes the property, the price to be paid therefor, if the price has been agreed upon, the parties, and the essential terms of the agreement, either by its own terms or by reference to other writings, so that parol evidence is not necessary to establish or explain it, is as valid and binding as the most formal instrument which could be constructed. The statute only contemplates that such a note or memorandum should be made as men in the hurry of business may be supposed to be likely to make; but, nevertheless, of such a definite character in all the essentials of the contract that the intention of the parties, their names, and relation to each other under the contract, can be gathered from the memorandum itself, leaving nothing to be supplied by parol. But a memorandum which is deficient in any of these respects is insufficient to take the contract out of the statute."

See, also, Browne, St. Frauds (4th Ed.) §§ 345a, 371, 371a.

The alleged oral contract in the present case relates to an option for the purchase of mining property, whereby the party obtaining the option seeks to secure the first privilege of purchasing the same within a given time upon complying with certain terms embodied therein. There are a number of people, generally known and designated as "promoters," who travel through the mining regions for the purpose of obtaining such options from the owners of a mine, and "trust to luck" to be able to market the same in the money centers of the world. Others often represent moneyed men who have furnished sufficient means to enable their agents to obtain such options, agreeing to furnish the money for the purchase, provided an examination and inspection of the property prove it to be of sufficient value to warrant the purchase. In the very nature of such cases the courts ought always, in order to prevent fraud, deception, or misstatement, where the contract is not in writing, to require that the note or memorandum which is relied upon to take the contract out of the statute of frauds should be reasonably clear, definite, and certain. The written memorandum contains several of the essentials required by the statute. It describes the property; the price agreed upon to be paid therefor. It is signed by the party to be charged thereby. But the time when the first payment is to be made is not clear and certain. The date is not fixed. It might, however, be held that the law would imply that it should be within a reasonable time. If so, the mere failure to name the date would not of itself prevent the enforcement. The authorities upon this point are by no means uniform. The discrepancies which exist may, to some extent, be attributable to the different kinds of contracts. The question is elaborately discussed in Pom. Cont. §§ 374, 387, 388, one group of decisions holding that, with reference to unilateral contracts, time is, and necessarily must be, essential in the strict sense of the term; while another group holds that time is merely mate-

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rial, but not absolutely essential. The authorities generally declare that, where mines or mining properties are the subject of the contract, time is of the essence. In 2 Lindl. Mines, p. 1111, § 859, the author says:

"The necessity for a strict adherence to the rule that in all contracts for the purchase of mines time is of the essence is apparent. Were the rule to be relaxed, and the owner of the mine executing the option or contract of sale, which is ordinarily unilateral, and not mutual, to be compelled to resort to the courts to terminate the equities of the proposed vendor, or remain in a state of uncertainty awaiting the lapse of an indefinite period called 'reasonable time,' his property would remain practically unmarketable. The holder of the option would be given unreasonable opportunities to speculate without the fear of incurring any loss. The law would place him in a position to interdict a sale to any one else, or to exact an unearned consideration for a surrender of phantom equities."

The written memorandum is in many other respects so uncertain and indefinite in its terms as to require oral testimony to explain it in order to enable the court, "without danger of mistake," to judicially determine its true intent and meaning. In Pom. Cont. § 71, the author, speaking of the statute of frauds, says:

"The controlling motive of the statute is one of expediency and convenience, and this motive has always been kept in view by the ablest courts in their work of interpretation. As its primary object is to prevent mistakes, frauds, and perjuries by substituting written for oral evidence in the most important classes of contracts, the courts of equity have established the principle, which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes. Designed to prevent fraud, it shall not be permitted to work fraud. This principle lies at the basis of the doctrine concerning part performance, but is also enforced wherever it is necessary to secure equitable results."

Acting under these general principles, the courts have held that, if the plaintiff's conduct in obtaining an option or contract, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance. Pom. Eq. Jur. § 400.

Specific performance is not a matter of absolute right, but rests entirely in judicial discretion, to be exercised according to the settled principles of equity so as to reach the ends of justice. Newton v. Wooley (C. C.) 105 Fed. 541, 544, and authorities there cited. The memorandum signed by Nelson agrees "to lease and bond" to Edwards the mining claims therein described, "providing the company accepts the proposition in proper time." But this last clause is claimed by plaintiff to have been inserted for the purpose and intention that it should be applied only to the assessment work that was to be done upon the mines, and has no application to the agreement of sale. By a literal reading of the last clause it would seem to apply only to the unfinished assessment work to be done in order to secure a title to the mines, but Edwards was to do this work "providing the company accepts the proposition in proper time." There is no pretense in the pleadings or evidence that Edwards did any of the location work. On the contrary, the complaint alleges and the proofs show that after the execution of the written memorandum the agreement as to this work was orally changed, and that Nelson agreed to do said unfinished work "at an agreed

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price of $175." The proofs show that neither Edwards nor the plaintiff ever paid or tendered to Nelson the sum of $175, or any sum of money whatever, for location work. It is evident that it was essential that the location work should be done either by Nelson or Edwards within the time allowed by law. The proofs show that Nelson had, prior to that time, done the location work on some, but not all, of the claims, and that upon several of the claims the assessment work was never done, and they have since been relocated by other parties. The testimony shows that Williams, Dupont, and Langley, who it is alleged were Edwards' associates, "furnishing him money for expenses," never accepted the proposition in "proper time," or at any time, but as a matter of fact declined to act in the premises.

Conceding that the last clause in the memorandum only applied to the location work, the question remains whether it was not an essential part of the memorandum? Would Nelson have signed it if that clause had been left out? If the bars are thrown down, and the court compelled to examine all the oral testimony, it clearly appears that he would not. But of that more anon. Does not the fact alleged in the complaint that Nelson and Edwards afterwards orally agreed to change its terms in such a manner as to depart from the writing signed by Nelson reduce the agreement between the parties to the level of a verbal contract, which cannot be enforced? In Bish. Cont. § 164, the author says:

"A contract partly in writing and partly oral is, in legal effect, an oral contract. It occurs where an incomplete writing, or one expressing only a part of what is meant, is by oral words rounded into the full contract; or where there is first a written contract, and afterward it is changed orally."

In the last line of the memorandum it speaks of the "company." What company? The name of the company is not stated. Nor are the names of the individuals comprising the company disclosed. It is difficult to separate one part of the memorandum from the other. There was but one memorandum. It must be construed in its entirety. The last clause sheds some light on the whole transaction. It indicates that Edwards was not acting for himself alone. It requires oral testimony to show who the company was, and the testimony upon this point is nearly as uncertain as the written note or memorandum. On one side the testimony is to the effect that Williams, Dupont, and Langley were to be equally interested with Edwards; on the other side it is claimed that it was Judge Burton's contract because he put up the money to pay Edwards' expenses. There is a decided conflict in the evidence upon all material points. Was the contract, if such it can be called, assignable? The weight and reliability of the oral testimony shows that Edwards misrepresented the facts and concealed the truth as to the parties for whom he was acting, and thereby induced Nelson to sign the memorandum and enter into a contract. He represented that he was acting for McCornick & Co., bankers at Salt Lake, whom Nelson knew to be responsible, and possessed of large means. Nelson testified that he owned other mining claims in the vicinity of those mentioned in the written memorandum, and that he wanted to dis-

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pose of those mentioned to parties who had the means to work and would develop the same, believing that it would increase the value of his other claims; that he stated this fact to Edwards, and that Edwards then made the statement that he was representing McCornick & Co.; that Nelson believed such statement to be true, and would not have signed the memorandum if he had not believed these representations made by Edwards. The law is well settled that contracts of this character, entered into by one party upon the representations of the other as to the responsibility and solvency of the other party or parties, are not assignable. 2 Am. & Eng. Enc. Law (2d Ed.) 1037, and authorities there cited. In Arkansas Val. Smelting Co. v. Belden Min. Co., 127 U. S. 379, 387, 8 Sup. Ct. 1308, 1309, 32 L. Ed. 246, 248, the court said:

"Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305, 93 Am. Dec. 93; Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; King v. Batterson, 13 R. I. 117, 120, 43 Am. Rep. 13; Lansden v. McCarthy, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pol. Cont. (4th Ed.) 425."

Section 3100, Cutting's Comp. Ann. Laws, relied upon by plaintiff, does not change the rule as to the assignability of such contracts. The statute does not enlarge the right of assignment, nor authorize it "in cases where it did not before exist." 7 Enc. Pl. & Prac. 757, and authorities there cited; Pom. Rem. & Rem. Rights, 145; Wheeler v. Walton & Whann Co. (C. C.) 64 Fed. 664, 667. The option had no binding force until it was accepted in compliance with its terms. Pom. Cont. §§ 59, 60; Hackley v. Oakford, 39 C. C. A. 284, 98 Fed. 781; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Erickson v. Wallace, 45 Kan. 430, 432, 25 Pac. 898. The oral testimony satisfactorily shows that Nelson, after he signed the memorandum, upon learning that Edwards had misrepresented the facts as to McCornick & Co. being the parties for whom he was acting, and before there was any acceptance by the company, repudiated the contract, and declined to have anything more to do with Edwards, and, among other things, accused Edwards of having deceived him and lied to him, etc. Nelson, under the facts of this case, had the unquestioned right, before any valid acceptance, to withdraw the offer. In Pom. Cont. § 61, the author said:

"As the offer is not in any sense binding, the person who makes it may, at any time before a valid acceptance has changed its character, withdraw it, and thus put an end to the negotiation. He can do this whatever be its form, whether promissory or not, and without any reason except his own will. Although the person to whom the offer was made may have intended, and even attempted, to accept, still if the acceptance was for any reason imperfect, and not binding, so that no contract was concluded, the power of withdrawal remains unaffected."

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The record shows that the plaintiff bought the interest of the parties under whom he claims with full knowledge of all the facts and of all the equities in the premises, and is, of course, bound by them.

With reference to the question of part performance, relied upon by plaintiff, it is enough to say that, in my opinion, there is no sufficient evidence of any such part performance by plaintiff, or of any of the parties under whom he claims, as would justify this court to decree a specific performance on this ground.

The views I have expressed are conclusive that plaintiff has failed to make out such a case as entitles him to any decree. It is therefore unnecessary to consider any of the other questions discussed by counsel.

The defendant is entitled to a judgment for his costs. Let a decree be entered accordingly.

KINNEY et al. v. COLUMBIA SAVINGS & LOAN ASS'N.

(Circuit Court, D. Utah. January 13, 1902.)

No. 349.

1. BUILDING AND LOAN ASSOCIATION—STOCK—LOAN—PLACE OF CONTRACT.
Where plaintiff subscribed for stock in a Colorado building and loan association, and borrowed money thereof, giving a mortgage on property in Utah to secure the payment, the notes and interest to be paid in Colorado, the contract was a Colorado contract.

2. SAME—INTEREST—RATE—PAYMENTS.
Where, on borrowing from a building association, plaintiff gave a note, agreeing to pay the principal, with interest and installments, according to the by-laws, and no rate of interest was fixed by the by-laws, but the prospectus used in inducing plaintiff to join the association, and which was part of the contract, by illustrations, showed the amount of the monthly payments, each, of the borrowing and the nonborrowing members, the excess paid by the borrowing member as so illustrated should be construed as payments of interest and not as payments on the principal.

3. SAME—BORROWER—WITHDRAWAL OF STOCK.
Under the statutes of Colorado, a stockholder who has borrowed from a building and loan association cannot withdraw his stock until the loan is paid.

4. SAME—MATURITY OF STOCK—MORTGAGE—FORECLOSURE.
Where at the time of borrowing from a building and loan association it is estimated that the stock will mature and pay the loan in six years, and a note is given, payable in six years, a mortgage given to secure such note may be foreclosed at the expiration of six years if such stock has not then matured.

5. TRUST DEED—FORECLOSURE—ATTORNEY'S FEE.
Where, in an action to have a note canceled, defendant, by cross bill, asks a foreclosure of the trust deed given to secure such note, alleging that the trustee refuses to act, on recovering such relief defendant is not entitled to the attorney's fee provided in such deed to be paid to such trustee in case of foreclosure.

6. SAME—BUILDING ASSOCIATION—SALE OF STOCK.
Where, in an action by a building and loan association to foreclose a trust deed given by a borrowing stockholder, it is prayed that the stock

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of such borrower be sold, the court may require that such stock be not sold for less than its withdrawal value.

7. SAME—WITHDRAWAL VALUE OF STOCK—ASCERTAINMENT.
Where, in an action by a building and loan association to foreclose a trust deed and sell the stock of a borrowing member, the withdrawal value of such stock is not ascertained or stipulated by the parties, the decree should be withheld until such value has been ascertained and reported by a master.

In Equity.

C. S. Varian, for plaintiffs.
A. J. Rising and Jabez Norman, for defendant.

MARSHALL, District Judge. The defendant is a building association organized on the plan usually affected by such associations. It issues stock to subscribers, of a par value of $100 per share. A small entrance fee is required, and the subscriber promises to pay to the association 70 cents per month on each share so issued. The funds accumulated by these monthly payments are used by the association—First, for the payment of its expenses; and, secondly, for the making of loans to its shareholders. When the profits made by the association from its loans and the monthly payments made by the shareholders aggregate $100 for each share of stock subscribed, the shares are said to be matured. They are then canceled, and their par value paid to the subscribing shareholders. The defendant was organized as a corporation under the statutes of Colorado. Section 2 of the statute of that state entitled "An act concerning building and loan associations," approved April 17, 1889 (Sess. Laws 1889, p. 41), provided, in substance, that any shareholder of such a corporation should have the power to withdraw his shares upon giving 30 days' notice of an intention to do so, and should on such withdrawal be entitled to receive the amount provided by the by-laws of the company or determined by the board of directors, less all fines and other charges, provided, however, that no shareholder should be entitled to withdraw the stock held in pledge for security. The defendant issued a prospectus, on the faith of which subscription to shares was solicited and taken, and in which it was stated that "stock may be withdrawn at any time, and the member will be entitled to receive for each share the money paid into the loan fund in monthly payments on such shares, together with six per cent. annual interest after one year. Members who have obtained loans cannot withdraw their shares until loans are paid." The complainants are husband and wife. On the 12th day of June, 1890, Antoinette B. Kinney, for the benefit of herself and of her husband, subscribed for 25 shares of the capital stock of the defendant, paid the required entrance fee, and the stock was issued to her. This subscription was made with the intention of procuring a loan of money from defendant. On the 22d day of November, 1890, the complainants borrowed from the defendant $2,500, and made to it their promissory note as follows:

"No. ———. Salt Lake City, Utah, November 22nd, 1890.

"On or before six years after date, for value received, we, or either of us, promise to pay to the Columbia Building and Loan Association, at its office in Denver, Colo., twenty-five hundred ($2,500.00) dollars, with interest and

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installments according to the by-laws of the association, payable on or before the 5th day of each and every month.

"$2,500.00. Antoinette B. Kinney.
"Clesson S. Kinney."

On the same day they executed to a trustee a deed of trust of certain real estate situated in Salt Lake county, Utah, to secure the payment of said note, "with interest and installments thereon, according to the by-laws and rules of said association." At that time the formal by-laws of the association contained no provision as to any rate of interest, but the association had issued a prospectus which contained various regulations of the association. In the bill it is alleged that the contract by which the shares of stock were issued to Mrs. Kinney was "made by both parties in accordance with the representations of said prospectus, which by agreement of the parties were made a part of the contract of subscription," and this is admitted in the defendant's answer. The prospectus in question contained the following illustration of the cost of shares to a nonborrower, and of the cost to a borrower:

"Illustration.

Showing the cost to the nonborrower of ten shares of stock:

Admission fee, $1.00 on each share	$ 10 00	
Monthly installment, $7.00 per month for 72 months	504 00	
Total cost to the investor	$ 514 00	
Amount of shares at maturity	1,000 00	
Net profit on ten shares		$ 486 00

Showing cost on ten shares, of $100 each, to the borrower:

Admission fee of $1 on each share	$ 10 00	
He receives in cash	1,000 00	
He pays on the last Saturday of each month 1/72 of $1,000 (less membership fee)	13 75	
Also his interest at 3 per cent. per annum on $1,000	2 50	
	$ 16 25	
In 72 months he will have paid		$1,170 00
Also the admission fee as stated above		10 00
Total cost of $1,000 loan		$1,180 00

"The certificate of shares, having matured, is worth $1,000 which pays the loan. Thus the borrower has had the use of $1,000 six years, and has paid an amount equal to 3 per cent. interest per annum for the use of the same."

It further provided that "once in six months the profits arising from interest, fines, and other payments are divided among the shares in good standing. All members receive the same per cent. of profits as the dividends are declared on the entire business, and not on any one branch."

In the bill it is further alleged, and the answer admits, that prior to the 1st day of January, 1901, the by-laws of the defendant were amended so as to, in part, at least, conform to the representations made in the prospectus. The material part of such amended by-laws is as follows:

"Sec. 4. Each shareholder, for each share named in his or her certificate, shall be entitled to a loan of $100 from the association. * * * All shares

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must be in force three months before said shareholder shall be entitled to a loan."

"Sec. 7. Shareholders having obtained loans shall, on or before the last Saturday of each and every month, until the stock borrowed upon shall have matured, and the loan is thereby repaid, make, or cause to be made, payments as follows: One seventy-second of the sum borrowed (less the membership fee); also interest at the rate of 8 per cent. per annum upon the original amount of the loan."

"Sec. 9. All shareholders shall pay, or cause to be paid, a monthly installment of seventy cents on each share named in his certificate; said installments to be paid to the association on or before the last Saturday of each month during the continuance of the certificate, unless a loan has been obtained on the stock, when payments shall be made according to section 7. Shareholders are required to pay all monthly installments without notice."

The original by-laws provided that:

"Sec. 14. Three or more shareholders may associate, and form a local board, elect officers,—one as a secretary, to visit the home office, or any office of the association, and examine the books and affairs of the association, and report the same on his return; elect a treasurer, who, upon giving bond, can receive all installments, and any payments in the locality in which he resides, as agent of the shareholders, but not of the association, and remit the same to the home office." And further: "Monthly payments should be paid at the office of the association." And that "all remittances for admission, monthly installments, fines, penalties, interests, dues, and all other payments, shall be made to the association at its principal office."

The shareholders of the association within Utah elected a local board of directors and the requisite officers, and the payments made as hereafter stated by complainants were made to the local treasurer, and by him remitted to the home office of the association. Commencing with the 5th day of July, 1890, and until January 1, 1891, the plaintiffs paid as installments on their stock $17.50 each month, which was at the rate of 70 cents per share. From the 1st of January, 1891, until the 1st day of August, 1896, they paid to the association the sum of $40.63 each month. No further payments were made until the 2d day of August, 1898, when the sum of $40.63 was paid, and a similar payment made for September, October, and November of that year. In December, 1898, they paid the sum of $17.50, and no further payments have been made.

It is stipulated by the parties that prior to the filing of the original bill "the plaintiffs demanded of the defendant that it satisfy said loan and deed of trust, and cancel and deliver their promissory note, and reassign their policy of insurance, and that it permit them to withdraw the said shares of stock, all of which the defendant refused, and still refuses, to do." The suit was filed by the complainants, claiming that they had overpaid their indebtedness to the defendant. They asked that the deed of trust be canceled, and their note surrendered; that an accounting be had to determine the amount due by the defendant to them by reason of their overpayment; and that the defendant be required to pay any amount found to be due upon the accounting. The bill also contained an offer on the part of the complainants to pay any sum found to be due from them on such an accounting. The defendant filed its answer, in which any overpayment is denied, and also, by a cross bill, seeks to foreclose the deed of trust so executed by the complainants. The defendant claims that the

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entire principal and a large part of the interest of the indebtedness are still unpaid. It is alleged and shown that the trustee named in the deed of trust, and also his successor in trust, have declined to act.

The contract between these parties was to be performed in the state of Colorado, and is to be construed as a Colorado contract. On the argument this was, in effect, admitted. It is settled by the highest authority. Bedford v. Association, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834; Association v. Rector, 38 C. C. A. 686, 98 Fed. 171; Andruss v. Association, 36 C. C. A. 336, 94 Fed. 575; Hieronymus v. Association (C. C.) 101 Fed. 12; McIlwaine v. Ellington (C. C. A.) 111 Fed. 578. It is not claimed that, so considered, there is any legal objection to the validity of the contract, whether the plaintiffs' or defendant's construction of it be accepted. The plaintiffs' contention is that they borrowed money of defendant, and agreed to pay interest thereon at the rate of 3 per cent. per annum; that all additional monthly payments made by them were either partial payments of the principal debt, or monthly payments on their shares in the association; that when they exercised their option to withdraw their stock they became entitled to receive from the defendant all money paid to it in monthly payments on their shares, with 6 per cent. annual interest after one year; and that, if the sum so due them on the withdrawal of their stock is applied in payment of the debt, it will be found that they have overpaid it, whether the monthly payments in excess of 3 per cent. interest are applied immediately in the reduction of the principal, or are suffered to accumulate in the loan fund of the company until the withdrawal of the stock. This contention fails unless the contract rate of interest was as assumed. The note made by the plaintiffs did not specify the rate of interest. By it they promised to pay the principal sum, with interest and installments, according to the by-laws of the association. The deed of trust recites that the note was made for the principal sum of $2,500, payable on or before six years after date, "with interest and installments thereon according to the by-laws and rules of said association." The by-laws, as they existed when the note was made, are entirely silent as to any rate of interest, but the prospectus contained many rules and regulations of the association. The illustration given as to the required payments on a loan contained all the necessary information. The plaintiffs assert, and the defendant admits, that this prospectus formed a part of the contract by which the subscription for shares was made. The plaintiffs further allege, and the defendant admits, that shortly after the loan the defendant amended its by-laws so as to, in effect, make them conform to the representations of the prospectus. Sections 7 and 9 of the amended by-laws are specified, among others, as particulars in which the amended by-laws were made to conform to the prospectus. The right to the loan on good security was based on the subscription for shares. In view of all the circumstances surrounding the parties, the reference in the note to the by-laws and in the trust deed to the rules of the association must be held to refer to the prospectus, which contained, so far as appears, the only requirement on the subject of interest. This accords with the practical construction placed on this contract

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by the parties. For many years after the loan payments were made in exact accordance with the requirements of the prospectus. It also seems to accord with the theory of both the plaintiffs and of the defendant. What is the true construction of the prospectus as to the rate of interest? It there appears that it was estimated that each share of stock would mature, or be worth par, at the expiration of six years after the subscription. This was an estimate, and not a warranty. The illustrations given of the cost of shares are based on this estimate. The cost to the borrowing and to the nonborrowing shareholder is itemized. The nonborrowing shareholder receives the par value of his shares at maturity, and the shares are then canceled. The borrowing shareholder receives the par value of his shares at the date of the loan, and his shares, when matured, pay the principal of the loan. Evidently the excess of all sums provided to be paid by the borrower over that exacted of the nonborrowing shareholder constitutes the cost to the borrowing shareholder of the use of the money as a loan. In the illustrations given, the nonborrowing shareholder of 10 shares, of the par value of $1,000, pays to the association $7 per month. The borrowing shareholder, to whom the par value of his stock, $1,000, has been advanced, pays $16.25 per month until his stock matures, when the stock is applied in satisfaction of the loan. It is evident that $9.25 per month is what such a borrowing shareholder pays for the use of the money borrowed, or is the interest paid on the debt. It is true that in the illustration the monthly payment of $16.25 is stated in two items. The first item is 1/72 of $1,000, less membership fee,—$13.75; the second, the monthly proportion of interest on $1,000 at 3 per cent. per annum,—$2.50. But the terms used are immaterial. The monthly payment to be made by the borrower is distinctly stated, and it is just $9.25 more than the monthly payment exacted of the nonborrower. As stated in End. Bldg. Ass'ns, § 336:

"The fact that in some loans by building associations interest upon the advance is not reserved as such can make no difference in the essential nature of the transaction, where its equivalent is added to the borrowing member's stated contributions, the payment of which, thus increased, is secured by his mortgage. Thus, if the par value of a share be $200, the monthly dues upon which, for an investing member, are $1, but, after he has taken a loan of $200 from the association, become $2, it is evident that the additional $1 per month exactly represents the interest he would have to pay, at six per cent. per annum, upon the $200, whether it be called 'dues,' 'interest,' or 'redemption money.' Calling it by another name does not make it another thing."

It is true, that the plan of the association is somewhat disingenuously stated in the prospectus. It carefully avoids stating the actual rate of interest. It was apparently prepared for the purpose of concealing from the ignorant that a very large rate of interest was exacted, —in this case, over 11 per cent.,—and of also concealing from such a person the fact that the mortgage required from the borrowing shareholder secured the monthly payments on his stock, as well as the principal and interest of his loan. But the sums the borrower was required to pay were distinctly stated. It needed but a simple calculation to ascertain the rate of interest. In the case at bar it was en-

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tirely plain that $17.50 per month was the requisite 70 cents per share on the stock, and that the remaining $23.13 of the required payments was interest on the loan. Nor can any part of the monthly sum paid be considered as a part payment of the principal of the debt. As shown by the illustration, neither the 3 per cent. annual interest, nor the residue of the monthly payment, decreased in amount as payments were made. At the maturity of the note the stock, if then matured, was to be surrendered in payment of the principal, although all of the monthly payments had then been made. The stock at maturity would equal the full amount of the original principal of the debt. Nor was it a part of the contract that any portion of the excess of the monthly payments of the borrowing over that of the nonborrowing shareholder should be considered as paid on the shares held. The defendant was organized to do business on a mutual basis. In the prospectus (a part of the contract of subscription) it was expressly provided that the profits arising from interest, fines, and other payments should be divided among the shareholders in good standing, and that all members should receive the same per cent. of profit. This shows that there was an equality of right on the part of each shareholder in proportion to the shares held. In this case Mrs. Kinney occupies a twofold contractual relation to the defendant, and her position as a shareholder is entirely distinct from her position as a borrower. Association v. Price, 169 U. S. 45–54, 18 Sup. Ct. 251, 42 L. Ed. 655. She gained no advantage as a shareholder by reason of her character as a borrower. Her right to an apportionment of the funds of the company, and her right on the withdrawal of her shares, was precisely the right of any other shareholder who owned the same number of shares. She can only claim to have paid on her shares the sum required of her as a shareholder, and not as a borrower. No effect can be given the attempt of the plaintiffs to withdraw their stock. At the time of this attempt the stock had not matured, and was held as collateral security by the company, and the statute of Colorado forbade the conferring of such a right. The prospectus of the company, on the faith of which the subscription was made, expressly provided that "members who have obtained loans cannot withdraw their shares until loans are paid." The demand made by the plaintiffs that the stock be withdrawn was before the payment of the loan, and embraced no offer to pay it. Until the loan was fully paid, the defendant had a right to insist that its security on the shares be preserved, and to refuse to release the shareholder from her obligation to make future monthly payments thereon. It follows from what has been said that the plaintiffs have paid no part of the principal of the loan made to them, and that they are entitled to no relief under their bill.

The right of the defendant, under its cross bill, to a foreclosure of the trust deed, must follow. More than six years have lapsed since the note was made. The debt has matured. Its maturity did not depend upon the maturity of the shares. It was estimated that the shares would first mature, and the illustration given in the prospectus shows that it was contemplated that the shares at maturity would pay the principal of the note. But the note was payable absolutely on

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or before six years after its date, and not upon condition that the shares had been matured.

Claim is made by the cross complainant for an attorney's fee upon the foreclosure. This is based upon the provision in the trust deed by which the trustee is to be paid a reasonable counsel fee in case of any suit to which he is a party. Such provisions are to be strictly construed. The cross complainant gains no right to a counsel fee from the fact that the trustee would have had such a right, and has declined to act. Fowler v. Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786. The trustee was a representative of both parties, and it was reasonable that he should be indemnified for his costs, but the borrowers did not promise to pay the counsel fees of the cross complainant, and are not liable for them. Payette v. Association, 27 Ill. App. 307; Improvement Co. v. Whitehead, 26 Ill. App. 609.

The cross complainant also prays a judicial sale of the 25 shares of stock pledged as security for the debt. It is within the power of the court to fix an upset price on the sale of these shares. In Association v. Junquist (C. C.) 111 Fed. 645, Judge Riner entered a decree in a similar case in which he directed that the pledged shares be sold for a price not less than their withdrawal value. The present withdrawal value of the 25 shares issued by the defendant to Mrs. Kinney does not appear, and, unless the parties to the suit stipulate as to this value, the case will be referred to the master in chancery, with direction to ascertain it upon a hearing upon notice to the parties, and from evidence produced by them.

A final decree of foreclosure will be withheld until the coming in of the master's report.

In re MESSENGILL.

(District Court, E. D. North Carolina. January 27, 1902.)

BANKRUPTCY—COMPOSITION—ACCEPTANCE—MAJORITY OF CREDITORS—DETERMINATION.

Bankruptcy Act, § 12, declares that an application for the confirmation of a composition may be filed in a court of bankruptcy after it has been accepted by a majority in number of all creditors whose claims have been allowed, etc. *Held* that, in determining whether a majority have accepted an offer of composition, an assignee of a large number of claims should be counted as one creditor only, and not as the number of creditors who have assigned claims to him.

In Bankruptcy.

Clifford & McLean, for bankrupt.

PURNELL, District Judge. The referee for the Fourth division of the district certifies the following as having arisen in the course of the proceedings to consider a proposition of composition pertinent to the proceedings. The facts are certified that the creditor purchased several claims after the debts had been allowed. No pleadings or evidence accompany the referee's certificate. The question for consideration is thus stated:

"In determining whether or not a majority of the creditors, whose claims represent a majority of the indebtedness of this estate in bankruptcy, have

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signified their agreement in writing to accept 30 % offer of composition, should E. F. Young, to whom a large number of creditors have sold their claims, be counted as one creditor, or as the number who have assigned claims to him? The referee holds that he should be counted as one creditor, and the bankrupt excepted and appealed to the district judge. And the said question is certified to the judge for his opinion thereon."

The foregoing decision of the referee is affirmed. Section 12, Bankruptcy Act, should be strictly construed. In re Rider, 96 Fed. 808, 3 Am. Bankr. R. 178. Where a claim has been assigned after proof, the real owner alone can vote. In re Frank, Fed. Cas. No. 5,050; Loveland, Bankr. § 105. He is one creditor, holding several claims.

This question does not come up in the form required by section 18, cl. c, of the bankruptcy act, which requires all pleadings raising questions of fact to be verified. It is passed upon, but this action must not be taken as evidence the court is inadvertent to, or will not enforce, the provisions of the statute in this respect. Attention of referees is especially called to the statute.

THE NORANMORE.

(District Court, E. D. Virginia. January 21, 1902.)

1. SHIPPING—INJURY TO STEVEDORE—INDEPENDENT CONTRACTOR.
A ship is not liable to a longshoreman employed by a stevedore, an independent contractor, to assist in loading, for injury caused by falling of athwart portions of hatch cover, because of failure to have in place bolts to hold the crossbeams on which such athwart portions rested; the ship having been turned over to the stevedore, and he having removed all the portions of the hatch cover, including the crossbeams, and put them back without properly fastening them.

2. SAME—DEFECTIVE APPLIANCES.
Any duty of a ship to a longshoreman in the employ of a stevedore, in loading, relative to suitable appliances, in the furnishing of a hook for loading, is fulfilled where the hook is reasonably safe for the work in hand.

In Admiralty.

George McIntosk and Theodorick A. Williams, for libelant.
Garnett & Garnett and Whitehurst & Hughes, for claimant.

WADDILL, District Judge. The libelant, Richard Skinner, a longshoreman, was employed by the South Atlantic Export Company, who were doing business as stevedores, to assist in loading the Belgian steamship Noranmore with flour, at the port of Norfolk, on the 19th day of April, 1900. At the time of sustaining the injuries sued for, the libelant was working in the forecastle hatch of said ship, and was injured by the athwart portions of the hatch cover falling in upon him. Said hatch cover consisted of three sections, and at the time of the injury the middle section only was open, and the other portions thereof closed on account of the weather. The covers and sections to the hatch rested upon two crossbeams extending from side to side, and fitting in iron shoes,

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with bolts to hold the beams in place. The negligence assigned consisted in the failure of the ship to furnish a safe place for the libelant to work, together with safe and suitable appliances with which to perform the duties required of him; the specific allegations being that the bolts holding the beams aforesaid were not in place at the time of the injury, and that the hook fastening into the sling in which the flour was loaded into the hold was in a defective condition, in that it was a protected hook, with the lip or flange broken off, and that in using it by means of a tackle operated by the winch it caught under the beam supporting the covers of the hatch, thereby throwing the same down.

The first question presented is whether any liability attaches against the steamship by reason of the injury, the libelant being an employé of the stevedore, an independent contractor, in loading the ship. Such liability clearly does not exist, unless there be some exceptional reason in this case for holding the ship liable. The Indrani, 41 C. C. A. 511, 101 Fed. 596, 598, 599 (United States circuit court of appeals, Fourth circuit), and cases there cited; Hughes, Adm. 188–191. The exceptional causes of liability insisted upon are the failure of the ship to furnish a safe place to work in, and a suitable hook with which to perform the duties required,—it being admitted that the particular hook was that of the ship, and not of the stevedore. The insecurity of the place where the work was being performed arose, not from any defect in the ship, or its proper structural condition, but because of the failure to have in place the bolts to hold the beams upon which the athwart portions of the cover of the hatch rested. This failure cannot be imputed, under the circumstances of this case, as negligence on the part of the ship; as the evidence conclusively shows that this ship had been turned over to an independent contractor; that on the day and night previous to the injury all the sections of the hatch cover and the two crossbeams had been removed, in order that the stevedore might properly do the work in hand; and at 7 o'clock in the morning on which the injury was sustained at 10 o'clock the foreman of the day force of stevedores, upon returning to work, found that the hatch, with the exception of the middle sections, had been closed by the night force, and proceeded to use that section. The absence of the bolts through the beams was patent and obvious, and could have been seen by the day foreman aforesaid, or any other person observing the same. On getting into port, the custom is for the ship's carpenter to remove the bolts from the hatch beams, and the stevedore in charge takes control. On this occasion the stevedore had the management and direction of the hatches, opened and closed them, as found desirable for the convenient dispatch of the work to be done. No liability arises against the ship by reason of the negligence of the stevedore, an independent contractor, in removing the hatches and beams, or putting them in place improperly. If negligence exists in this respect, the stevedore, an independent contractor, is liable, and not the ship. The Picqua (D. C.) 97 Fed. 649, 651; The Auchenarden (D. C.) 100 Fed. 895; The Willowdene (D. C.) 103 Fed. 678; The Aldborough (D. C.) 106 Fed. 90.

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As to whether or not the hook in question was defective, and to what extent that caused the injury to libelant, considerable evidence was taken, including that of the foreman of stevedores, on the part of the libelant, who testified that he called the attention of the first officer of the ship to its condition when working in the open hatchway the day before the accident. Whether any liability exists against the ship, arising from the use of this hook by the stevedores, may be doubted (The Mary Stewart [D. C.] 10 Fed. 137; The Dago [C. C.] 31 Fed. 574), though it is unnecessary to pass upon this question in this case. While it is true the hook was one of the appliances of the ship, it seems that the stevedore should have furnished his own tackle, which he failed to do. But, be the question of the ship's liability what it may, and placing the case in the most favorable light to the libelant, that is, treating it as the duty of the ship to furnish the appliances, and making it liable for failure so to do, under the facts in this case, as viewed by the court, the libelant would nevertheless not be entitled to recover, as it abundantly appears from the evidence that the hook used was reasonably safe and suitable for the work then engaged in. It was substantially such a hook as was in general use in this and other ports for the purpose of loading ships; the evidence being that in loading ships an open hook is preferable to a protected one; and that the particular hook, a protected hook, with the lip out, was substantially the same as an open hook. It is true that the evidence tended to show that to some extent there was a slight difference; but none appreciable. The measure of duty required of a master in furnishing appliances is not that all the latest, the most approved, or, indeed, the best appliances that can be had, shall be used; but such as are reasonably safe for the purpose of the particular work. It is not expected that appliances can or will be furnished, from the use of which an accident may not happen, but those from which, in the exercise of proper care and caution on the part of persons using them, no injury will likely result. Shear. & R. Neg. § 92; Hough v. Railroad Co., 100 U. S. 213, 218, 25 L. Ed. 612; Railroad Co. v. McDaniels, 107 U. S. 454, 459, 460, 2 Sup. Ct. 932, 27 L. Ed. 605; Railroad Co. v. O'Brien, 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. Ed. 766. The hook used was reasonably safe for the work in hand, and that the ship exercised proper care and caution in supplying the same, and should not be held liable for an accident to those handling it, particularly when such accident would not have happened but for the negligence of others, for whom the ship was not responsible, in not properly fastening and keeping in place the beam to the hatchway aforesaid.

It follows, from what has been said, that the libel should be dismissed; and an order may be accordingly so entered.

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UNITED STATES v. FREEMAN et al.

(District Court, D. Washington, N. D. January 13, 1902.)

1. EMINENT DOMAIN—DAMAGES—EVIDENCE—ADMISSIBILITY.
On an issue as to the damages sustained by owners of property taken by the government in condemnation proceedings, evidence showing the price fixed by agreement and paid by the government for an adjoining tract several years back should be excluded, as likely to be misleading.

2. SAME—INSPECTION OF PROPERTY BY JURY—MISCONDUCT.
In a condemnation proceeding, where the jury impaneled to assess the damages were taken to view the land, the fact alone that they were also conducted over adjoining property was not ground for setting aside their verdict, where it did not appear that they were misinformed as to the identity of the land, or that there was any intentional misconduct on the part of the engineer accompanying them.

3. SAME—SETTING ASIDE VERDICT—POWER OF COURT.
The statutes of the state of Washington respecting condemnation proceedings prescribe a special procedure distinct from the practice in civil actions, and the provisions of the civil practice act authorizing courts in which actions are tried to set aside verdicts for error in assessment of damages are not applicable, and do not authorize the same courts to grant new trials in condemnation cases.

4. SAME.
2 Ballinger's Ann. Codes & St. Wash. § 5616 et seq., relating to condemnation proceedings, does not in express terms nor by any fair implication authorize a court of original jurisdiction to set aside the verdict of the jury for error in assessment of damages or to grant a new trial.

5. SAME.
The laws of Washington requiring the compensation to be paid to an owner of property condemned for public use to be determined by a jury, by authorizing an appeal and specially conferring power on the appellate court to pass on the justness of the award, in effect denies the right of a court of original jurisdiction to set aside the jury's verdict.

6. SAME—CONSTITUTIONALITY OF STATUTE ALLOWING APPEAL.
The statute of Washington relating to condemnation proceedings, in so far as it authorizes an appeal to the supreme court of the state and empowers that court to consider the justness of the compensation awarded, is constitutional whether or not the provision authorizing the court to determine finally the compensation is invalid, the provisions being separable.

E. E. Cushman, Asst. U. S. Atty.

Sachs & Hale, Tucker & Hyland, R. E. Moody, A. R. Coleman, W. W. Felger, and A. W. Buddress, for defendants.

HANFORD, District Judge. This proceeding was instituted by the government of the United States for the purpose of appropriating a number of lots and parcels of land required by the government for military purposes, and to enlarge Ft. Worden. A special venire was issued for jurors, from whom 12 were selected and impaneled in the usual manner of selecting jurors, and sworn to determine all disputed questions of fact as to ownership of the property, and fix the valuation thereof, and assess any damages resulting to the owners from the taking of their property. As provided by the act of congress authorizing the condemnation of land re-

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quired for fortifications (see 1 Supp. Rev. St. [2d Ed.] pp. 601, 780), the proceedings were conducted as near as practicable according to the procedure prescribed by the laws of this state. On the trial before the court and the jury there was no controversy as to the ownership of the property, and the jury was required only to determine the value and assess the damages. Witnesses, including business men of Port Townsend, were called on the part of the government, as well as of the owners, who gave their estimates of the value of the land and of the improvements thereon, and the court and jury visited the premises for the purpose of viewing the same, and, after returning to the court room, arguments were made to the jury by counsel representing all the parties, and the case was submitted to the jury with instructions by the court that they were to determine the reasonable value at the present time of the land sought to be condemned and the improvements thereon, and assess damages in favor of any of the owners who were shown by the evidence to have been damaged by the taking of their property, and afterwards the jury returned into court a separate verdict as to each of the different lots and parcels of land appropriated. Compared with the estimates testified to by the witnesses on the part of the government, the sums awarded are just and reasonable, but, measured by the testimony introduced by the defendants, the sums awarded are in some instances very much below the reasonable value. The defendants are dissatisfied with the verdicts, and have moved the court to set the same aside and grant a new trial on a number of specified grounds, all of which, by disregarding legal verbiage, may be resolved into the following: (1) Error in law committed by the court on the trial in excluding evidence offered by the defendants to prove the price of adjoining lands, which was fixed by agreement, and was paid by the government. (2) Misconduct on the part of a superintending engineer in the employment of the government at the time the jury were taken to view the premises, in this: that said engineer conducted the jury to and upon lands other than the land to be condemned. (3) Error in the findings of the jury, in this: that the sums awarded by their verdicts are inadequate, and not sufficient to constitute just compensation for the property taken.

The price which a purchaser pays for one piece of property is not a fair criterion by which to determine the value of an adjoining tract several years after the transaction, for the reason that the necessity of the purchaser, the disposition of the vendor, and peculiar circumstances and conditions may be such as to oblige a purchaser to submit to severe exactions in order to consummate a purchase without delay. Therefore evidence of a particular transaction is likely to be misleading unless all the circumstances and conditions are explained, and it is not practicable for parties to be ready on the trial to produce witnesses to explain transactions not involved in the issues. It was for this reason that the court excluded the testimony offered by the defendants, and I believe now, as I believed at the time, that the evidence was incompetent. It is not shown by the affidavits filed that the jury were misinformed with respect to the identity of the land to and upon which they were conducted

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It was fair to all parties that the jury should have an opportunity to see the land, and the mere circumstance of their being conducted over adjoining property would not necessarily, nor probably, be prejudicial to the defendants. The intelligence and good sense of jurymen must be appealed to when they are called upon to determine questions of value and assess damages; and an opportunity to see the property which is the subject of controversy, and also to see and compare other property in the immediate vicinity, cannot reasonably be presumed to have diminished the knowledge, experience, and common sense which qualifies jurymen to discharge their functions in cases of this character. I do not think there was any intentional misconduct on the part of the engineer, nor that any error which he may have committed in conducting the jury justifies a suspicion that the land condemned was appraised lower than it would have been if the jury had not been permitted to see other land contiguous thereto. I adhere to the ruling made by this court in the case of U. S. v. Tennant (D. C.) 93 Fed. 613, to the effect that in condemnation cases in this state the law does not authorize the court of original jurisdiction to set aside the verdict of a jury on the ground that the appraisement was erroneous or unfair. Upon a re-examination of the question I am confirmed in the opinion that the statutes of this state as expounded by its supreme court prescribe a special and peculiar mode of procedure distinct from the practice in civil actions. Therefore the provisions of the civil practice act authorizing courts in which actions are tried to set aside verdicts for error in assessment of damages are not applicable, and do not authorize the same courts to grant new trials in condemnation cases. See Railway Co. v. O'Meara, 4 Wash. 17, 29 Pac. 835; Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Long v. Billings, 7 Wash. 267, 34 Pac. 936; Western American Co. v. St. Ann Co., 22 Wash. 158, 60 Pac. 158. The act prescribing a special method of procedure in condemnation cases (section 5616 et seq., 2 Ballinger's Ann. Codes & St. Wash.) does not in express terms, nor by any fair implication, authorize the court to set aside the verdict of a jury, nor to grant a new trial; and, as the law providing for new trials in civil actions does not apply, there is no statute giving the court power to grant a new trial. If the court has the power, it exists not by virtue of any statute, but because it is necessarily one of the inherent powers of the court. I believe that the court has inherent power to correct its own errors, but by the constitution and laws of this state the compensation to be paid to the owner of property condemned for public use must be determined by the verdict of a jury; and if a jury errs in assessing damages the law does not confer upon the court of original jurisdiction power to correct the error, nor leave the court free to exercise any inherent and unnamed power to resubmit the case to a second jury, but allows an appeal to the supreme court of the state, and provides that the propriety and justness of the award shall be for the consideration of the appellate court; and I hold that by authorizing an appeal and specially conferring power upon the appellate court to pass upon the propriety and justness of the award the legislature in effect

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has denied the right of the court of original jurisdiction to interfere with the verdict of a jury.

It is contended on the part of the defendants that a statute authorizing the appellate court to determine finally the amount to be awarded as compensation for property condemned to public use is contrary to section 16, art. 1, of the constitution of the state of Washington, and to the seventh amendment of the constitution of the United States. It does not help their side to argue that the act of the legislature is unconstitutional. Its provisions are separable, and the court must uphold the validity of the statute as to all of its provisions which are not repugnant to the constitution, and only disregard the particular provisions which are repugnant; and this statute, in so far as it authorizes an appeal to the supreme court of the state of Washington, and in so far as it authorizes that court to consider the propriety and justness of the amount of compensation awarded by a verdict, is not unconstitutional, and it confers the same power upon an appellate tribunal which the defendants are urging this court to exercise without statutory authority. If the appellate court cannot, by its decree, increase or reduce the amount of compensation without violating the constitution, then a serious question must arise as to the proper method and means by which the court may exercise its power to pass upon the propriety and reasonableness of the award. Upon that question this court does not have to express any opinion. It is enough to say that the difficulty which may be encountered in the appellate court may or may not be insurmountable, but it is safe to assume that, if the power to order a new trial exists at all, it belongs to the tribunal to which aggrieved parties who may have grounds for disputing the propriety and justness of the amount of damages awarded to them by a jury are authorized to appeal. The national government does not have to submit this controversy to the decision of the supreme court of the state, but there is an appellate court to which the case may be appealed; and, as congress has adopted the procedure prescribed by state laws, the practice of the appellate court as well as this court must be governed thereby, and the parties must be concluded by the verdicts unless they can be avoided by the judgment of that court.

Motions denied.

THE LAUREL.

(District Court, D. Washington, N. D. February 3, 1902.)

1. VESSELS—NAVIGATION—MARITIME CONTRACT.

An agreement by which one of the parties undertakes the responsibility of navigating a vessel on the ocean and bringing her back to her home port for a stipulated compensation is essentially a maritime contract.

2. SAME—CONTRACT TO EMPLOY MASTER—BREACH—DAMAGES—LIEN.

Where, after plaintiff had contracted to take charge of a vessel as master, but before he commenced performance, the owner refused him such employment, plaintiff has no lien on the vessel to secure his damages for such breach of contract, either under the maritime law,

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which gives no lien to a master for his wages, or under 2 Ballinger's Ann. Codes & St. Wash. § 5953, which gives a lien only for services rendered on board, and for nonperformance or malperformance of a contract for the transportation of passengers or property.

In Admiralty.

Libel to recover damages for breach of a contract by which the libelant was engaged to serve as master of the schooner Laurel on a fishing voyage, the allegations being that a contract was fully agreed to, and that, after the libelant had entered upon the performance thereof, it was, without his consent, repudiated by the owner of the vessel; that by his engagement he missed opportunities of going as master of other fishing vessels, and has been deprived of employment in his profession during the fishing season of the year 1900. Heard on exceptions to the libel alleging that the contract is not a maritime contract.

James M. Epler, for libelant.
Preston & Bell, for claimant.

HANFORD, District Judge. The ground alleged for the exceptions is not well chosen. An agreement by which one of the parties undertakes the responsibility of navigating a vessel on the ocean and bringing her back to her home port for a stipulated compensation is essentially a maritime contract,—that is to say, it contains all the essential elements of a maritime contract,—and no good reason has ever been given for excepting it from the class of contracts which in law are denominated maritime contracts. I am bound to decide, however, that a suit in rem for the cause stated in the libel cannot be maintained, for the reason that the law does not entitle the libelant to a lien upon the vessel. It is settled by the determinations of the courts in this country that the general maritime law does not subject a ship to a lien for the wages of her master. 19 Am. & Eng. Enc. Law (2d Ed.) 1116. As a lien does not attach for wages earned, a fortiori there can be none for an unliquidated claim for damages against the employer for breaking a contract to hire. The statutes of this state make all boats and vessels liable "for services rendered on board," without any exception, and in my opinion entitle a master as well as mariners subordinate to him to a lien for wages earned by services actually rendered; but the rule of strict construction applies, and the courts have no right to extend the law so as to confer a lien for damages claimed for breach of an unperformed contract. The same section of the Code gives a lien upon a vessel for nonperformance or malperformance of a contract for the transportation of passengers or property. 2 Ballinger's Ann. Codes & St. Wash. § 5953. These provisions clearly indicate the limitations of the statute. In one case a lien is given "for services rendered." This excludes demands based upon any other ground than services rendered. The other gives a lien for nonperformance of a contract for transportation of passengers or property, and this excludes every other kind of contract from consideration.

For the reasons above stated, I direct that a decree be entered dismissing the case, and awarding costs to the claimant against the libelant and the sureties upon his stipulation.

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PRIMROSE v. FENNO et al.

(Circuit Court, D. Massachusetts. February 7, 1902.)

No. 934.

1. TAXATION OF COSTS—CONFORMITY TO LOCAL PRACTICE.
Prior to Act Feb. 26, 1853 (10 Stat. 161), the taxation of costs in the federal courts in the various districts conformed to the practice of the state in which the district was situated, and the same since its enactment, as to all items of costs not specially covered thereby.

2. SAME—DISCRETION OF COURT.
While the federal courts in taxing costs are to follow the local practice, except so far as modified by statute or by special usages, they are not so far bound thereby as to be embarrassed in doing justice.

3. SAME—EXPENSES OF AUDITORSHIP—MASSACHUSETTS PRACTICE.
According to the practice in Massachusetts, the taxable expenses of an auditorship are all charged on the defeated party, except so far as borne by the public authorities.

4. SAME.
After hearing the opening of this case the court of its own motion, neither party objecting, discharged the jury and appointed an auditor. After the coming in of his report plaintiff moved to amend his writ so as to embrace all matters which he maintained were within the scope of the report, and, his motion being disallowed, submitted to a discontinuance. Afterwards each party paid one-half of the auditor's fee. *Held* that, under the circumstances, no part of the fee paid by either party should be taxed in his favor against the other.

5. SAME—WITNESS FEES.
As a general rule, the fees of witnesses appearing before an auditor are taxed against the losing party.

6. SAME—CERTIFICATE OF WITNESS—AFFIDAVIT.
In taxing witness' fees, the certificate of the witness in the usual form is prima facie sufficient without an affidavit.

7. SAME—ACTUAL PREPAYMENT—NECESSITY.
The certificate of the witness need not show that his fees have been actually paid by the successful party, but they may be taxed against the loser notwithstanding, the successful party being alone liable for them.

Whipple, Sears & Ogden, for plaintiff.
Storey, Thorndike & Palmer, for defendants.

PUTNAM, Circuit Judge. The plaintiff has requested us to revise the clerk's taxation of costs. The questions relate to one-half of the auditor's fee of $1,515, and the travel and attendance of witnesses who attended before him. The manner in which the auditor was appointed appears by the following extract from the record:

"Case opened by the plaintiff to the second jury. After hearing the opening of the case, neither party objecting, the court discharges the jury from the case, and appoints Frederick Dodge, Esq., auditor, with liberty to make alternative findings, and orders that attendance of counsel before the auditor shall be regarded the same as attendance in open court before this court, and that the auditor's report be filed on or before the 15th day of April next."

After the coming in of the report, the plaintiff moved to amend his writ for the purpose of covering all matters which he maintained were within the scope of the auditor's findings. This motion was disallowed. Thereupon the plaintiff submitted to a discontinuance,

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which carried costs to the defendants. Afterwards one-half of the auditor's fee was paid by the plaintiff. The defendants, having also paid one-half, claim that the same should be taxed in their favor, as well as the travel and attendance of their own witnesses before the auditor, in accordance with the usual certificate, signed by the witnesses and filed with the clerk.

Both of these items were allowed by the clerk. There can be no question that the clerk's taxation is in all respects in accordance with the ordinary practice in this circuit, and that it must be confirmed, unless the court can exercise discretionary powers with reference to taxing the compensation of an auditor, and of the travel and attendance of the witnesses incidental to the hearing before him.

Many propositions have been submitted by the plaintiff, but they are all resolved by the few which we will state. Prior to the act of February 26, 1853 (10 Stat. 161), which is now scattered through the Revised Statutes, the taxation of costs between party and party in civil suits, in the various districts, conformed to the practice of the state in which the district was situated. The Baltimore, 8 Wall. 377, 390, 391, 19 L. Ed. 463. Since its passage, and, especially, since the decision in 1867 in Nichols v. Brunswick, 3 Cliff. 88, 90, 91, Fed. Cas. No. 10,239, and in 1869 in Jordan v. Woolen Co., 3 Cliff. 239, 243, Fed. Cas. No. 7,516, the practice in this circuit has been uniformly the same as it was before the act of 1853, except so far as in terms restricted by that statute. It seems to have been accepted that the act of 1853 was intended, not to cover the entire subject-matter, but merely to obviate some uncertainties, and to prevent the continuance of certain irregularities, among which was the allowance of counsel fees in admiralty cases, as early approved by the supreme court. Consequently, for all items of costs not specifically covered by the act of 1853, we must look primarily to the practice of the local courts.

It is to be remembered, however, that the general rule in the federal courts arose from the provisions of what is now section 914 of the Revised Statutes, adopting the practice of state courts of record. But this section provides only that the practice in the federal courts shall conform "as near as may be" to that of the local tribunals. It is also to be remembered that the whole subject of taxation of costs, except so far as in terms directed by statute, is controlled by usage, and that all statutes are assumed to be embedded in that usage. It would be impracticable to take up items of costs and dispose of them theoretically, without regard to the reasonable and actual limitations arising from the usages of the courts, without thereby establishing rules which, under some circumstances, would render costs so burdensome as to be comparatively ruinous. Consequently, while, on the one hand, we are to follow the local practice, except so far as it has been modified by statute or by special usages of this court, we are not required to hold ourselves so far bound by it as to embarrass us in doing justice between parties. We could not freely accomplish this, and should unduly hesitate in instituting incidental proceedings of our own motion, if thereby we might burden too heavily one party or

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the other. In this particular case these considerations cannot be overlooked.

Notwithstanding that the extract which we have made from the record shows that neither party objected to the appointment of the auditor, yet it is apparent that the appointment was the act of the court of its own motion. It follows that it made the appointment, not in the interest of either party, but for its own relief. It must also be conceded that the court, in thus appointing an auditor of its own motion, on the opening of the trial to the jury, proceeded on the apparent state of the case, by which it may have been misled, so that in truth it may have been that, notwithstanding the court's belief that such an appointment was necessary to the orderly trial of the cause, the fact was otherwise, and the case might have been disposed of without involving the parties in the costs incident thereto. It is much more clear that the charges connected with the auditorship under such circumstances arose from the attempt of the court to assist itself than from any act of either party of that class which ordinarily casts upon it the entire costs of litigation in the event the act proves futile. Therefore, under the circumstances of this case, it is not clear that there is any equity which should cast the entire cost of the auditorship on either party. The condition is substantially different from what it would have been if the losing party had moved for the appointment of the auditor, or if there had been a trial, and he had there used his report.

There can be no question that, in the practice of the local courts of Massachusetts, the taxable expenses of an auditorship are all charged upon the defeated party, except so far as they are borne by the public authorities. Pub. St. c. 159, §§ 51–55. In view of the fact that the auditor in the present case was given liberty to make alternative findings, it may be that he did not come strictly within this act; but, independently of any statute, the ordinary local rule is to charge the losing party with the taxable expenditures arising out of the auditing. Therefore, ordinarily, that rule should govern this court in this district; but, looking at the other considerations, we think we may justly follow Mr. Justice Story, who in Whipple v. Manufacturing Co., 3 Story, 84, 86, Fed. Cas. No. 17,515, divided equally between the parties the cost of a survey ordered by the court, which, also, under the ordinary local rule in Maine, in which district the cause was pending, would have been borne entirely by the losing party. Consequently, inasmuch as each party in the present case has already paid one-half of the fees of the auditor, we direct that, so far as that item is concerned, no part thereof is to be taxed in favor of either against the other.

So far as the witnesses before the auditor are concerned, it is undoubtedly the ordinary rule that their fees follow that of the auditor, and are taxed against the losing party. Inasmuch as the record before us does not show under what circumstances these witnesses were called, it is impossible for us to say that there are any equities of the class which we have explained in connection with the fee of the auditor, or any other equities which would authorize us to depart from the ordinary rule. Moreover, the objection to

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the allowance of the witness fees is based on only two propositions,—one that the certificate in this case, which is in the usual form, should have been supported by an affidavit, and the other that the certificate does not show that the witnesses have been paid their fees. So far as the first objection is concerned, it has been settled in Massachusetts, longer than the memory of man runneth to the contrary, that a certificate in this form is prima facie sufficient. Cook v. Holmes, 1 Mass. 295; Howe, Prac. 332. The certificate never shows that the witness has been paid. There is no necessity that it should, because, whether paid or not, the witness has no claim at law against the losing party after the allowance of his fees. Moreover, in a case involving a successful litigant of moderate means in large expenditures, it is not impossible that recovery of witness fees from the losing party may be necessary in order for him to make payment thereof. However this may be, the clerk's allowance of the fees on the certificate filed is in accordance with the practice of more than a century, and cannot now be questioned. The mere fact that section 983 of the Revised Statutes uses the word "paid" is not to be unreasonably construed, as intended to establish a new and stringent rule in this regard. So far as the losing party is concerned, the fees are paid in law, because they stand in such position that the winning party alone is liable for them. On the whole, while the clerk is directed to revise the taxation so far as to disallow the amount paid by the defendants on account of one-half of the auditor's own fees, his taxation must stand in all other respects.

Inasmuch as, with reference to the item which the clerk is thus directed to disallow, the defendants claim to stand on a strict legal right, they will be entitled to a writ of error, as explained by the court of appeals for this circuit in The City of Augusta, 25 C. C. A. 430, 80 Fed. 297, 303. Therefore, on the coming in of the revised taxation, the defendants will be entitled to have allowed a bill of exceptions so far as our ruling is adverse to them.

COONROD v. KELLY et al.

(Circuit Court, D. New Jersey. January 29, 1902.)

1. MORTGAGES—PRIORITY OF RECORD—FAILURE TO RECORD—EFFECT.
Under Rev. St. N. J. p. 2106, § 22, providing that a mortgage shall be void against a subsequent bona fide mortgagee for a valuable consideration without notice, a party asserting priority for a mortgage recorded after the recording of a subsequent mortgage must prove that the subsequent mortgagee did not pay a valuable consideration, or that at the time of taking the mortgage he had notice of the prior mortgage.

2. SAME—SUBSEQUENT MORTGAGE—NOTICE — CONSIDERATION—EVIDENCE—SUFFICIENCY.
In an action demanding that a mortgage be a prior lien to a mortgage subsequently executed, but recorded before the former mortgage, the mortgagor testified that he did not inform the subsequent mortgagee of the existence of the prior mortgage. The mortgagee testified that he had not heard of such prior mortgage, and that he paid the consideration for the mortgage. He admitted knowledge of another mortgage.

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This was all the evidence on notice and payment of the consideration. *Held* that, if this evidence be disregarded on the ground of its improbability, though express testimony cannot be rejected solely on that ground, the presumption of want of notice of the prior unrecorded mortgage or of the payment of the consideration is not overcome, and the subsequent mortgage, having priority of record, constitutes a prior lien.

3. SAME—PAYMENT OF FORMER MORTGAGE—SUBROGATION.

A mortgagee in a mortgage prior in date and subsequent in record to a mortgage subsequent in date and prior in record, who pays a former mortgage of record at the time of the recording of the subsequent mortgage, cannot be subrogated to the rights of the paid mortgagee, as against an assignee of the subsequent mortgage, the latter relying on the record, and believing the mortgage to be a first lien.[1]

4. SAME—PRIORITY OF RECORD—ORDER OF PRIORITY.

An assignee of a mortgage subsequent in date and prior of record to a mortgage prior in date and subsequent of record, who finds on the record the mortgage prior in date and subsequent in record, does not have actual notice of such prior mortgage, so as to put him on inquiry, the record alone showing the order of priority of the two mortgages.

James E. Howell, for complainant.
Fred Prout, for defendant Kelly.
Joseph Cross, for defendant Dime Savings Inst.

KIRKPATRICK, District Judge. The complainant in this case files his bill for the foreclosure of his certain mortgage for $10,000 upon lands in the county of Somerset, in the state of New Jersey, bearing date May 1, 1899, executed by George Booth, and Ella, his wife, on the same day, delivered to complainant on the 3d day of May, 1899, and lodged for record in the clerk's office of Somerset county on the 6th of May, 1899. The bill also prays that the complainant's mortgage may be declared to be a prior lien on the property therein described to another certain mortgage given by said Booth to one Howlett, and now held by assignment by the Dime Savings Institution, of Plainfield, N. J., and which, while bearing date the 3d day of May, 1899, was lodged for record in the clerk's office of Somerset county on the 3d day of May, 1899, three days prior to the date of record of complainant's mortgage. The following facts are not disputed, and they clearly appear from the record: That the complainant agreed to loan to defendant Booth the sum of $10,000, to be secured by mortgage on the property described in the bill, and that such mortgage was drawn on May 1, 1899, executed by Booth and his wife on May 1, 1899, and the money paid on the morning of May 3, 1899, $2,498 in cash, $2,400 by receipt of admitted indebtedness of Booth to complainant, and $5,102, the amount due upon an existing mortgage on the premises, held by the Mutual Life Insurance Company of New York; that the complainant's mortgage was forwarded by mail to the clerk of Somerset county, where the lands were located, to be lodged for record; and that, because the instrument was not properly stamped as required by the United States revenue laws, it was returned to complainant's attorney, who, after affixing the requisite stamps, returned it again to the clerk, so

[1] Subrogation to rights of mortgagee, see note to Rachal v. Smith, 42 C. C. A. 304.

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that it was recorded on the 6th of May, 1899. Upon the same day upon which Booth delivered the mortgage to complainant, viz., May 3, 1899, and about two hours later, he and his wife executed and delivered another mortgage upon the same premises to one Frederick J. Howlett to secure the sum of $8,000. This mortgage Howlett, on the same day, lodged with the clerk of Somerset county for record, and it was so recorded May 3, 1899. Afterwards the complainant, through his attorneys, paid the mortgage upon said premises given by one Day, a former owner of the premises, held by the Mutual Life Insurance Company of New York, from the money left in his hands for that purpose, and the same was, on the 8th day of May, 1899, canceled of record. The record then stood (i. e., on May 8, 1899) in this way: May 3, 1899, mortgage, Booth and wife to Howlett; May 6, 1899, mortgage, Booth and wife to Coonrod; May 8, 1899, mortgage, Day to Mutual Life Insurance Company, canceled. On the 12th of June, 1899, Frederick J. Howlett, the mortgagee above named, made an application to the Dime Savings Bank, of Plainfield, N. J., for the sale to them of his said mortgage, and represented the same to be a first lien on the said property; and the said institution afterwards purchased the said mortgage, and paid therefor the full amount of principal and interest due thereon, taking the precaution, however, to have made a search of the records of the county to ascertain the title, and finding it to be as above set out. The General Statutes of the state of New Jersey (Rev. St. p. 2106, § 22) provide:

"That every deed of mortgage, or conveyance in nature of a mortgage, of or for any lands, tenements or hereditaments, which shall have been made and executed after the first day of January, in the year of our Lord one thousand eight hundred and twenty-one, or shall hereafter be made and executed, shall be void and of no effect against a subsequent judgment creditor, or bona fide purchaser, or mortgagee for a valuable consideration, not having notice thereof, unless such mortgage shall be acknowledged or proved according to law, and recorded or lodged for that purpose with the clerk of the court of common pleas of the county in which such lands, tenements or hereditaments are situated, at or before the time of entering such judgment, or of recording or lodging with the clerk as aforesaid, the said mortgage or conveyance to such subsequent purchaser or mortgagee: provided, nevertheless, that such mortgage, as between the parties and their heirs be valid and operative."

So that upon the face of the record in the office of the county clerk the mortgage given to Howlett was a prior lien on the property to that of the mortgage of Coonrod, though the latter was first in date and delivery. To give Coonrod priority for the lien of his mortgage, it was necessary for him to show that Howlett was not a mortgagee for valuable consideration, or that at the time he took said mortgage he had notice of complainant's mortgage. These matters are not presumed. The burden of proof is upon the party alleging them. Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. 18. The complainant charges them in his bill, but the proofs do not sustain him. The only witnesses examined on part of complainant touching these matters were Booth, the mortgagor, and Howlett, the mortgagee. Booth swears that he did not say anything to Howlett of having mortgaged the property to complainant; that he had pre-

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viously told Howlett of the mortgage to the Mutual Life Insurance Company; and that on the day the Howlett mortgage was executed he exhibited to him a search, which had been prepared by Mr. Badgley, showing the title up to that date, and upon which the Mutual Life Insurance Company's mortgage appeared, but not that of the complainant. Howlett testified that he had never heard of complainant's mortgage; that he examined the search given him by Booth; and that he personally took his mortgage to the clerk's office, so that he might continue the search to the time his mortgage was lodged there for record. Howlett also swore that he paid the $8,000 consideration money, and that he paid it partly ($7,000) in gold coin and partly ($300) in bills, and partly ($700) receipted bill for services rendered. Booth testified to the same effect as to the payment of the consideration, and gave a detailed statement of how he disposed of the gold coin, which he said he had received as part consideration. Both of these witnesses were called by the complainant, and their testimony is all that is presented to the court on the question of notice and consideration. Counsel for the complainant urges the improbability of this story told by these witnesses, but they are uncontradicted, and, if their testimony were disregarded as unworthy of belief, there is nothing in the case which would overcome the presumption of want of notice of existence of complainant's mortgage or of the payment of the consideration. Express testimony cannot be rejected on the sole ground of its improbability. Berckmans v. Berckmans, 16 N. J. Eq. 122; Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109. The Howlett mortgage, so far as the evidence shows, was a valid mortgage, given for a valuable consideration, and accepted without notice of complainant's mortgage, and therefore, having priority of record, a prior lien to the mortgage of the complainant. The complainant insists that, inasmuch as Howlett took his mortgage with a knowledge of the existence of the mortgage given by Day to the Mutual Life Insurance Company of New York, and that mortgage was paid with his money, he is entitled to be subrogated to the rights of the Mutual Life Insurance Company. The answer is that Howlett has parted with his mortgage, and that the present holder, relying upon the record made by the complainant, has taken title to the same, believing it to be a first lien on the property. The mortgage of the Mutual Life Insurance Company has been canceled of record by the complainant, and the Dime Savings Institution was, because of such cancellation, induced to accept the Howlett mortgage as a first lien on the property. It should not be injured by the act of complainant. The act of cancellation of the Mutual Life Insurance Company's mortgage was voluntary on the part of the complainant, made without any examination of the record, and he should not now be permitted to revive it to the injury of one who was misled by his acts. Keely v. Cassidy, 93 Pa. 318; Appeal of Gring, 89 Pa. 336.

It is contended that because the Dime Savings Institution, in searching the title, found upon the record a mortgage subsequent in record and prior in date to that of which they took the assignment, such finding was actual notice of its existence, and that they were

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put upon an inquiry. But this point is not well taken. The record shows the order of priority, and there was, as I have said, no presumption that the Howlett mortgage came within the excepted class which made it a subsequent lien. The complainant is entitled to a sale of the premises subject to the lien of the mortgage owned by the defendant, the Dime Savings Institution, and without subrogation to the rights of the Mutual Life Insurance Company.

Let a decree be drawn accordingly.

WILLIAMS v. NORTHERN LUMBER CO.

(Circuit Court, D. Minnesota. October 8, 1901.)

1. MASTER AND SERVANT — RAILROADS — MINNESOTA STATUTE RELATING TO FELLOW SERVANTS.

Rev. St. Minn. 1894, § 2701, providing that any railroad company owning or operating a railroad in the state shall be liable for injury to any agent or servant occurring through the negligence of a fellow servant, without contributory negligence on his part, is limited in its application to quasi public corporations having franchises from the state, and operating railroads open to public travel or use. It does not apply to a logging road built and operated only for private purposes, and not as a common carrier.

2. SAME—INJURY OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate was employed by defendant as head brakeman and conductor of a logging train, in which capacity it was his duty to superintend the loading of the cars and the making up of the train, and to see that the logs were properly loaded, having reference, among other things, to their different lengths, so that the cars could be safely coupled together. While making up a train so loaded, he was fatally injured by a log which fell or was thrown from a car. There was no evidence to show negligence on the part of defendant in respect to the place where the work was done or the appliances, or in the employment of fellow servants, nor was there any direct evidence of the manner in which the injury occurred. *Held* that, if it was not due to the negligent manner of loading, it resulted from a danger of the employment, of which deceased assumed the risk, and, if there was negligence in loading, being charged with its superintendence, he was guilty of contributory negligence, which precluded a recovery for his death.

At Law. Action by plaintiff, as administratrix, to recover damages for the alleged wrongful death of her intestate.

After the plaintiff had rested her case, counsel for defendant moved the court to instruct the jury to find a verdict for the defendant, on the following grounds: First. That there is no negligence shown on the part of the defendant by the evidence. Second. That from the evidence on the part of the plaintiff it appears that the injury was caused by one of the risks incident to the business in which the plaintiff had engaged. Third. That the evidence shows that the deceased was guilty of contributory negligence. Fourth. That, if there is any negligence at all shown here aside from that of the plaintiff's intestate, it was the negligence of a fellow servant. Fifth. That the danger and risk of a log falling off from one of these cars was open and apparent, and was one of the hazards of the employment, the risk of which was assumed by plaintiff's intestate.

Robert C. Saunders, for plaintiff.
Howard T. Abbott, for defendant.

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LOCHREN, District Judge (orally). This is a motion to direct a verdict in favor of the defendant. A motion of this kind does not call for any exercise of discretion on the part of the court. It is a matter of strict right. If the evidence tends to sustain any facts upon which the plaintiff would be entitled to a recovery in case the jury find such facts from the evidence (and upon a motion of this kind the evidence must be construed most strongly in favor of the plaintiff), then there is a question for the jury, and the motion ought not to be granted. The fact that the son of the plaintiff was injured, so that he died, by a calamity which occurred while in the employ of the defendant, is sustained by the evidence, and is not seriously questioned. The only question is whether there is any evidence tending to show that his death, or the injury which caused his death, was caused by negligence which is imputable to the defendant, and for which the defendant is in law responsible. If there is no such evidence, there is nothing to support a verdict, if one should be rendered in favor of the plaintiff. Now, negligence is the lack of that care which a party is by law required to exercise under the particular circumstances of the case. If a party fails to exercise such care, and the result is an injury to another person, then the party guilty of the negligence is liable to the person injured for damages caused by the injury, providing there was no negligence on the part of the person injured which would prevent his recovery. The law, irrespective of the statute which has been referred to, requires an employer to exercise ordinary care in respect to the place in which the employé is put to work, and in respect to the appliances which he is to use, and the surroundings, so that they shall be reasonably safe; and with respect to fellow servants who are employed in the same business the duty of the master is to use ordinary care to see that only careful, competent, and suitable men are employed in the business. On the other hand, the employé assumes the ordinary hazards and risks of the business about which he undertakes to work. Some kinds of business are more hazardous than others; but, whatever the degree of hazard, that which is apparent, and belonging to the business that he engages in, is assumed by the employé, and he also assumes the risk of carelessness on the part of fellow servants. If the master uses ordinary care to select competent fellow servants, and, notwithstanding this, a fellow servant commits an act of negligence or carelessness which injures another employé, the master is not liable, because he had done all that the law requires of him if he selected competent and suitable men. Of course, experience shows that, notwithstanding that degree of care, servants will be guilty of negligence which may injure themselves or their fellow servants. Now, with respect to this particular injury, the business in which the deceased was injured is apparently a hazardous business. The handling of logs, loading and assisting in moving them,—they being ponderous articles, liable, if they fall upon a person, to do him great injury, and hazard his life and limb,—is a business which, in its nature, is a hazardous one. The hazard may be and is increased by the danger of carelessness on the part of the employés who are engaged in the business,—in

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this case, in the loading of the logs. Aside from the statute, as I stated before, all these hazards are assumed by all of the employés who hire themselves out and engage in that business; and if, by reason of the negligence of themselves or their fellow servants, an injury occurs, and the master has used due care, and there is no fault in the appliances, the master is not responsible, and the injury that one may sustain is his own misfortune. In this case there is no evidence that there was any fault on the part of the master in respect to the place at which the work was being done, or in respect to appliances that were furnished by the master; nor is there any charge that the servants were known to be careless or ignorant, or that they were ordinarily so; so there is no lack of care cast on the selection of the fellow servants. Aside from the statute I have referred to, there would be no evidence making the master responsible for the injury which the employé suffered in this particular instance; and one thing to be considered is whether that statute applies to a case of this kind.

Section 2701 of the Revised Statutes of Minnesota of 1894 provides that any railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part. That would include responsibility on the part of a railroad corporation for negligence of a fellow servant, and it changes the law in that respect, but it does not change it with respect to the effect of contributory negligence. This statute, as stated in several decisions, would be unconstitutional, as being in the nature of class legislation, imposing a responsibility upon railroad corporations that is not imposed upon other employers of labor, if it were not from a consideration that it is a peculiar regulation with respect to quasi public corporations which have franchises from the state, granted for the reason that the public is interested in the business of these corporations, and for that reason the legality of such regulation by the state is maintained as a proper regulation for the safety of individuals and of the public generally with respect to corporations of this kind. It is perhaps a long stretch of the power of regulation to impose upon these corporations a liability for the acts of their servants that is not imposed upon other corporations or upon individuals, but the courts have sustained this particular regulation. It has been sustained by the supreme court of this state, and like statutes have been sustained in other states, and also by the supreme court of the United States; so it is beyond question now that this is a proper regulation, as far as the scope of this statute extends. So one question presented now is whether this statute applies to a railroad of this kind, which is not a public railroad, used by the public, and which is not a common carrier; for no person has a right to require that he be carried upon it, or to have his private goods carried upon it. It is a private concern, belonging to individuals, or to a company which is not a railroad corporation, and therefore does not come within the category of bodies who are invested with franchises for the use of the public, which

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gives the state the right to make peculiar regulations for public safety. It does not come within the language of the statute, because it is not a railroad corporation; and the proviso in the statute indicates that the statute is intended to apply only to corporations of the character to which I have referred, possessed of franchises, open to public travel or use, because the proviso is that they shall not be liable for damage during the construction of a new road not open to public travel or use. It is said by counsel for defendant that it cannot apply to a railroad of this kind, because there was no such railroad in operation at the time of the passage of the act in 1887, and therefore it could not have been considered by the legislature. I do not know what the fact is as to that. My impression is that counsel is right as to the fact that there was no such railroad in operation at the time in this state, but I am not sure, and will not assume, whether that is the fact or not. The language in this statute indicates that it was not intended to include roads of this kind. But, if it were the fact that these railroads were in existence in the state, as they are now, then the presumption would be still stronger that they were not intended to be included in that act, for the reason that the language of the act would exclude them; and, if they were in operation, it must be presumed that the fact was known to the members of the legislature at that time. The fact that language was used which would ordinarily exclude would be stronger evidence that they were intended to be excluded than if there were no such railroads in operation at the time, and therefore they were not considered. I think it is true that an act may take effect upon business that was not carried on at the time when the act was passed if the language of the act is such that it will include that kind of business, although the same was not known at the time. But it seems to me the language of this statute does not include railroads of this kind; therefore I feel constrained to hold that the ordinary doctrine with respect to negligence on the part of the fellow servants applies in this case, and that such negligence is a part of the risk taken by the employé, and cannot be imputed to the employer.

Upon another branch of this case I think that the same result will follow, and that is the matter of contributory negligence. There is no direct evidence as to how this accident or calamity occurred. There is evidence as to how this particular car was loaded, and how cars were loaded in general. It appears the car was brought up to the skidways to which the logs are hauled from the woods for the purpose of being loaded; that the cars were placed opposite these skidways. But, as I understand the testimony, the cars are detached at these skidways, and are not coupled together, so that the cars would be loaded separately against the skidways, and afterwards coupled together for the purpose of being taken out. It appears that these cars are about 20 feet in length, and the logs to be loaded vary from 10 to 12 feet up to 22 or 24 feet. I think 24 is the longest that the testimony mentions. I do not know but one of the witnesses mentioned 26 feet, but I am inclined to think that 22 or 24 is the longest. So these logs are longer than the

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cars, and necessarily project beyond the ends of the cars. If the logs were all of that length, it is evident they could not be loaded on cars of that length, and the latter be coupled together as cars are ordinarily coupled. But the long logs project over the ends of the cars, and, if they are opposite the ends of shorter logs, which do not reach the end of the car adjoining, of course they can be made to ride in that way. It appears from the testimony that the ordinary way of loading these cars with logs is to place as many as can be conveniently put on the bed of the car, and then logs are laid on top of these sloping up towards the center for a certain height, when chains are put around the logs, and drawn and hooked together; and then logs are laid on top of these chains, for the purpose of holding them down, and making them taut, so they will hold the logs properly; and it further appears that these logs on top of the chains sometimes, by reason of the motion of the cars, are liable to slip off or drop off. Now, the testimony is that the deceased was a young man of 19 years of age, industrious, and had been in the habit of working and earning wages from the time he was 13 years old; that he was of good habits, good disposition, and inclined to support his mother's family; and that he sent some of his wages to his mother from the time he commenced to earn wages, and to a considerable amount. Of course, as he had not yet reached the age of 21, his father would be entitled to the wages he would earn until he reached that age. So there is no question that the father was damaged by the death of the son. It seems that the deceased was employed as a brakeman upon that train. Up until a short time before that he had been employed upon another train with the witness Carl Johnson; Carl Johnson being the head brakeman, and the person who acted as conductor, and the deceased acted as his assistant. After that he had been changed to another train, where he assumed the duties and position of head brakeman and conductor, and he was in the discharge of these duties at the time he was killed. The testimony on the part of the plaintiff is that he had charge of the making up of the train; that the engineer moved according to his signals and directions in pushing the cars to which the engine was attached so as to connect with the other cars; that it was his duty to examine the loading of the cars, and see that they were safe when loaded and put into the train, before coupling them; further, that, if he was not satisfied with the loading, it was his duty to see that they were unloaded, and properly reloaded. It seems that these logs loaded on the cars were in plain sight, easy to be seen, some 12 feet in height, the body of the car being about 3 feet high; so that in passing from one car to another the position of the logs on the cars was plain to be seen, and in clear view. It was the duty of the deceased himself to see that the cars which he was about to hitch onto the train were properly loaded, so they could be safely attached to the other cars. There was nothing, so far as the evidence shows, to prevent his seeing the projection of any of the logs (if they did project) as he approached them. It was his duty to see that they were in proper position, so there would be no danger from them. I think

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this was his duty so strictly that, if he attached cars that were improperly loaded, it would be such negligence on his part that, if another person had been injured, the injury would have been imputable to the master, if the case came within the statute of this state. But here, he being negligent himself, and being the person that was injured by that negligence, it comes under the head of contributory negligence, which would prevent a recovery.

It seems to me, upon both of these grounds, there is no evidence upon which the jury can lawfully find a verdict in favor of the plaintiff.

Gentlemen of the jury, the court directs that your verdict be for the defendant.

THE PLANET VENUS et al.

(District Court, E. D. Pennsylvania. January 14, 1902.)

No. 44.

1. ADMIRALTY — JOINDER OF DEFENDANTS — SUIT ON CONTRACT OF AFFREIGHTMENT.
   A ship and its charterers may be joined as defendants in a suit in admiralty to enforce a contract of affreightment where both are charged with liability for its breach, such practice being within the spirit, though not the letter, of admiralty rule 59.
2. SAME — PRACTICE — POWER OF DISTRICT COURT TO ESTABLISH.
   A district court has power, under admiralty rule 46, to establish the practice of permitting process in rem and in personam to issue upon the same libel, either by rule or decision.

In Admiralty. On exceptions to libel.

N. Dubois Miller and Scott & Upson, for libelants.
John F. Lewis and Horace L. Cheyney, for respondents.

J. B. McPHERSON, District Judge. This libel, which charges the breach of a contract of affreightment, was originally filed against the steamship Planet Venus, and "John Doe and Richard Roe, doing business under the name of the Philadelphia Transatlantic Line, Charles M. Taylor's Sons, managers, the charterers of said steamship." The vessel was attached by process in rem, and, upon giving stipulation, was released in due course. No process in personam was issued, but not long afterwards the libelants asked permission to amend, so as to describe the other respondents as "Frederick W. Taylor and James S. Taylor, the charterers of said steamship, doing business," etc. Permission having been granted, process was issued against the persons named, and was duly served. The present exceptions are filed both by the claimant of the steamship and by the individual respondents, and attack the jurisdiction of the court on the ground that proceedings in rem and in personam upon a contract of affreightment cannot properly be joined.

Assuming, for present purposes, that the attack is properly directed, and that the jurisdiction of the court is the matter in question, I am of opinion that the objections should not prevail. It is true that the practice in this district, which is supported by a decision of

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Judge McKennan in The Alida (C. C.) 12 Fed. 343, has not heretofore permitted process in rem and in personam to issue upon the same libel, and I might perhaps be justified in simply following this precedent. If the point were doubtful, I think I should be likely to adhere to our own custom; but believing, as I do, that the contrary practice is clearly adapted to avoid circuity of action and to promote the administration of justice, I am disposed to follow the course that has been adopted in some other districts, securing also the incidental advantage of furthering uniformity of procedure in the courts of admiralty. I have the less hesitation in taking this step because of the considerations to which I shall now briefly refer. The decision in The Alida was pronounced in 1882, and was expressly based upon Citizens' Bank v. Nantucket Steamboat Co., Fed. Cas. No. 2,730, decided in 1811, and upon Dean v. Bates, Fed. Cas. No. 3,704, decided in 1846. Apparently no other cases were called to the court's attention; for it is stated in the opinion that, "so far as the question has been judicially considered in this country, there is no substantial diversity of decision." This statement, I think, could hardly have been made, if the court had seen the careful and well-considered opinion of Judge Betts in The Zenobia, Fed. Cas. No. 18,208, which was decided in 1847, and the decision of Judge Blatchford in Vaughan v. Six Hundred and Thirty Casks of Sherry Wine, Fed. Cas. No. 16,900, which was rendered in 1874, and affirmed by Chief Justice Waite in 1878 (Fed. Cas. No. 12,918). Within a month or two after The Alida was decided, the opposite practice, upheld by The Zenobia, was again maintained by Judge Brown in the Southern district of New York (The Monte A [D. C.] 12 Fed. 331), in an opinion of which the reasoning is, I think, eminently satisfactory. A few years later, in 1886, the practice of joining the vessel and the owner or master in one libel was approved by Judge Deady in the district of Oregon (The Director [D. C.] 26 Fed. 708); and the ruling of Judge Brown was adhered to by him in The J. F. Warner (D. C. 1883) 22 Fed. 342, and The Baracoa (D. C. 1890) 44 Fed. 102. A similar practice appears to exist in Wisconsin. The Keokuk, 9 Wall. 517, 19 L. Ed. 744. It is also to be observed that in 1883, the year following the decision in The Alida, the supreme court promulgated the fifty-ninth rule in admiralty, permitting the two remedies to be joined in an action for collision; and the extension of this rule to cases within its spirit, although not within its letter, has been expressly approved by the supreme court in the very recent decision of The Barnstable, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954. It seems to me, therefore, that if the point decided in The Alida were now presented in this district for the first time, there could be little doubt, in the light of the subsequent action of the federal courts, that it would be decided in favor of the libel under consideration; and I feel free, therefore, to follow my own inclination, and to permit hereafter the two forms of remedy to be used together ordinarily in a proceeding brought to enforce a contract of affreightment. There may be circumstances under which a joinder should not be permitted, but exceptional cases may be left for consideration as they arise. The present controversy is one in which both the ship and the charterers are

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charged with liability on the same contract of affreightment, and I think they may properly be called upon to answer in the same proceeding. If it should be contended hereafter that the liability ought to be shared, or should be borne by one rather than by the other, these matters also can be determined, and the whole controversy adjusted in one suit.

Objection was also made by the respondent that the district courts have no power to establish the practice of permitting process in rem and in personam to issue upon the same libel. I do not think the objection is sound. In my opinion, rule 46 gives the district courts ample power to establish such a practice, either by a formal rule, or by a decision directing the method of future procedure.

The exceptions to the libel are dismissed.

ARROTT v. STANDARD SANITARY MFG. CO.[1]

(Circuit Court, W. D. Pennsylvania. February 7, 1902.)

No. 16.

PATENTS—PRIOR INVENTION—PLEADING—PLEA.

A defense of prior invention and use in a suit in equity for the infringement of a patent, which, under Rev. St. § 4920, subd. 3, is provable on notice in writing in the answer, cannot be raised by plea.

In Equity. Sur motion to strike off plea.

Christy & Christy, for plaintiff.

Connelly Bros. and Lyon, McKee & Mitchell, for defendant.

ACHESON, Circuit Judge. Every defense which may be a full answer to the merits of a bill in equity is not, of course, to be considered as entitled to be brought forward by way of plea. Story, Eq. Pl. § 652. The true end of a plea is to save the parties the expense of the examination of the witnesses at large, and the defense proper for a plea is such as reduces the cause, or some part of it, to a single point. Id. This is a suit in equity for the infringement of a patent, and the bill is in the usual form. The defendant has filed a plea setting up the prior invention and use by one Marschutz of the thing patented by the plaintiff. This is one of the defenses which by the provisions of section 4920, Rev. St., is provable in an action at law under the general issue upon notice in writing, and in a suit in equity upon like notice in the answer. Now, in Carnrick v. McKesson (C. C.) 8 Fed. 807, Judge Blatchford held that the defense of a prior patent or previous description in a printed publication specified in subdivision 3 of section 4920 must, in a suit in equity, be set up in an answer, and not by a technical plea. This conclusion is based upon a reasonable construction of section 4920. I do not find that the authority of the case has been shaken by later decisions. Again, in Sharp v. Reissner (C. C.) 9 Fed. 445, it was

[1] Pleading in infringement suits, see note to Caldwell v. Powell, 19 C. C. A. 595.

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held by Judge Blatchford, and in Korn v. Weibusch (C. C.) 33 Fed. 50, it was held by Judge Coxe, that in a suit in equity the question of infringement cannot be determined upon a plea. In Knox Rock-Blasting Co. v. Rairdon Stone Co. (C. C.) 87 Fed. 969, Judge Severens declared that a plea to a bill in equity for infringement of a patent is inappropriate, unless in very special circumstances. In 3 Rob. Pat. § 1112, it is said that, "while such special matters as the departure of a reissued patent from its original may form the subject of a plea, defenses which attack the patentability of the invention, or the fact of infringement, or other principal averment of the bill, can be set up only in the answer." The text of this writer, I think, is sustained by the clear weight of authority. In the cases cited by the defendant the circumstances were special, or new matters were set up in defense. Thus, in Edison Electric Light Co. v. United States Electric Lighting Co. (C. C.) 35 Fed. 134, the plea alleged that the plaintiff's patent had expired before the suit was brought, by reason of the expiration of a previously granted foreign patent for the same invention. And in the case of Westervelt v. Library Bureau, 114 Fed. ——, before Judge Colt, special reasons for filing the plea were shown. To sanction such pleas as the one before the court would lead to the trial of patent causes by piecemeal. Should issue be taken on this plea, and determined adversely to the defendant, no doubt the question of the alleged prior invention and use by Marschutz would be conclusively settled against the defendant; but, in its answer over, the defendant might set up all other defenses on the merits, including other anticipations. Such a practice would be intolerable.

Unless the defendant shall file within 10 days a stipulation agreeing that this plea shall stand for an answer, an order will be entered striking off the plea, with leave to the defendant to answer the bill within 30 days.

WOODS v. BAILEY.

(Circuit Court, M. D. Pennsylvania. February 12, 1902.)

1. SECURITY FOR COSTS—AFFIDAVIT OF POVERTY.
Plaintiff may file a proper affidavit of poverty, though a former affidavit of poverty, under Act July 20, 1892 (27 Stat. 252), has been adjudged insufficient, and an order to give security for costs has been made.

2. SAME—TRUTH OF AFFIDAVIT—HOW CONTESTED.
The filing of the affidavit of poverty under Act July 20, 1892 (27 Stat. 252), and not the truth of it, constitutes the answer to defendant's demand for security for costs, and defendant can only contest this truth by a motion to dismiss under the fourth section.

T. M. B. Hicks, for plaintiff.
J. T. Fredericks, for defendant.

ARCHBALD, District Judge. By a previous order of this court, the plaintiff, as a nonresident of the district, was required to give security for costs in the sum of $250. 111 Fed. 121. Before that

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order was made, on a rule taken upon her to give such security, she endeavored to avail herself of the act of July 20, 1892 (27 Stat. 252), by filing an affidavit of poverty, but it was adjudged insufficient, and the order made. She now comes in with one which is sufficient in form, and the question is whether she is entitled to have it considered. In my opinion, she is. While there is quite a little force in the defendant's contention that her plea of poverty has been heard and disposed of, at the same time I cannot close my eyes to the fact that the former affidavit was thrown out on the ground that it was evasive, the assertion of poverty not being absolute, but relative, to meet the supposed demand for bail in $1,000, and that the present is an effort to cure its defects. The assertion now is absolute, and, unless the affidavit is received, by a mere slip in the form of oath previously taken she may be deprived of a substantial right. I do not think the law should be so administered, and, considering the matter as within my discretion, I will allow the affidavit to come in. In a measure, it may still be regarded as in time, within the meaning of the act; for the order for security is a demand to which the plaintiff makes answer by the affidavit now presented, and thus comes within its terms. It was so held in McDuffee v. Railroad Co. (C. C.) 82 Fed. 865, where an affidavit was received after an order for security had been entered; and in Whelan v. Railway Co. (C. C.) 86 Fed. 219, a second more specific affidavit was allowed to meet the exigencies of the case; while in Reed v. Pennsylvania Co., 111 Fed. 714, the court, in denying an application because the affidavit was not sufficient, expressly provided that it should be without prejudice to a renewal upon one that was. These cases seem to indicate a liberality of practice which I am not inclined to abridge.

It is further urged by counsel that the defendant is entitled to produce evidence to contradict the affidavit, and show that the plaintiff is not the poor person she claims to be; but, upon a careful reading of the statute, I do not think, at the present stage of the case, it can be done. The affidavit, if sufficiently direct and positive, is, in the first instance, to be taken as true, and the plea of poverty accepted. But this does not leave the opposite party without remedy. In the first place, by the second section of the statute, if the affidavit is willfully false the affiant may be prosecuted for perjury; and in the next place, by the fourth section, the court may dismiss the case, "if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious." Under this section, it has, indeed, been held that upon the presentation of an affidavit the court may inquire into the facts, and grant or refuse relief, according as it is found true or otherwise. This was the course pursued in Boyle v. Railroad Co. (C. C.) 63 Fed. 539, and in Brinkley v. Railroad Co. (C. C.) 95 Fed. 345, both decided by Hammond, J.; and a similar view seems to have been taken in Whelan v. Railway Co. (C. C.) 86 Fed. 219, where it was declared by Lacombe, J., that the act does not secure an unrestricted right to prosecute as a poor person, a preliminary investigation being provided for by the fourth section. So, in Whittle v. Railway Co. (C. C.) 104 Fed. 286, it was said by Trie-

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ber, J., that "this [fourth section] clearly demonstrates that, before such leave will be granted, there must be some kind of showing made to the court that there is reasonable cause to believe that, if permitted to prosecute the suit in forma pauperis, the plaintiff is likely to recover something by his action." But, with due respect to the eminent judges who have so ruled, the true construction of the act, in my judgment, is that put upon it by Wheeler, J., in McDuffee v. Railroad Co. (C. C.) 82 Fed. 865, where it was held that a demand for security for costs is fully met by the filing of an affidavit, without more. "The statute does not * * * provide," it is there said, "that an affidavit shall not, if untrue, be an answer to a demand for security in an action pending, but only that the court may dismiss any such cause so brought under the act, if it be made to appear that the allegation of poverty is untrue. * * * The filing of an affidavit, and not the truth of it, is what the statute makes an answer to the demand." Following this view, I therefore hold that, on filing an affidavit in proper form, the party is entitled to proceed with the case in forma pauperis, leaving it to the opposite party to contest the truth of the affidavit on a motion to dismiss, if desired. This was the course pursued in Wickelman v. A. B. Dick Co., 85 Fed. 851, 29 C. C. A. 436, and seems to me to be the one to be observed. It raises the issue in an orderly way, and after a full hearing, in which both parties have opportunity to produce the evidence pro and con, it enables the court to act directly and effectively upon the question. All that the statute, at the outstart, in terms, requires, is an affidavit, without particulars, that, because of poverty, the party is unable to pay the costs or give security for them, and not until this allegation has been called in question can he be expected or prepared to maintain its truth. Until this is done, by a motion to dismiss on a proper countershowing the affidavit of the applicant must stand. As strengthening this construction, it is to be noted that the only question before the court on such an application is whether or not it shall be granted; a refusal being the only possible adverse result. But in proceedings under the fourth section much more is contemplated. The power is there given to end the case by an order of dismissal, if either the allegation of poverty is found untrue, or the cause of action is deemed malicious or frivolous, and this double inquiry is entirely inappropriate and unprovided for in disposing of the preliminary question whether the plea of poverty shall prevail. A dismissal is the penalty attached to a false plea successfully made, and is inapplicable to an effort which has failed. It is a summary remedy, necessary, no doubt, to hold in check the temptation to resort to the statute, but because of its drastic character it is not to be allowed except in the way that is there pointed out. The applicant, having invoked the law, cannot complain if its provisions are turned against him, but he is entitled to have it done, not only in the way that affords him the fullest opportunity to be heard, but in the way that the law provides. Considering, therefore, that the remedy given by the fourth section is distinct and specific, it must be specifically and separately pursued. It is the method provided by the statute for testing the falsity of the

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affidavit, and is not to be drawn into the preliminary inquiry when the affidavit is presented, where the question of its formal sufficiency is alone involved.

The plaintiff having now filed an affidavit of poverty which conforms to the requirements of the statute, the order heretofore made, that she give security for costs, is set aside.

In re McCALLUM et al.

(District Court, E. D. Pennsylvania. January 25, 1902.)

No. 993.

1. BANKRUPTCY—CLAIMS AGAINST ESTATE—JURISDICTION OF DISTRICT COURT.
Bankr. Act, § 23, cl. "b," providing that suits by the trustee in bankruptcy shall only be brought in the courts where the bankrupt whose estate is being administered by such trustee might have brought them if the bankruptcy proceedings had not been instituted, unless by consent of the proposed defendant, being confined to suits by the trustee, places no limitation upon the jurisdiction of the district court as to suits against the estate or trustee, conferred by section 2, cl. 7, giving such court power to determine controversies in relation to the bankrupt estate.

2. SAME—AMOUNT INVOLVED.
Under Bankr. Act, § 2, cl. 7, conferring power upon the district court, as a court of bankruptcy, to collect, reduce to money, and distribute the estates of bankrupts, and to determine controversies in relation thereto, except as therein otherwise provided,—there being no provision elsewhere in the act regulating suits or claims against the estate, or against the trustee as its representative,—the jurisdiction of the district court as to such suits and claims is unlimited, and is not dependent upon the amount in controversy.

3. SAME—FUNDS IN TRUSTEE'S HANDS—PROCEEDS OF GOODS SOLD ON CONSIGNMENT.
Where a bankrupt's estate has been converted into cash, and such cash is in the hands of the trustee in bankruptcy, a claim by a creditor for the payment of the full amount of his debt on the ground that it was for the value of goods which had been only consigned to the bankrupt, the title remaining in the creditor, but which had been converted into cash by the trustee, is nothing more than a claim against a fund in the hands of the court, which the court, as an incident to the power to distribute, has the right to hear and determine.

4. SAME—STATE COURTS.
Such claim, being a claim to a superior right to a fund about to be distributed, and in which all the other creditors of the bankrupt were interested, should be determined in the district court, where the other creditors might be heard in defense of their rights, and an application for leave to sue upon such claim in the state court should be refused.

In Bankruptcy. Application in the matter of McCallum & McCallum, bankrupts, for leave to sue the trustee in bankruptcy in the state court. Refused.

Read & Pettit, for creditor.
Preston K. Erdman and Wm. S. Price, for trustee.

J. B. McPHERSON, District Judge. The facts upon which this application rests are these: Before the petition in bankruptcy was

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filed, the bankrupts had made an assignment for the benefit of creditors, under which a large part of their assets had been sold and converted into cash. The fund thus arising has been handed over to the trustee, and is now in his hands. The present petitioner's claim, which he asks to pursue in the state court, is based upon the averment that he delivered to the bankrupts certain oriental rugs, to be sold by them upon consignment; the title to the rugs to remain in the petitioner, and the bankrupts to be compensated by being paid a commission on the sales. These rugs, it is further averred, were all sold by the bankrupts or by the assignee; and the petitioner seeks to follow the proceeds, asserting a right to be paid in full out of the fund in the hands of the trustee. He has also proved his claim as an ordinary debt against the bankrupt estate, but has not accepted the dividend that was recently declared, asking for leave first to pursue his claim to be paid in full, and, failing success in this attempt, intending to resume his position as an unsecured creditor of the estate. He asks leave to sue the trustee in a state court, because he believes that the bankrupt act, as interpreted by the supreme court in Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, requires such a suit to be brought in the circuit court, if the other jurisdictional requisites exist, or in the state courts, if, as in the present case, the amount in controversy is less than $2,000.

I am unable to take this view of the bankrupt act. The case of Bardes v. Bank interpreted section 23, cl. "b," which is concerned simply with suits brought by the trustee, and has no reference to suits brought against him. I find nothing either in the statute or in the opinion of the supreme court further to qualify section 2, cl. 7, of the act, which confers power on the district court, as a court of bankruptcy, to collect, reduce to money, and distribute the estates of bankrupts, and to determine controversies in relation thereto. The only restriction upon this grant of power, which congress had the undoubted right to make, is the restriction contained in the final words, "except as herein otherwise provided"; and, as I have already intimated, there is no provision elsewhere in the act regulating suits brought or claims made against the estate, or against the trustee as its representative. It seems to me that the present application is the ordinary case of a claim against a fund in the hands of a court, and such claims the court in possession of the fund has the right to hear and determine. It is an incident to the power to distribute, and, except where this power is expressly so limited by competent authority that a claim to a share of the fund must be sent to some other court for determination, the court that has possession of the fund is the proper tribunal to decide all controversies concerning its ownership.

I do not deny the jurisdiction of the state courts to determine controversies, in proper cases, between the trustee and adverse claimants; but this, I think, is not such a controversy. The claim here is essentially that the applicant be declared to have a superior right to a certain part of a fund about to be distributed. He is not asserting that he can recover any personal chattels from the trustee.

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Whatever title he may have had to the rugs themselves is gone, and his claim, in one character or the other, has been transferred to the proceeds. If he is an ordinary creditor, he must, of course, prove his claim in the bankrupt court. If he is claiming a superior right against the same fund,—a right to take away a part of it to the prejudice of other creditors,—I think he ought to pursue the claim where they can all be heard in defense of their rights.

For these reasons, I am of opinion that the applicant should present before the referee such claim as he may be advised to make. The application for leave to sue the trustee in the state courts is refused.

NEW JERSEY & N. C. LAND & LUMBER CO. v. GARDNER-LACY LUMBER CO. et al.

(Circuit Court, E. D. North Carolina. February 11, 1902.)

1. TRESPASS—REMOVAL OF TIMBER—PRELIMINARY INJUNCTION.
Where a bill to remove cloud and enjoin trespass on land, on which a temporary restraining order is issued, is against numerous defendants, with a diversity of interest, some of whom do not answer, it will be taken pro confesso, and the restraining order continued to the hearing, as to the defendants not answering.

2. SAME—VACATION.
Where a complaint against numerous defendants seeks, in equity, to establish title, remove cloud, and enjoin trespasses on land, and a defendant in possession of part of the land traverses complainant's title, denies all allegations of trespass, and sets up an apparently good title, thus raising issues of law, which must be tried in an action of ejectment, the court will direct a temporary restraining order vacated, unless proper steps are taken within 10 days for the trial of defendants' right to retain possession.

3. SAME.
Where a defendant in a suit in equity to establish title, remove cloud, and enjoin trespasses on land, claims title, and avers that it has established, in good faith, lumbering works on the land, at great expense, and has in preparation for market quantities of timber, which will cause it great loss if not immediately prepared for commerce, the court will dissolve a temporary restraining order on such defendant giving bond conditioned that, if so required, it will account to complainant for timber used from the land, and further direct such order vacated unless complainant within 20 days formulate issues for the trial of the title to the lands by a jury.

In Equity.

Meares & Ruark, for plaintiff.
John D. Bellamy and George Rountree, for defendants.

PURNELL, District Judge. Plaintiff filed its bill in equity against numerous defendants, and a restraining order was granted, returnable on the rule day in February, 1902. The bill alleges: Complainant is a corporation created and existing under the laws of New Jersey. That the Gardner-Lacy Company is a corporation created and existing under the laws of South Carolina, having a place of business in Brunswick county, N. C., and that the numerous other defendants are citizens of North Carolina. That the

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state of North Carolina in 1795 granted to Benjamin Rowell, Stephen Williams, and Wm. Collins certain lands in North Carolina, and complainant is the owner in fee, seised and in possession, of the land described in said grants. Muniments of title, surveys, and acts of the legislature are set out at length. That complainant has for 30 years had possession of said land, except some small tracts (which are not described), moving trespassers therefrom, paying taxes thereon, etc. That defendants have filed entries on parts of said land, trespassed thereon, cut timber (which is the chief value of the lands to plaintiff), and caused irreparable damage and depreciation of complainant's interests. That to establish complainant's rights would involve it in a multiplicity of suits, endless litigation, delay, and irreparable damage; and it seeks this remedy to establish its title, remove all clouds, and enjoin trespassers in one action. That while complainant is informed as to the location of its own lines and boundaries (which are not set out in the bill, but appear in the grants and plots attached), and the fact of defendants and others trespassing and committing acts of spoliation within its boundaries, it has been unable to ascertain the particular grants and deeds, if any, under which defendants pretend to justify and defend, and defendants, in equity and good conscience, should be required to disclose fully and completely the grants, entries, claims, or deeds under which they claim the right to trespass upon the said lands, cutting and removing timber therefrom; and defendants cannot show any superior title to complainant. That said lands are assessed for taxes in complainant's name at $61,000. Then follow the prayers for relief. A temporary restraining order was granted, returnable on the rule day in February, 1902. The subpœna, bill, and restraining order were returned served on 58 of the defendants (naming them) when the questions involved were heard; counsel appearing on both sides.

Upon an examination of the record, it appears Mrs. N. J. Schulken, one of the defendants, filed an answer January 31st in which she denies the title of complainant to parts of the land referred to, sets out her muniments of title thereto, and raises issues of fact which constitute an apparently good defense at law. A court of equity cannot try these issues. This defendant also denies any trespass or cutting of timber,—in short, sets up defenses upon an apparently good legal title, which must be tried by a jury on the law side of the docket. To the rule to show cause she makes no specific answer, but her answer is considered in this connection, having been filed before the return day. On the return day the Gardner-Lacy Company answered with many affidavits, and demurred ore tenus to the bill. This defendant claims to be the owner in fee of certain tracts,—the Burnice Little tract (80 acres), the Elijah Little tract, the Nathan Little tract, the Formyduval tract, the Narlow and Williams tract, the Samuel Evans tract (100 acres), and the Noah Williamson tract, of 100 acres, of which it and those under whom it claims have for more than seven years been in open, notorious, continuous, and exclusive possession under color of title. It claims the timber interests on all these lands; has established a

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lumbering camp, and constructed a tramway, with iron rails, engine, and logging outfit, five or six miles long, and prepared timber for market in ways described; some rafted, some cut down, and other trees belted preparatory to being felled. On the same day (being the return day) this defendant demurred to the bill, which demurrer will be more properly considered on the hearing on the next rule day. Other defendants do not answer the rule, and the bill may, for the present, be taken pro confesso as to them. At the hearing many questions will doubtless be presented which it would be premature to consider now, and which the court has no intention or disposition to even consider at this time.

The only question for consideration at this time is, shall the restraining order be continued to the hearing? It is only when complainant in his bill alleges a joint liability or community of interests that the answer of one defendant will inure to the benefit of other defendants. Bates, Fed. Eq. Proc. 330, and authorities cited. Here there seems to be no community, but a great diversity, of interests, on the part of the defendants, and diverse defenses. Hence the defenses set up by Mrs. Schulken and the Gardner-Lacy Company do not affect the other defendants, except in so far as other defendants are connected with such defenses. As to other defendants, the bill is taken pro confesso, and the injunction continued to the hearing.

Mrs. N. J. Schulken traverses the title of complainant, denies all allegations of trespass, alleges she is not cutting and has not cut timbers, and sets up an apparent good title in herself. Issues are thus raised which must be tried by a jury on the law side of the docket. She is in possession of a part of the land, claiming title thereto, and her right to retain such possession must be tried in an action or issues formulated in the form of an action of ejectment. This cannot be done on the equity side of the docket. As against her, the bill does not set up such equities as entitle complainant to injunctive relief, unless such action of ejectment is commenced at once, as soon as her defense is disclosed; and, unless proper steps to this end are taken within 10 days, the restraining order will be vacated as to the defendant N. J. Schulken. This order is entered on an examination of the record ex mero motu.

One of the principal objects of the bill, as said in Dick v. Foraker, 155 U. S. 405–415, 15 Sup. Ct. 124, 39 L. Ed. 201, and Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, being to remove clouds on and quiet title, it has served its purpose and accomplished its end as to that part of the land claimed by the Gardner-Lacy Company, which discloses an apparently good title, with the boundaries of the land claimed by this defendant. Defendant discloses its muniments of title; also that it has timbers in different stages of preparation for market, and great loss will be suffered if the same is not prepared for commerce within a reasonable time. Timber belted preparatory to being felled or that cut, on the ground or in the water, if left standing, lying, or floating, and not utilized when in proper condition, becomes worthless for commercial purposes. To effect this end by injunction would

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be inequitable, and serve the contrary of the primary object of a court of conscience and equity,—a loss to all parties concerned. This the court will not do. It is not equity. Defendant sets up an apparently good title. It has erected its works at considerable expense,—evidently in good faith, depending on its title. To tie up its enterprise by injunction after these disclosures would smack of oppression, not equity. Complainant has its rights. Defendant also has rights. The court will preserve both. The traversed allegations in the bill will be tried by a jury, being the usual questions in actions of ejectment,—is the complainant the owner and entitled to the possession of the land, the boundaries of which are now known? etc. In the meantime, if complainant shows its good faith by taking steps to test its claim, the interests of the parties as they appear will be protected and preserved. The test should be made in a reasonable time. Under the circumstances, the law's delay would be an injustice. A consideration of the questions of law and equity discussed on the hearing has been purposely avoided, lest their consideration at this time should, when the contentions, rights, and equities of the parties are more fully disclosed, embarrass the parties or the court by a premature consideration or discussion. The final hearing will probably be had within the next 60 days, when these questions can more intelligently be considered and determined.

It is therefore considered, ordered, and adjudged that as to the Gardner-Lacy Lumber Company the restraining order heretofore granted be, and the same is hereby, modified and dissolved, on the said Gardner-Lacy Company entering into bond, in the sum of $10,000, conditioned that it shall, if so required by order of this court, account to complainant and pay for such timbers as it shall cut and use from the land claimed by, or of which it shall be adjudged by the court, the New Jersey & North Carolina Land & Lumber Company was and is the owner and entitled to the possession. Said restraining order is continued in full force and effect as to lands claimed by complainant, and not included within the boundaries of the land to which the Gardner-Lacy Company claims title. It is further ordered that, unless the New Jersey & North Carolina Land & Lumber Company shall within 20 days from the entering of this order formulate issues and take steps to have its title to said land claimed by the Gardner-Lacy Lumber Company tried by a jury, the said restraining order heretofore granted herein shall be, and the same is hereby, vacated and dissolved. And this cause is held for further order.

AMERICAN ALKALI CO. v. CAMPBELL.

(Circuit Court, E. D. Pennsylvania. February 6, 1902.)

No. 66.

1. CORPORATIONS—CALL ON STOCK—LIABILITY.

The registered owner of preferred stock of a corporation, on call made thereon during the continuance of such ownership, becomes charged with a definitive debt, and is liable thereon, though he has made no express promise to pay.

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2. SAME—TRANSFER OF STOCK—LIABILITY FOR CALL.
Where the registered owner of corporation stock, after call made thereon, transferred his shares on the books of the corporation to a purchaser before any installments of the call were payable, he was not thereby relieved from his obligation to pay the call, which became a fixed debt at the time of the call.

3. SAME—ASSENT OF CORPORATION.
The assent of a corporation to a transfer on its books of preferred shares, on which a call has been made, does not relieve the registered owner thereof at the time of the call from the liability fixed by the call.

4. SAME—FORFEITURE FOR NONPAYMENT OF CALL—CUMULATIVE REMEDY.
Though a corporation is authorized by statute to forfeit shares of stock for nonpayment of calls made thereon, it can still enforce payment thereof by action against the registered owner of such shares at the time of the call; the remedy of forfeiture being merely cumulative.

5. SAME—EXCHANGE OF SHARES FOR PAID-UP SHARES—REMEDY OF OBJECTING STOCKHOLDER.
Where the directors, authorized by the stockholders of a corporation, resolved to issue paid certificates of preferred st ck on which $20 was paid in exchange for outstanding unpaid shares of preferred stock, and to place in the treasury of the company the remaining shares, the remedy of an objecting stockholder would be a suit to restrain consummation of such proceeding.

6. SAME — CALLS — EXTENSION OF TIME — EXCHANGE OF SHARES FOR PAID-UP SHARES—FORFEITURE OF FRANCHISE.
The directors of a corporation passed resolutions extending the time for payment of the first installment of a call on preferred shares, and directing an exchange of stock, whereby two shares of full-paid and nonassessable preferred stock should be exchanged for five shares of the preferred stock on which $20 would have been paid; thus leaving three-fifths of the preferred stock in the treasury, and two-fifths outstanding. *Held* to show no effort to reduce the capital stock of the corporation, by purchasing its stock or otherwise, so as to forfeit its franchise, and thus deprive it of the right to recover the debt incurred by a stockholder by a call on the preferred stock.

7. SAME—RECOVERY OF CALL—AFFIDAVIT OF DEFENSE—SUFFICIENCY.
In a suit by a corporation to recover an unpaid call on stock, an affidavit of defense alleging fraud in making the call, and that in order to carry out the fraud an assessment was levied, though unnecessary for any purpose of the company, but not alleging that the assessment was in excess of the directors' powers, or would be unnecessary if it were intended that the company should continue to prosecute its business, is insufficient.

8. SAME—AFFIDAVIT OF DEFENSE—SUFFICIENCY.
Under Rev. St. U. S. § 954, which requires United States courts to proceed to judgment according to the right of the cause, without regarding any defect in a declaration, except those which, in cases of demurrer, the party demurring specially set down, together with his demurrer, as the cause thereof, an affidavit of defense in an action by a corporation to recover a call on stock, stating that the statement of claim shows no cause of action, and is insufficient to justify a verdict or judgment, amounts, at most, to a general demurrer, and is insufficient to bar the cause of action.

9. SAME—DECLARATION—SUFFICIENCY.
A statement of claim alleged that defendant was the registered owner of a certain amount of stock in plaintiff corporation, and that by virtue of a call, notice, and demand thereon, which were set forth, defendant became liable to pay a specified amount. No agreement by defendant to pay the call in question was alleged, nor was the plaintiff's certificate of incorporation made part of the declaration. Defendant was not alleged to be the holder of the stock at the time when the call became due and payable. *Held*, that the declaration was sufficient.

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10. SAME—DEFENSE—IRREGULARITY OF ORGANIZATION.
The owner of stock in an acting corporation cannot defend himself in an action to recover calls made on such stock by alleging irregularity of the corporation's organization.

11. SAME—DECLARATION—AMENDMENT.
Under Rev. St. U. S. § 954, which requires United States' courts to give judgment without regarding defects in a declaration, except those which, in cases of demurrer, the party demurring specially set down together with his demurrer, as the cause thereof, a statement of claim in an action by a corporation to recover unpaid calls on stock may be amended by an allegation that the balance remaining due on the stock after the first installment thereon had been paid has not since been paid.

12. SAME—AFFIDAVIT OF DEFENSE—AMENDMENT.
Where an amendment of a statement of claim has been allowed, a supplemental affidavit of defense, confined to the subject-matter of such amendment, will also be allowed.

Burr, Brown & Lloyd, for plaintiff.
F. B. Bracken, for defendant.

DALLAS, Circuit Judge. This is an action upon a call made by the board of directors of the plaintiff corporation on the holders of its preferred stock of record on September 16, 1901. It has been heard upon plaintiff's rule sec. reg. for judgment for want of a sufficient affidavit of defense. The plaintiff's statement of claim alleges that on September 16, 1901, the defendant was the holder of 5,100 shares of the said preferred stock, which were duly registered, and stood in his name upon the books of the company; and it avers that by reason thereof, and by force and virtue of the call, notice, and demand set forth, the defendant became, and then was, liable to pay the plaintiff the sum of $12,750 on November 11, 1901; being $2.50 per share due upon that date under the terms of said call as modified by resolution of September 25, 1901. The affidavit of defense first filed, which is somewhat voluminous, need not be here set forth at length, nor even summarized; for defendant's counsel has clearly defined the questions intended to be raised by it, and, as the counsel for plaintiff has conceded that those questions are adequately presented for decision, the attention of the court may well be confined to their consideration.

The defendant, as the registered owner of preferred stock of the corporation plaintiff when the call sued on was made, was liable thereon, though he had made no express promise to pay. Webster v. Upton, 91 U. S. 66, 23 L. Ed. 384. The duty which before call pertains to such ownership is inchoate and indefinite, but, upon call made and notified, the owner, by reason of that pre-existing duty, becomes charged with a definitive debt,—a sum fixed and certain, which he is absolutely bound to liquidate. The learned counsel of the defendant has urged upon my attention the case of Braddock v. Railroad Co., 45 N. J. Law, 363, where it is said that "a call is nothing more than an official declaration that the sums subscribed are to be paid"; but by this, I think, is meant—what is obviously true—that a call cannot be creative of the pre-existing duty to which I have referred, and which in Webster v. Upton, supra, is defined as "the legal duty of paying all legitimate calls made during the

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continuance of the ownership." It does not mean that one who is a stockholder—not by subscription, but by assignment—becomes, by reason of his legal duty to pay all calls when and as made, an actual debtor of the company from and at the time he acquires his shares, even though no call whatever be in fact made during the continuance of his ownership. To my mind, such a proposition would appear to be manifestly unsound, and careful reading of the entire opinion of the New Jersey court has satisfied me that it had no thought of affirming it. The general rule that the indebtedness which is established by a call is that of the persons who at that time are recognized on the company's register as the owners of its stock is not rendered inapplicable to the present case, either by any peculiarity of this particular call, or by reason of the fact that, after the call had been made, the defendant's shares were transferred on the books of the corporation to a purchaser to whom he had previously sold them. The statement of claim alleges the call in accordance with what seems to me to be its clear legal effect,—as being "a call for $10 per share on the holders of the preferred stock of the plaintiff company of record on September 16, 1901"; and, inasmuch as the defendant was then of record as such holder, I see no reason to doubt that he was bound by it. He was not, it is true, required to pay, except in installments to mature at later dates, but his position as a debtor was then finally fixed. Was it shifted to the transferee by the transfer which subsequently, but before any part of the sum called became payable, was made on the books of the company? I think not. Whatever right, if any, the transferror might have as against the transferee, the responsibility of the former to the corporation itself was one arising out of a duty imposed by the law; and therefore, even if it be assumed that the company's assent to the transfer was given with intent to discharge him, and by one having full authority to do so on its behalf, yet it may well be doubted whether such assent could in any case have the effect of releasing a particular stockholder from the common obligation of each of them to contribute to make good the subscribed capital, for the benefit of the general body of stockholders as well as of the corporation's creditors, if any. Burke v. Smith, 16 Wall. 394, 21 L. Ed. 361. But there is nothing to warrant the supposition that, in permitting the transfer in this instance, it was intended to discharge the defendant from his then positively incurred indebtedness. The existence of such intent is certainly not a necessary inference from the conduct of the company, and it cannot be implied upon mere conjecture, however plausible. In Hood v. McNaughton, 54 N. J. Law, 428, 24 Atl. 497, "a distinction is drawn between one who holds his stock by transfer and the original subscriber. The former may, in the absence of any fraudulent purpose, discharge himself from liability for unpaid installments by due transfer of his shares, while the latter cannot obtain immunity in that way." But the installments which are here referred to are not installments payable on a call previously made, but the uncalled installments of the balance due on the original subscription, which a stockholder by assignment is under the legal duty of paying if called for "during

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the continuance of his ownership." The correctness of this understanding is plainly shown by the employment of the same word ("installment") a few lines below in the opinion, where it is said that the subscription constitutes "a contract between the subscriber and the company, by which the subscriber engages to pay the remaining installment [i. e., the balance due on his subscription] on demand by the corporation." It is this duty of paying "the remaining installment" on demand which devolves upon a stockholder by transfer, and, as that duty attaches to any call made during the continuance of his ownership, his consequent liability becomes fixed when a call is made, and, when so fixed, cannot be discharged by any subsequent disposition which he may make of his shares, even if accompanied or followed by transfer. Whether the corporation's auxiliary right to forfeit and sell these shares was lost or waived by its acquiescence in the change made in their ownership is unimportant; for neither the obligation to pay, nor the personality of the obligor, would be affected or altered by the obligee's relinquishment of one of the means provided for securing the debt and facilitating its collection. The statutory provision for forfeiture affords a cumulative, not an exclusive, remedy. The law to this effect is well stated, and in accordance with at least the great weight of authority, in Cook, Corp. § 124, as follows:

"Frequently, when a corporation is authorized by statute to forfeit shares for nonpayment of the subscription, the question arises whether the statutory remedy of forfeiture is exclusive, thereby preventing a resort to the common-law remedy of an action of assumpsit on the contract. It is the well-established rule that it does not. A grant of the power to declare a forfeiture of the shares of a subscriber for nonpayment of calls does not, by implication, deprive the corporation of its option of remedies; and the corporation may, in its discretion, upon the failure of the subscriber to pay for his stock, either proceed against him by suit to collect the unpaid calls, or may forfeit his shares of stock. The corporation, by such a statute, is given its choice of remedies, and may pursue either. The remedy by forfeiture is additional. In legal language, the remedy by forfeiture is cumulative."

For the reasons which have been indicated, I hold that the defendant was liable upon the call in question (if valid), notwithstanding his sale of his stock and its transfer on the books of the company as alleged by him, and that such liability is enforceable by action, although the New Jersey statute authorized the sale, when ordered by the board of directors, of such number of the shares of a delinquent owner as will pay all assessments then due. But the validity of the call is denied upon two grounds, and these will now be separately considered.

1. It is contended that "by virtue of the resolutions of September 25th, passed by directors of plaintiff company, and approved by the stockholders October 30, 1901, as stated in the affidavit of defense, the terms of the call sued upon were radically changed, and the said resolutions are of such a character as to relieve the defendant from liability." No authority has been cited as sustaining this proposition, and the very ingenious argument which has been submitted in its support has not convinced me that it should be accepted.

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The resolutions upon which it is based are set out or mentioned in the affidavit of defense as follows:

"'Resolved, that payment of the first installment, of $2.50 per share, payable October 21st, 1901, be, and the same is hereby, extended to November 11th, 1901. Resolved, that it is the judgment of this board that the best interest of the stockholders will be served by the exchange of two shares of the preferred stock of this company, full paid and nonassessable, for five shares of the preferred stock of this company, on which twenty dollars ($20) shall have been paid, after which exchange there will remain in the treasury of the company three-fifths of the preferred capital stock, amounting to seventy-two thousand (72,000) shares, leaving outstanding forty-eight thousand (48,000) shares of the full-paid preferred stock, of the par value of fifty dollars ($50) per share. Resolved, that a special meeting of the stockholders of the American Alkali Company be called and held at the registered office of the company, 417–19 Market street, in the city and county of Camden, in the state of New Jersey, on Wednesday, October 30th, 1901, at twelve o'clock noon, for the purpose of authorizing the exchange of full-paid preferred shares as set forth in the foregoing resolution, the election of a board of directors, and for such other business as may come before the meeting.' And at a special meeting of the stockholders of said company held in pursuance of the last above recited resolutions at said company's office, in the city of Camden, state of New Jersey, on October 30, 1901, a resolution was adopted authorizing the exchange of full-paid preferred shares as set forth in the resolution last above recited."

If it were true, as is contended for defendant, that the effect of these resolutions, if acted upon, would be to reduce the capital stock of the company, it would not follow that the defendant's liability upon the call which had been previously made would be thereby annulled. The procedure proposed was not only recommended by the judgment of the board of directors, but was expressly authorized by the stockholders themselves; and, if they were without lawful power to confer such authority, the obvious remedy of an objecting stockholder would be by suit in equity to restrain the consummation of the scheme. Neither its proposal nor adoption would dissolve the corporation. If carried into effect, a forfeiture of the corporation's franchise to exist and to conduct its legitimate business would not result, and therefore its right to sue for the recovery of debts due to it, including those created by calls upon its stockholders, would not be lost. But I cannot perceive that these resolutions did in fact contemplate or produce a reduction of the capital stock of the company. They merely authorized the directors to issue full-paid certificates to the extent which the payments made would justify, and thereupon not to cancel, but to place in the treasury of the company, the remaining shares. "Hence this was not even an effort to reduce the capital stock of the company by purchasing its stock or otherwise. But if it had been intended as a purchase of its own shares, there are numerous cases which hold that a corporation may do so, and violate no duty to the stockholders unless prohibited by its charter." Chetlain v. Insurance Co., 86 Ill. 220.

2. In the brief submitted for defendant it is said that "it is not contended that mere mismanagement in the affairs of a company, or even fraud in its management, constitutes a defense to an action for calls on stock; but in this case the allegations in the affidavit

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go much further, and charge fraud in the making of the call itself." Substantially, then, what the defendant alleges is that a fraud was practiced upon him and other holders of the preferred stock by the directors of the company, in making this call, and that, in order to carry out a fraudulent scheme, the assessment was levied, although unnecessary for any purpose of the company. But it is not alleged that the assessment was in excess of the powers of the directors, nor that it would be unnecessary if it were intended that the company should continue to prosecute its business. Consequently the following observations of Mr. Justice Field in Oglesby v. Attrill, 105 U. S. 609, 26 L. Ed. 1186, are directly applicable, and seem to be conclusive against the sufficiency of this particular defense. He said:

"As to the wisdom of an assessment, or its necessity at the time, or the motives which prompt it, the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised. They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful."

This authoritative statement of the law, although it does preclude stockholders from setting up a fraudulent motive in levying an assessment as a defense to an action at law brought for its recovery, does not leave them wholly without remedy; for they are, upon plain equitable principles, entitled to the assistance of a court of chancery "by decree compelling the directors to wind up the company's business and distribute the assets among those who are entitled to them, unless they can be lawfully used for other business purposes allowed by the charter." Benedict v. Construction Co., 49 N. J. Eq. 23, 23 Atl. 485.

The affidavit of defense originally filed, after presenting the several defenses which have been considered as in bar of the cause of action as set forth in the declaration, contains this final paragraph:

"Defendant further avers that he is advised and believes that the facts alleged in plaintiff's statement of claim filed in this case do not show any cause of action against the defendant, and are not sufficient to justify the finding of a verdict or the entry of a judgment against the defendant for the amount of the claim in this suit, or any part thereof."

The utmost that can possibly be said for this averment is that it amounts to a general demurrer; but the courts of the United States are required, in all civil cases, to proceed and give judgment according to the right of the cause, without regarding any defect in a declaration, except those which in cases of demurrer the party demurring specially sets down, together with his demurrer, as the cause thereof. Rev. St. § 954. If, however, the court were at liberty and inclined to disregard this statutory mandate, it would not, I think, be justified in refusing the judgment now asked for by reason of any of the objections to the statement of claim which have been relied on in argument. It is by no means clear to me that it does not sufficiently allege that the balance remaining due upon the original subscription to the preferred stock after the first installment of $10 thereon had been paid has not since been paid,

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but, in abundance of caution, the plaintiff will be allowed to amend in this particular. Id. I am of opinion that it is not necessary that the statement of claim should set out any provision of the laws of the state of New Jersey further or otherwise than it already does; that an agreement by the defendant to pay the call in question need not be either alleged or proved; that it is not essential to the plaintiff's right of action that it should appear that the defendant was a holder of stock at the time when the call became due and payable, and that it was not incumbent upon the plaintiff to make the entire certificate of its incorporation a part of the declaration.

The brief of the defendant includes no point especially founded upon the supplemental affidavit of defense. That affidavit, however, I have carefully examined, and I understand its purpose to be to show that the organization of the plaintiff company was irregular, and that its certificate of incorporation is defective. Whether or not it does show this, I do not feel called upon to determine, inasmuch as "it is settled by the decisions of the courts of the United States and by the decisions of many of the state courts, that one who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging irregularity of its organization. * * * The same principle applies to the case of a subscription to the capital stock in an organization which has attempted irregularly to create itself into a corporation, and has acted as such." Chubb v. Upton, 95 U. S. 667, 24 L. Ed. 523.

The plaintiff is allowed to amend its statement of claim by inserting therein an allegation that the balance remaining due upon its preferred shares of stock after the first installment of $10 thereon had been paid has not since been paid, and leave is granted to the defendant to file within 15 days after notice of such amendment a further supplemental affidavit of defense, which, however, must be confined to the subject-matter of said amendment; and, if no affidavit be filed in pursuance of the leave hereby granted, the plaintiff's present rule for judgment for want of a sufficient affidavit of defense will be made absolute.

CENTRAL R. & BANKING CO. OF GEORGIA v. FARMERS' LOAN & TRUST CO. OF NEW YORK et al.

(Circuit Court, D. South Carolina. February 1, 1902.)

RECEIVER'S ACCOUNTS—MUTUAL CLAIMS.

For a system of railroads, at the head of which was the C. Co., and among which was the P. Co., the federal court for Georgia appointed H. receiver; and, the greater part of the P. road being in South Carolina, the federal court therefor, in ancillary proceedings, confirmed and recognized the appointment of H. as receiver of the P. road. Thereafter the federal court for Georgia dismissed the bill so far as it related to the P. road, and discharged such road from the custody of the receiver; and the federal court for South Carolina thereupon, by order contemplating that H. should account before the federal court for Georgia, adopted its decree of discharge. Thereafter A. was appointed receiver

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for the P. road by the state court of South Carolina. *Held* that, as against claim of A. and his successor in interest for amount due the P. road by H. as such receiver, there could be set off claims against A., as receiver of the P. road, for supplies afterwards furnished him by H. and his successors, the receivers of the C. Co.

In Equity.

Smythe, Lee & Frost, for petitioners.
Lawton & Cunningham and Mitchell & Smith, for respondents.

SIMONTON, Circuit Judge. This case now comes up on a report of the special master upon the accounts of H. M. Comer, late the receiver of the Port Royal & Augusta Railway Company. Very much testimony has been taken. The report is very voluminous. The papers in the original report were in a confused condition,—a confusion removed in some measure by a second report, after recommittal of the original report. In order to reach a conclusion, a statement of facts in detail is needed.

The Central Railroad & Banking Company, a corporation of the state of Georgia, was in control of an extensive system of railroads within and outside of the state of Georgia. All of these roads were tributary to the center of the system, the Central Railroad & Banking Company, and were conducted in its interests. The accounts of the whole system—of each road in the system—were kept at Savannah in the office of the Central Railroad & Banking Company, and by its agents. Some of these tributary roads were owned by the Central Railroad & Banking Company, and others were under its control and domination by reason of its ownership of stock therein and of bonds having voting power. Among the roads of this latter class were the Port Royal & Western Carolina Railroad and the Port Royal & Augusta Railway, each of which had a terminus in the state of Georgia, the greater portion of each being in South Carolina. Both companies were incorporated in each of these states. On the 1st day of July, 1892, under proceedings in the circuit court of the United States for the Southern district of Georgia, in a cause entitled "The Central Railroad & Banking Company against the Farmers' Loan & Trust Company," the whole of the system of the complainant was placed in the hands of H. M. Comer, as receiver, with a view to preserve the integrity of the system. To these proceedings the two Port Royal corporations were made parties. As the greater part of these two railroads were within the district of South Carolina, ancillary proceedings were instituted in this court for the purpose of facilitating the control of the receiver appointed in the court in Georgia, and the appointment of H. M. Comer as receiver was recognized and confirmed in this court. The whole system had been conducted as a unit, and the administration of H. M. Comer was upon the same line and was governed by the same purpose. As was said by this court, when the order appointing Comer receiver was filed here, it put him in the place of and with the same powers that the Central Railroad & Banking Company had. On the ——— day of ———, 1893, the circuit court of the United States for the Southern district of Georgia dismissed so much of the original bill as related to the Port Royal & Western Carolina Railway and the Port Royal

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& Augusta Railway, and discharged and released from the custody of H. M. Comer, receiver, these two corporations. So soon as this court received official information of this action on the part of the court of original jurisdiction, it adopted and confirmed its decree, and, as that court had done, ordered Comer, receiver, to turn over to the Port Royal & Augusta Railway Company all the property and effects of said company in his hands as receiver. In the meantime certain proceedings were had in the court of common pleas for Aiken county, in the state of South Carolina, by King et al. against the Port Royal & Augusta Railway Company, wherein John H. Averill was appointed receiver. This cause was removed into this court, and Mr. Averill was recognized as receiver. This, however, was subsequent to the discharge of H. M. Comer, and after the order adopting the action of the Georgia court. So Mr. Averill was not the successor of H. M. Comer in the sense of one substituted in his stead, but he occupied his place as receiver under wholly different authority. He was the appointee of a state court, and when the cause was removed into this court, coming over in the same plight as it left the state court, Mr. Averill's receivership came with it. Duncan v. Gegan, 101 U. S. 810, 25 L. Ed. 875; Hinckley v. Railroad Co., 100 U. S. 153, 25 L. Ed. 591. The order of this court confirming the action of the circuit court for the Southern district of Georgia, discharging Mr. Comer from his receivership of the Port Royal & Augusta Railway, instructed him when his accounts as such receiver had been rendered to the circuit court of the United States for the Southern district of Georgia, and had been approved by said court, he must file a certified copy thereof with the clerk of this court. The record does not show whether this was done. But in June, 1893, J. H. Averill, receiver, filed his petition in this court, stating that Mr. Comer, as receiver, had not turned over any money or property to him, and praying that he be made to account. Whereupon an order was entered in July following, requiring Mr. Comer to account for his actings and doings as receiver of the Port Royal & Augusta Railway. The order of this court terminating the receivership of Mr. Comer, above referred to, contemplated that he should account before the circuit court of the United States for the Southern district of Georgia for his actings and doings as receiver of the Port Royal & Augusta Railway, and that on such accounting a certified copy thereof should be filed in this court. This proceeded upon the theory that this special receivership was a part of the receivership of the entire system, and so its accounting should be had at the court of original jurisdiction. Inasmuch, however, as no evidence of such accounting as contemplated in the order appeared, this order of July, 1893, was made. An account having been filed, and finally corrected by Mr. Comer, receiver, under that order, it was referred to D. B. Gilliland, Esq., as special master, and his report thereon will be considered hereafter.

The proceedings in the matter of the Central Railroad & Banking Company, in the circuit court of the United States for the Southern district of Georgia, culminated in an order of foreclosure and sale of all the property and assets of every kind of that great system, and Ryan and Thomas became the purchasers. Ryan and Thomas there-

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upon filed their petition in that court stating that the purchase was made by them pursuant to a plan formed between them and divers of the mortgagees, lessees, and other creditors of the Central Railroad & Banking Company looking to the formation of a new company; that they were also owners of a large number of securities formerly of the Railroad & Banking Company; that all the accounts of the receivership had been to a large extent wound up, though there were still in existence many claims whose collection would involve litigation and delay. They asked to be put in possession of all the assets of the receivership, they assuming all its outstanding obligations. On 5th February, 1896, the circuit court of the United States for the Southern district of Georgia granted the prayer of the petition, and directed the receivers to carry it out, subject to the outstanding obligations. The company referred to in this petition of Ryan and Thomas was formed under the name of the Central Railroad of Georgia. To it Ryan and Thomas conveyed all the railroad property and all the assets of the receivership, excluding therefrom any claim against the Port Royal & Western Carolina Railway and the Port Royal & Augusta Railway. Thus, the entire interest of the Central Railroad & Banking Company in these two South Carolina roads remained in Ryan and Thomas, subject, of course, to the condition of the order that they assume the obligations of the receivership as to them.

As has been seen, the Port Royal & Western Carolina Railroad was placed in the hands of Mr. Comer as receiver by the circuit court in Georgia. In May, 1893, an order was entered in this court appointing John B. Cleveland as receiver, not as successor to Comer, but as an original appointment; the court carefully drawing the distinction between Comer's position and his. Finally, under decrees for foreclosure, the property was sold November 20, 1895, to Thomas and Ryan as purchasers, who afterwards procured the incorporation of the Charleston & Western Carolina Railroad Company, and transferred to it the property purchased. After their purchase of the Port Royal & Western Carolina Railway, Ryan and Thomas presented their petition on 6th November, 1896, to the court, showing that they held certain preferential claims against the receivership of that road, assigned to them by the receivers of the Central Railroad & Banking Company, and offering to receive in full of their claim all the choses in action, etc., of the receivership, agreeing to pay all of its liabilities. This petition was granted, and the transfer made on this condition. On 2d February, 1899, mutual releases were executed between Thomas and Ryan and the Charleston & Western Carolina Railway of this claim, and of all others of every kind.

On 1st September, 1896, the mortgages upon the Port Royal & Augusta Railroad Company were foreclosed, and the property covered by them sold. At that sale Thomas and Ryan became the highest bidders, and they transferred their bid to the Charleston & Western Carolina Railway. The conveyance was made to this company by the master. Afterward, upon its petition, all the choses in action and property of that description held by the receivers were transferred to the Charleston & Western Carolina Railway Company, it assuming all the claims against and obligations of the re-

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ceiver. Being thus possessed of all the rights of Receiver Averill in the choses in action and accounts of the Port Royal & Augusta Railway, the Charleston & Western Carolina Railway Company intervened in this suit, and claim all the results of the accounting of Comer, receiver.

This leads to a discussion of the account filed by him in this court. This account, as finally presented, is as follows:

H. M. Comer, Receiver, to Port Royal and Augusta Railway Company, Dr.

To earnings of road from July 1, 1892, to April 25, 1893	$236,968 97	
Less amounts due by agents and C. & S. R. R., statement attached	1,920 61	
		$235,048 36
By operating expenses, July 1, 1892, to April 25, 1893	$215,669 98	
By rails laid, as per statement attached	9,210 05	
		224,880 03
		$ 10,168 33
To sundry bills due receiver, as per statement attached		21.085 70
To amount due H. M. Comer, receiver		$ 10,917 37

The items $235,048.56 and $215,669.98 are not disputed. The items of credit $9,210.05 and $21,085.70 are in controversy.

By a memorandum made by the master, at a reference held in Savannah, 24th November, 1893, in the presence of counsel, it is stated that "no question is made as to the actual amounts which have been charged up, subject, however, to their [right of counsel] right to make any legal objections to the impropriety of the charges having been made or to the mode of prorating adopted by the Central Railroad and Banking Company." It is impossible to learn from the record to what this memorandum refers. So far as one can conclude from the trend of the argument, it does not apply to the item $9,210.05, and possibly, but not certainly, may apply to the item $21,085.70.

The vouchers for the item $9,210.05 are as follows:

Port Royal & Augusta Railway, to H. M. Comer, Receiver, Dr.

To 214,406 ft., 1,435.75 tons, secondhand 45 lb. iron, at $21.00 per ton, including fastenings, laid on main stem Port Royal and Augusta Ry.	$30,150 75
To 13,894 ft., 111.65 tons, secondhand 54 lb. steel, laid between 52 and 53 M. P., and "Y" at Yemassee, at $25.00 per ton, including fastenings	2,791 25
To 9,600 ft., 77.14 tons, secondhand 54 lb. steel, laid in cotton yard, Augusta, at $25.00 per ton, including fastenings	1,928 50
	$34.870 50

Contra.

By 1,383.38 tons scrap rail, at $18.23 7/10	$25,228 73	
By 41.260–2,240 tons frogs	431 72	
		25,660 45
Balance due H. M. Comer, receiver		$ 9,210 05

The vouchers for the other items will be discussed hereafter.

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The master was instructed to report the testimony. All legal questions were thus reserved to be made before the court. When the report of the master came on to be heard in February, 1900, it was recommitted to him, with instructions to ascertain: (1) When the rails for which Mr. Comer seeks credit were furnished, during, before, or after his receivership. (2) Were they laid on the track and property of the Port Royal & Augusta Railway Company? (3) How were they obtained? Were they furnished by the Port Royal & Western Carolina Railway Company and by the Central Railroad & Banking Company of Georgia, and charged against the Port Royal & Augusta Railway Company as a debt of the latter company, as the account in the receiver's report would indicate? or were they procured by the receiver from these companies, and paid for out of net earnings of his receivership or otherwise? (4) What is meant by "net earnings" in the vouchers of the receiver? Does the term mean only the balance on this particular account? or is it the result of all the operation of the railway, after a deduction of all expenditures, for every purpose, from the gross amount earned?

1. The testimony submitted by the special master in response to these questions has been carefully examined. It is impossible to escape the conclusion that the rails for which Mr. Comer seeks credit were furnished during his receivership.

2. The items $30,150.75 and $2,791.25 are for rails laid on the main stem of the Port Royal & Augusta Railway. The item $1,928.50 was for rails laid down in the yard at Augusta upon land the property of this railway company. The rails so laid down were used by the Central Railroad & Banking Company, and by the two Port Royal Railroads, all of these roads being then under the control and management of H. M. Comer, the receiver of the system to which all of the roads belonged, which control and management was under the domination of the system and for its interest.

3. The rails so laid down on the Port Royal & Augusta Railway were furnished by Comer, receiver of the Port Royal & Western Carolina Railway, to himself as receiver of the Port Royal & Augusta Railway, charged against the receivership of the latter road, and credited to the receivership of the former road; these renewals of rails being an incident in the management of the system under the control of Comer, the charges and the credits having been made on the books of the receivership of the Central Railroad & Banking Company. The receiver had authority to do this in the interests of the property in his charge. Cowdrey v. Railroad Co., 1 Woods, 336, Fed. Cas. No. 3,293. Testimony has been introduced tending to show that the iron was charged at an unreasonable price. The account was filed in 1894. The testimony was taken as late as April 23, 1901. At this late day the principal party is dead, and the chief witnesses either dead or removed to parts unknown, and cannot be here and speak to or explain the transaction. So many years having passed when the matter could have been and was not brought up, the ends of justice will best be served in accepting the statement of the account.

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4. The item for rails in the yard at Augusta should also be allowed. They were laid upon the property of the Port Royal & Augusta Railway, and passed with this property to the purchaser. It is true that the track so laid was used by other roads in the same system. Such use during the receivership of course was the result of the domination of the system, and in accordance with the purpose of the receivership, the preservation of the integrity of the system. Its use during the receivership of Mr. Averill, if against his wishes, could have been prevented or paid for.

These items having been allowed, there remains a balance of $10,168.33 to be accounted for. He seeks to reduce this balance by sundry bills for items due by Averill, receiver, to the receivership of the Central Railroad & Banking Company. The itemized statement in evidence begins with bills sent on 12th June, 1893, with a list following of subsequent dates, up to and including April, 1894. Comer ceased to be receiver of the Port Royal & Augusta Railway, April 24, 1893, and all the items were for repairs, supplies, and prorates furnished by or due to the receivership of the Central Railroad & Banking Company.

The petitioner, the Charleston & Western Carolina Railway Company, stands in the shoes of J. H. Averill, receiver, and is bound by all the equities which bound him. The case must be treated as if Mr. Averill, receiver, was the party seeking relief. If, therefore, Averill, as receiver of the Port Royal & Augusta Railway, demanding the balance of account from Comer, appointed ancillary receiver of the same railway, in proceedings connected with the system of the Central Railroad & Banking Company, and wholly distinct from those under which he held his appointment, is met by a statement of an account between him as receiver and the receivers of the system of the Central Railroad & Banking Company, could this be allowed to discharge such balance? It is important to understand exactly the position of Comer, receiver. He was appointed upon the bill of the Central Railroad & Banking Company, receiver of the entire system conducted under that name, including its subsidiary and controlled roads, among these the Port Royal & Augusta Railway. The bill was filed to preserve the integrity of the system of which the complainant was the center and exponent. Having been appointed with this purpose, ancillary bills were filed in this jurisdiction, and his appointment was recognized and confirmed. The order of this court was passed out of comity with the circuit court of the United States for the Southern district of Georgia, carrying out its purposes and accomplishing its ends. Comer was treated as the representative of the system, and was put in the place of, and with the same powers as, the Central Railroad & Banking Company. So complete was this representation, and so manifest the sole purpose of the recognition of Mr. Comer as head of the system, that when the court of original jurisdiction reversed its action, revoked so much of Mr. Comer's appointment as put the Port Royal & Augusta Railway as a part of his receivership, dissociated that railway from the system, and directed Comer to surrender the property to the company, this court, upon official

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notice of that action, at once adopted and enforced it. This is the language of this court:

"It is ordered and adjudged that the prayer of said petitioner be granted so far as to discharge and release from the possession of this court and its receiver in the above-entitled cause the Port Royal & Augusta Railway, and all property and effects of the Port Royal & Augusta Railway Company; and it is further ordered and adjudged that H. M. Comer, Esq., receiver, do forthwith turn over to the Port Royal & Augusta Railway Company all the property and effects of said company in his custody as receiver, and that as receiver of the Port Royal & Augusta Railway Company, its property and assets, the said H. M. Comer be, and he is hereby, discharged."

More than this, in discharging him this court further ordered:

"That when the accounts of said Comer, as receiver, of his operation and management of the Port Royal & Augusta Railway Company, during the period he has held possession of the same, shall be rendered to the circuit court of the Southern district of Georgia, the court of primary jurisdiction, and shall have been approved, a certified copy thereof must be filed by him with the clerk of this court."

So that, while Comer was recognized and confirmed as receiver in this jurisdiction, it was because he was discharging his functions as receiver of the whole system of the Central Railroad & Banking Company and its associated and dependent roads to which he had been appointed by the court in Georgia. And this view is emphasized by the fact that he was instructed by this court to render his accounts as receiver of the Port Royal & Augusta Railway to the court of original jurisdiction, filing in this court a certified copy thereof after approval in that court. This is in accord with the practice of the federal courts in cases of ancillary receiverships. Beach, in his work on Federal Procedure, discussing the matter of ancillary receiverships (at section 617), says:

"In such cases an ancillary bill is filed in each of the courts of ancillary jurisdiction, and an order entered confirming the original appointment of the receiver, recognizing the court in which the first bill was filed as having primary jurisdiction over all the property and assets of the defendant railroad company, wherever situated."

In Ames v. Railroad Co. (C. C.) 60 Fed. 966:

"The receivers of a railroad system must report to and be governed by the circuit court sitting in the district of their original appointment in all matters relating to their general management of the trust, their general accounting, and the general operation of the road within the circuit."

The same principle was followed in Clyde v. Railroad Co. (C. C.) 56 Fed. 539; Ex parte Powell, Id. And it is stated to be the general law as to insolvent corporations in Smith v. Taggart, 30 C. C. A. 563, 87 Fed. 94. The conclusion drawn from all the cases is that it is the duty of an ancillary receiver, after paying the expenses of his receivership, to account with and remit to the receivers in the original jurisdiction all funds and assets in his hands. This being so, the balance in the hands of Comer, receiver of the Port Royal & Augusta Railway Company, was property of the receivership in the original jurisdiction, to be accounted for by it. It is true that the circuit court of the United States for the Southern district of Georgia reversed its action with regard to the Port Royal & Augusta Railway, and held that it was without jurisdiction. But Comer,

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appointed receiver under the original order, was, at all events, receiver de facto. Ralls Co. v. Douglass, 105 U. S. 730, 26 L. Ed. 957. This action of the Georgia court could not be reversed by this court. On the contrary, it was entitled to all respect, and the recognition and affirmance of that order by this court clothed Comer with all the powers, and subjected him to all the duties, of ancillary receiver.

After Mr. Averill became the receiver of the Port Royal & Augusta Railway in the case of King et al. against that corporation, under the appointment of the state court, and so recognized after the removal of the cause into this court, he kept up for a time the same friendly relations which had existed between his road and the system of the Central Railroad & Banking Company, conducted by its receivership. He had his traffic arrangements with it, got supplies from it, had his repairs made in its shops, and so incurred the bill now presented. So, when he seeks to obtain the balance he claims as the result of the ancillary receivership of Comer,—a balance, as we have seen, properly distributable in the court of original jurisdiction,—he is met by this counterclaim or offset of the receivership of the system. Admitting the balance, it claims that it has been extinguished by subsequent transactions which occurred between the date of the account and the period of the accounting. It is true that this offset is made out in the names of Comer and Hayes, receivers. But this does not affect it. A receivership is a continuing condition analogous to a corporation sole. The claim belongs to the receivership, not to the person of the receiver. McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796; Association v. Alderson, 39 C. C. A. 609, 99 Fed. 494. In my opinion, the account set up, due to the general receivership of the Central Railroad & Banking Company system, is good as against this balance in the hands of the ancillary receiver.

At the hearing a number of tax receipts, showing payment of taxes on the Port Royal & Augusta Railway for the year 1892, were presented. They are all in the name of the Central Railroad & Banking Company of Georgia. These items of taxation are not mentioned in any account filed, nor is the court in possession of sufficient information with regard to them. It would appear that these items had already been credited in the receiver's accounts, by anticipation as it were, although the actual payments were made afterward; that is to say, the total amount of tax to be paid was divided between the months of the year, and each month was credited in its account with its proportion of tax. At the end of the year, when the taxes were payable, the actual payment was made. However, if counsel desire, this can be made a matter of reference.

Let an order be taken dismissing the intervention of the Charleston & Western Carolina Railway Company.

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GERMAN STATE BANK v. MINNEAPOLIS, ST. P. & S. STE. M. RY. CO.

(Circuit Court, D. Minnesota, Fourth Division. September 18, 1901.)

1. RAILROADS—CARRIAGE OF MAIL—NEGLIGENCE—LOSS OF PACKAGE—LIABILITY.
A railroad carrying mail for the government owes no duty to the addressee of a package rendering the railroad liable for the loss of the same through its negligence.

2. SAME—DEGREE OF CARE.
Conceding that a railroad may be held liable by the addressee of a package for the loss of the same in the mail through the railroad's negligence, the degree of care required is only the reasonable care exacted of an ordinary bailee for hire.

3. SAME—COMPLAINT—ALLEGATION—SUFFICIENCY.
A complaint in an action against a railroad company alleged the mailing of a valuable package to complainant, and its carriage by the railroad company to its station, where it was alleged that the mail sack was delivered to defendant's station agent, whose duty it was to safely care for the mail sack during the night; that the agent left the station, and that a road master or foreman of the railroad entered the station, and with a false key opened the mail sack; and that such foreman had access to the office or room where the mail sack was deposited, and was permitted to go and come therefrom at will. *Held*, that the facts stated in the complaint failed to show a lack of ordinary care on the part of the railroad.

Action by the German State Bank against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment sustaining demurrer to the complaint, with leave to plaintiff to amend.

Dale & Allen and Geo. W. Brown (Henry Conlin, of counsel), for plaintiff.

Alfred H. Bright, for defendant.

LOCHREN, District Judge. This case is presented by demurrer to the complaint, which alleges, in substance, that on November 10, 1900, the Metropolitan Bank deposited in the United States mail at Minneapolis, in a prepaid and duly registered letter or package, addressed to the plaintiff at Harvey, N. D., the sum of $3,000 in currency, which therefore became the property of the plaintiff, who was then insured against the risks of the transportation of such money by the Bankers' Mutual Casualty Company of Des Moines, Iowa, under a policy of insurance, a copy of which is attached to the complaint. The mail sack containing said package was carried in a mail car in defendant's railroad from Minneapolis to Harvey under the exclusive control of postal clerks, who delivered said mail sack, duly locked, and containing said package, to defendant's night station agent at said Harvey, who was not an employé of the post-office department, and whose duty, on behalf of defendant, it was to safely care for and guard said mail sack and its contents during the night, and safely deliver the same to the postmaster at the Harvey post office, which was within 80 rods of the railway station. The night station agent deposited the mail sack in a room in the depot, and absented himself therefrom for a time, during which one Soule, a road master or foreman of defendant, entered the room, and with a key which he had caused to be made unlocked the mail sack, and took

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said package, and stole the money. The Bankers' Casualty Company, pursuant to its contract of insurance, has paid said sum of $3,000 to the plaintiff, who brings this suit for the benefit of the insurer.

1. The federal government has from the first assumed the absolute and exclusive control and performance of the postal service of the country under the express provision of the constitution authorizing congress to establish post offices and post roads. The function so exercised is governmental, as it is calculated to produce revenue, more or less as the policy of the government may dictate; and it is intended to minister to the general welfare by furnishing to all persons, and between all parts of the country, and reaching to other countries, means of communication as rapid and safe as can be devised, and protected by the safeguards provided by law. The government prescribes what matter shall be mailable, and the rates of postage, and the manner of payment of the same. These matters are regulated by law, and are not left open for negotiation or contract. No idea of contract has any place in the scheme. The government tolerates no competitor in the exercise of this function, but forbids under penalties the sending or carrying of sealed letters otherwise than in its mails. It permits, but does not compel, the sending of packages which may contain articles of value in its mails; but if a person avails himself of this permission the package enters the mail, and is entitled to the same care as any letter and no greater. The provision for registration applies equally to letters and other packages, and only aids in tracing their course and carriage. The government itself receives, handles, assorts, and carries the mails, and delivers the same as addressed. The postal officials, of whatever grade, and carriers, of whatever kind, are the servants of the government,—the hands which it employs in the performance of its functions. With the exceptions presently to be mentioned, I think it may be safely asserted that these servants are not in privity with, and owe no duty to, any one except the government, to whom their fidelity is sought to be assured by provisions of the postal laws, penal and otherwise. The exceptions are the cases where the duty of such servant, whether postmaster, clerk, or distributing carrier, requires him to assume to do an act personal to a known or designated individual,—such as receiving from him a letter or package to be placed in the mail,—in which case he would owe him the duty of using ordinary care to place it in the mail, or in the proper receptacle for mailing; or if such servant should receive through the mail a letter or package which it became his duty to deliver to the person addressed, he would owe that person the duty of using ordinary care in making safe and prompt delivery of the same. A railway company carrying the mails does not assume as to them any of the duties or responsibilities of a common carrier. No one but the government can require or receive such service, and the duties and responsibilities of such railway carrier of mails are measured by the terms of the contract, and by the provisions of the postal laws and regulations. The mails are not in the care, custody, or control of the railway company during the carriage, but under exclusive control of the railway postal

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clerks, in separate cars or compartments, fitted especially for that service. As to the safety of the persons of such clerks the railway company assumes the same duty which rests upon it respecting other persons lawfully being carried on its trains. But as to the mail itself it has no duty except what it owes the government, its employer. It has no notice or means of knowledge of the contents of mail sacks, nor as to who has sent or who is entitled to receive the letters or packages. It never was employed by such persons, has no privity with them, and owes to them, severally and personally, no duty whatever. Were it otherwise, then when, as often happens, cars are wrecked and burned, and the mail destroyed, as the result of negligence for which the railway company is in law responsible, so that recoveries against it are had for personal injuries, and for all destruction of luggage and merchandise, the courts would be burdened with actions to recover for the loss of valuable packages claimed to have been in the mail; affording such opportunity for fictitious claims as might speedily compel railways to refuse such hazardous employment. The fact that no such litigation has ever arisen is decisive against the claim that a railway company owes any duty to the sender or addressee or owner of the contents of any letter or package contained in the mails which can be made the basis of an action at law. As above stated, the law requires that all letters sent from place to place be sent by the mail. But there is no such requirement in respect to valuable packages, which may lawfully be sent through express companies, or by other responsible carriers. The postal service has become so efficient, speedy, and safe that, in view of its cheapness, many persons send valuable packages by post, taking the risk themselves, rather than pay more to responsible carriers, who make charges with some reference to the value of the article and consequent amount of the risk assumed.

2. But if it were conceded that under some circumstances an action of this kind can be maintained by the owner of a package lost from the mail against a railway carrier of the mail, no liability can arise under the facts stated in this complaint. If any privity can be imagined as existing between the railway carrier between distant places and the owner of a package in the closed mail sack, and that the railway company owes such package owner a duty to exercise care in the carriage of that especial package, it would not be that degree of care and of responsibility which rests upon a common carrier, but at most the reasonable care which an ordinary bailee for hire must exercise in respect to the article which is the subject of the bailment. There is in such case no responsibility if the article is stolen, even by a servant of the bailee, if the bailee has taken and caused to be taken reasonable care under the circumstances. Under the allegations of the complaint, and upon the theory of the concession suggested, the bailment would not cease until the mail sack containing the package was delivered at the post office at Harvey, which was within 80 rods of defendant's depot. It is alleged that the mail sack was delivered to defendant's night station agent, whose duty it was "to safely care for and guard said mail sack and its contents during the night." It must be in-

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ferred from this that the mail sack reached that depot too late in the night to be received at the post office before the following morning, and hence must be stored in the depot, as in a warehouse, for the night. There is no allegation that it was not put in a safe place in the depot, guarded by such sufficient locks as would be reasonable in such case. The only attempted allegation of negligence is that the night station agent, after receiving the mail sack, "did negligently leave said depot, and did absent himself therefrom for a period of time to this plaintiff unknown, and thereby defendant failed to safely keep and care for said mail sack and its contents." As I cannot hold that defendant's duty in respect to the mail sack under the circumstances required that the station agent should sit on the mail sack the balance of the night, and keep awake, I think the allegation just quoted fails to charge any negligence.

The remaining allegations are to the effect that one Soule, a road master or foreman of the defendant at Harvey, entered the depot, and with a false key opened the mail sack, and stole the package of money. The employment of Soule by the defendant, and the allegation that he had "access to the office or room where said mail sack was deposited, and was permitted to go and come therefrom at will," do not sustain any inference of lack of reasonable care. No facts are stated tending to show that defendant had any reason to regard Soule as other than honest and trustworthy; and the responsible character of his employment indicates that he was so regarded. The allegation that he had access to the room, and was "permitted to go and come therefrom at will," with defendant's knowledge, is too vague and indefinite, and requires too heavy a draft on the imagination, to lead me to regard it as a statement that Soule had, with defendant's knowledge and consent, such access or permission in the nighttime, or at any time other than when the occupations of his employment might properly direct him there.

The statement of the second ground of demurrer only specifies what may be a separate reason for sustaining the demurrer on the general ground.

The demurrer is sustained, with leave to the plaintiff to amend its complaint on or before the November rule day.

CORBITT v. PRESIDENT, ETC., OF FARMERS' BANK OF DELAWARE et al.

(Circuit Court, E. D. Virginia. February 13, 1902.)

1. REMOVAL OF CAUSES—NATURE OF CONTROVERSY.

An action by a trustee in bankruptcy to recover the amount of an alleged preference is not one arising solely by virtue of a state statute, and of which a court of equity would not otherwise have jurisdiction, but is properly maintainable in equity in a state or federal court, and, therefore, the diverse citizenship properly appearing, and the amount being sufficient, may be removed into the federal court.[1]

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[1] Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 479.

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2. SAME—DIVERSE CITIZENSHIP—NOMINAL PARTIES.
Defendant's counsel, in whose hands it is sought to attach money belonging to defendant, are not such necessary parties to an action by a trustee in bankruptcy to recover an alleged preference received by defendant as would prevent defendant from removing the cause to a federal court, where it is a citizen of a different state from plaintiff, notwithstanding that counsel are citizens of the same state.

McLemore & Corbitt, for complainant.
Heath & Heath, for defendants.

WADDILL, District Judge. The defendant, the Farmers' Bank of Delaware, in the West Norfolk Lumber Company involuntary bankruptcy proceedings, was by decree of the United States district court for the Eastern district of Virginia (112 Fed. 759) awarded certain moneys held by said court not to be a part of the bankrupt's estate, and as against which, in said court, the bankrupt's trustee could not assert any claim against the bank, by reason of an alleged preference said to have been received by the bank in its dealings with the bankrupt company. The bankrupt's trustee, the complainant, thereupon applied to the bankrupt court for leave to sue in some court of competent jurisdiction to recover the amount of the preference, and, upon leave being given, instituted this suit in equity in the court of law and chancery for the city of Norfolk to attach the money decreed by the court of bankruptcy to the defendant bank, in the hands of its attorneys, and also caused a copy of the attachment to be served upon the City National Bank of Norfolk, the registry of the United States district court, before the check issued by said court in favor of the defendant bank, and delivered to its attorneys, had been paid. The Bank of Delaware thereupon filed its petition for removal of said cause into this court, accompanied by proper bond, and the same was accordingly removed, and is now before this court upon a motion made by the complainant to remand to the state court.

The motion to remand herein is overruled, as it appears: First. That the requisite diversity of citizenship exists to entitle the removal. Second. That the amount involved is sufficient. Third. That the suit itself is not one arising solely by virtue of the statutes of Virginia, and of which a court of equity would not otherwise have jurisdiction. It is one properly maintainable in equity, in a state or federal court, and, the diverse citizenship properly appearing, and the amount being sufficient, it can be removed from the state into the federal court. Fourth. The defendants James E. Heath and James E. Heath, Jr., partners practicing law as Heath & Heath, the counsel for the Farmers' Bank of the State of Delaware, in whose hands it is sought to attach the money belonging to the bank, are not such necessary parties as would disentitle the bank to have the cause removed into the federal court because of the failure of the record to show that every party to one side of the litigation was a citizen of a different state from every party on the other side of the suit.

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THE JOHN H. STARIN.

(District Court, D. Connecticut. January 14, 1902.)

No. 1,308.

1. COLLISION—STEAMER AND ANCHORED VESSEL—EXCESSIVE SPEED IN HARBOR AT NIGHT.

The steamer John H. Starin, while passing down New Haven harbor about 11 o'clock at night, near the center of the channel, which was there 800 feet wide, and at a speed of 12 knots, came into collision with the anchored schooner Gurney and sunk her. *Held*, that the steamer was in fault for violation of the rule requiring her to keep to the right side of the channel, and because she was going at a dangerous speed, in view of the known fact that it was the custom of vessels to anchor in any part of the harbor, and that a number of vessels were then anchored therein, and further because, under the evidence, if she had kept a proper lookout she should have seen the schooner for a mile or more.

2. SAME—CONTRIBUTORY FAULT—PRESUMPTIONS.

Under the rule that, where the fault of one vessel for a collision is clearly established, she must establish the contributory fault of the other by evidence equally clear, and that every presumption will be indulged in favor of the latter, where there was evidence showing that a light was burning on an anchored schooner half an hour or less before she was struck and sunk by a passing steamer, which was clearly in fault, it will be presumed that such light was burning at the time of collision.

In Admiralty. Suit for collision.

Carpenter & Park, for libelants.

Henry G. Newton, Ward Church, and Harrison Hewitt, for claimant.

TOWNSEND, District Judge. At about a quarter before 11 on the night of October 18, 1900, the side wheel passenger steamboat John H. Starin, 200 feet long, while proceeding down New Haven harbor on her way to New York, struck the schooner Allan Gurney, 95 feet long, on the starboard side of her bow, and caused her to sink. The channel is about 800 feet wide at this point. The Starin was heading a little west of south, and going at full speed, about 12 knots an hour over the bottom, near the middle of the channel, in the usual course of the New York steamboats. The schooner was anchored in the usual anchorage ground for vessels in New Haven harbor, and was headed about northwest. That the Starin was in fault is clear from the testimony of her own witnesses. They assert that a dark cloud temporarily obscured the sky at about the time of the collision; that it was more difficult to see lights on vessels when thus going out of the harbor than when coming in. They admit that vessels have for 20 years anchored anywhere in New Haven harbor; that they had already passed a number of vessels in going down the harbor; and that when they first sighted the schooner, 200 feet away, it was impossible to avoid a collision. The Starin, without excuse, violated the statutory rule that steam vessels shall keep on the right-hand side of the channel. She was proceeding down a crowded harbor at a confessedly dangerous speed under the existing conditions,—a speed inconsistent with the safety

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of other vessels. The City of Paris, 9 Wall. 638, 19 L. Ed. 751; The Syracuse, 9 Wall. 676, 19 L. Ed. 783. Furthermore, the testimony of the disinterested witnesses and of the witnesses for libelant is to the effect that it was a clear night, so that vessels could be seen for a mile or more, regardless of lights, and that the schooner had one or both of her sails up, reefed. The Starin, having elected to take the center of the channel, failed to use vigilance as to lookout or speed, or both, sufficient to guard against collision. The conclusion reached is that the Starin was at fault. The Starin not only denies that it was in fault, but it contends that the schooner Gurney was in fault, because, first, although thus anchored near the center of the channel in the known path of New York steamboats, she had no lookout on deck. It does not appear that such a watch is required when there is a sufficient light, or that the presence of such a lookout could have prevented the collision.

It is further claimed that, although the schooner had a lantern in her fore rigging, it was not burning at the time of the collision. The Starin's witnesses swear that no light was visible. The schooner's witnesses swear that the light was burning prior to, and at the time of, the collision. Their testimony as to the light at the moment of collision is somewhat indefinite, owing to the fact that the mate went down with the schooner, and the captain was obliged to jump overboard. In addition to the evidence of interested parties as to lights, there is the evidence of three apparently disinterested witnesses. Knight, pilot of a steam tug, was anchored about a quarter of a mile from the schooner Gurney on the night in question. He testifies that he saw the light on the Gurney when she was a mile and a half away, and again when he passed her. It is not clear whether he saw the light later than 30 minutes before the collision. Springer, the watchman on board the Connecticut Naval Brigade transport, testifies that he was anchored about three-quarters of a mile from the Gurney; that she had a bright light; that he went off duty a little after 12 o'clock; that about an hour before this he "noticed a change in the light of one of the schooners [the Gurney]. It seemed lower towards the water." He noticed this change about an hour after he first saw the Gurney's light. It is agreed that, after the Gurney sank, a light was thus located in her fore rigging. Blake, a watchman of oyster beds, swears that he was going up and down the harbor that night, and that he saw the Gurney's light burning some 15 or 20 minutes before he saw her going down. It is thus sufficiently established that a proper anchor light was burning on the Gurney some 20 or 30 minutes prior to the collision. There is no satisfactory evidence that it continued to burn up to the time of the collision. To rebut the presumption of such continuance, claimants have shown that the regular cook, whose business it was to keep the lantern cleaned and filled, had left two or three days before, and that there is no evidence that the lantern had been filled since; the only evidence on this point being that of the mate of the Gurney, who testified that he hung the lantern in the rigging that night, and when asked, "Where did you get it from to hang it there?" said, "The cook lights and cleans

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it and passes it to me, and I hang it up." There was another cook on board on the voyage in question, but counsel stated that he had made such overtures to both sides that his testimony would be unworthy of credit, and for this reason it was not taken. In these circumstances, it must be found that a proper anchor light was burning on the Gurney at the time of the collision. Where a vessel clearly shown to be at fault seeks to impugn the management of the other vessel, all the presumptions are favorable to the latter. The Oregon, 158 U. S. 203, 15 Sup. Ct. 804, 39 L. Ed. 947. "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the collision, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. Its own negligence being established, it is required to prove the other's fault with equal clearness. A reasonable doubt in regard to the conduct of such other vessel should be resolved in its favor." The Minnie, 40 C. C. A. 312, 100 Fed. 128.

Let a decree be entered in favor of libelants.

In re SCHENKEIN et al.

(District Court, W. D. New York. February 8, 1902.)

No. 763.

1. INVOLUNTARY BANKRUPTCY—PRELIMINARY OBJECTION TO JURISDICTION—PARTNERSHIP.
   In involuntary bankruptcy, an objection that petitioner and the alleged bankrupts are partners is not determinable on a preliminary objection to the jurisdiction, where the arrangement between the parties is one going to the merits of the controversy.
2. SAME—SOLVENCY—BURDEN OF PROOF.
   Where the act of bankruptcy charged is removal and concealment, the burden of pleading and proving solvency is on the bankrupts.
3. SAME—ATTACHING CREDITOR—RIGHT TO PETITION.
   A creditor of an alleged bankrupt, who obtains an attachment, has, in substance and effect, a lien on the property until the attachment is vacated or becomes null and void by the adjudication, and to such extent, and up to that period, must be deemed to have a preference, and therefore not a provable debt, and, the attachment not being surrendered, has no standing to maintain a petition in involuntary bankruptcy.
4. SAME—TIME OF TAKING OBJECTION.
   The objection that an attaching creditor has no standing to maintain a petition in involuntary bankruptcy may be taken by the alleged bankrupts preliminarily, to prevent their examination, where they are in the custody of the court pursuant to a warrant of arrest issued under Bankr. Act, § 9b, which provides that the judge, under certain circumstances, may keep the bankrupt in custody until he shall be examined, or give bail for his appearance for examination.

In Bankruptcy. The following is the opinion of the special master:

This is an examination of alleged bankrupts under section 9b, Bankr. Act, referred to the undersigned, as special master, by an order of the district court dated November 16, 1901, with leave to the alleged bankrupts "to set up, assert, and present such preliminary objections to the sufficiency of the papers herein, to the regularity of these proceedings, and to the juris-

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diction, as though the same were personally presented" to the court. There seems to be little, if any, dispute on the facts, which may be stated as follows: On November 7, 1901, Emmett W. McConnell filed a petition in involuntary bankruptcy against Samuel Schenkein and Martin A. Coney, alleging, among other things, that the latter were "copartners and persons united in interest in the management and care of an institution known and described as the 'Infant Incubators' at the Pan-American Exposition, Buffalo, N. Y., and that your petitioner is a creditor of the said Schenkein & Coney, and your petitioner has an approvable claim against them, amounting, in the aggregate, in excess of securities held by him, to the sum of five hundred dollars." The petition also alleges that under the agreement between the petitioner and the alleged bankrupts, whereby, for certain considerations, he was to receive twenty-five per cent. of the gross receipts of the concession known as the "Infant Incubators," there "became and was due and owing your petitioner * * * the sum of thirty-one thousand two hundred and fifty dollars, no part of which has been paid, except the sum of fourteen thousand dollars, leaving a balance yet due and owing your petitioner of seventeen thousand two hundred and fifty dollars, with interest from November 1, 1901." The petition also alleges that the petitioner had previously begun an action in the supreme court of the state of New York on such indebtedness, and in such action obtained an attachment against "the property, building, paraphernalia, and appliances used by said Schenkein & Coney in the display at the Pan-American Exposition aforesaid," and that under such attachment the sheriff of Erie county has attached and taken possession of the same, and between fifty and sixty dollars in cash found on the premises, and about forty dollars on deposit in a local bank. The petition also shows that in such action an order of arrest was granted, and the debtors taken into the custody of the sheriff of Erie county, who at that time still had custody of them, but from whose custody, it appeared on the argument, they have since been released. The petition alleges as the act of bankruptcy committed by the alleged bankrupts that they have, "for the purpose of hindering, delaying, and preventing the collection of your petitioner's claim, and the claims of their other creditors, if any, and to defraud, wrong, and cheat and swindle your petitioner and their other creditors, if any, * * * concealed, assigned, transferred, and disposed of all moneys collected in said infant incubators by the exhibition thereof, and not remaining in their hands, in the sum of twenty-nine thousand dollars." On this petition, and on the affidavits of the petitioner, Emmett W. McConnell, and his attorney, Percival M. White, filed at the same time, the district court, on the 7th day of November, 1901, issued a warrant, directed to the marshal of the district, whereby he was required to bring the alleged bankrupts "before the court forthwith for examination, and thereafter and thereupon to hold such bankrupts * * * as this court may direct"; such warrant reciting the commission of an act of bankruptcy, and that the alleged bankrupts "are about to sell, assign, transfer, their property for the purpose of hindering and defrauding their creditors, and that they, and each of them, are about to leave this district * * * to avoid examination, and that their departure, or the departure of either of them, will defeat these proceedings in bankruptcy." The marshal thereupon took the alleged bankrupts into custody, and brought them into court for examination, whereupon the order of reference previously mentioned was made. Other facts will appear from the discussion of the questions raised by the respective parties.

The alleged bankrupts have appeared by counsel, and raised three preliminary objections to this examination, all of them going to the jurisdiction. For the purpose of this examination, they seem to have waived any technical objections to the papers themselves,—as, for instance, the use of the word "approvable," instead of "provable," in the petition,—so that the questions to be determined are three: (1) Whether the petitioning creditor and the alleged bankrupts were partners. (2) Whether, because of the unsurrendered attachment, the petitioner has a petitioning creditor's debt at all. (3) Whether the petition itself does not show the alleged bankrupts to be solvent.

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1. It is conceded by the respective attorneys that, if the agreement between McConnell and Schenkein and Coney amounts to a partnership, under Ex parte Richardson and In re Palmer, 3 Deac. & C. 244, Ex parte Briggs and In re Notley, 3 Deac. & C. 367, and Ex parte Gray, 4 Deac. & C. 779, the petitioner here has not a petitioning creditor's debt, and this plea to the jurisdiction will be fatal, not merely to this branch of the proceeding, but to the proceeding itself. It seems strange that this question has never been up in the United States; Robinson v. Hanway, Fed. Cas. No. 11,953, being in point only by analogy. There can, however, be no doubt that the principles laid down in the English cases cited express the law. Was, then, the arrangement between McConnell and Schenkein and Coney a partnership? By stipulation, the original agreement, bearing date April 10, 1900, and signed by the three individuals, has been made a part of the papers on this proposed examination, and a construction of it is necessary to determine the rights of the parties. Without quoting from such agreement in detail, it may be sufficient to summarize as follows: The counsel for the petitioning creditor claims that this agreement does not constitute the parties partners, for the following reasons: The words "partner" and "partnership" do not occur therein; Schenkein and Coney are together parties of the first part, and McConnell alone party of the second part. McConnell agrees to lend not more than $15,000 to Schenkein,—he being the official concessionaire,—and not to the two. McConnell is given title to the plant until he is repaid such loan. Schenkein and Coney, and not McConnell, have title to the plant after such loan is paid. Nothing on the face of the agreement indicates the rate of division, either as to profits or losses, between Schenkein and Coney. Nothing on the face of the agreement amounts to a covenant to share losses. Nothing on the face of the agreement amounts to a covenant to share net profits. Nothing on the face of the agreement amounts to a covenant on McConnell's part to devote his time or services. Nothing on the face of the agreement indicates that there was any consideration for the agreement, save the advance of money. Creditors other than McConnell are not affected; he being, as is alleged, the only creditor. The counsel for the alleged bankrupts claims that this agreement covers a period of three years, and prevents all three parties from engaging in any other similar business during that period; it appearing to have been the original plan to conduct the same exhibit not merely in Buffalo, but at the then proposed expositions at Toledo, Ohio, and St. Louis, Mo.; that the petitioning creditor has a proprietary interest in certain of the avails of the business, under the clause which is as follows: "It is understood and agreed by the parties hereto that should the parties of the first part, or either of them, prepare any lotions, foods, powders, or other preparations, or should any of the parties hereto adopt any lotion, food, or other preparation, to be used in the care and using of infants, and shall have the same protected by trade-marks, copyrights, or patents, the party of the second part shall have an undivided one-fourth interest in said trade-marks, copyrights, or patents;" that the interest of none of the three could be disposed of without the consent of the others; that in one of the recitals of the agreement it is stated that McConnell "desires to take an interest in said concession of infant incubators"; that McConnell has the right to appoint a representative or cashier; that the gross receipts were to be divided daily in the presence of all the parties. In brief, the agreement would seem to indicate that the concessionaire, Schenkein, who had associated with him the alleged bankrupt, Coney, needed money; that McConnell was willing to furnish the money to install the plant, provided he had title to the same until he could be repaid his advancement, he to take one-half of the gross receipts until such repayment was accomplished, and then to receive one-fourth of the gross receipts thereafter, the title to the plant to vest instantly in Schenkein and Coney, and McConnell to have no interest in the business save his 25 per cent., other than the one-fourth proprietary interest in the lotions, foods, powders, and other preparations which should be used in the plant, and then only after the same had been protected by trade-marks, copyrights, or patents. I am frank to say that my first impression of this arrangement which was based upon the petition and affidavits, was that it was a part-

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nership. The submission of the original agreement, however, has led to the opposite conclusion. The law of the state of New York, which is, of course, controlling on this proposition,—this being a New York contract, and carried out in that state,—while not entirely clear, seems to be summed up in the following, from Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267: "The general rule, no doubt, is that, to constitute a partnership, there must be a community of interest inter sese, and that the parties shall share the profits and loss. 3 Kent. Comm. 23; Pattison v. Blanchard, 5 N. Y. 186. This, however, is not without exception, and, where there is an agreement for sharing in the profits of a business, in some cases it is sufficient to establish a partnership as to third persons. See Manufacturing Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177. And here comes in another exception to the rule last stated, which is that where the person has no interest in the capital or business, and is to be remunerated for his services by a compensation from the profits, or measured by the profits, or what is to depend, as in case of seamen or other voyages, upon the result, it has no application. Where, then, one is only interested in the profits of a business as a means of compensation for services rendered, he is not a partner. Leggett v. Hyde, 58 N. Y. 272, 280, 17 Am. Rep. 244; Smith v. Bodine, 74 N. Y. 30; Vanderburgh v. Hull, 20 Wend. 70; Burckle v. Eckart, 1 Denio, 337, on appeal 3 N. Y. 132; Fitch v. Hall, 25 Barb. 13; Lamb v. Grover, 47 Barb. 317; 1 Smith, Lead. Cas. (5th Am. Ed.) 292. These cases fully sustain the doctrine laid down, that, where the profits are a measure of compensation, no partnership is created." Compare, also, Curry v. Fowler, 87 N. Y. 33, 41 Am. Rep. 343; Cassidy v. Hall, 97 N. Y. 159. The rule laid down in Richardson v. Hughitt, supra, has been distinguished by the same court in such cases as Hackett v. Stanley, 115 N. Y. 625, 22 N. E. 745; Magovern v. Robertson, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; Bank v. Gallaudet, 122 N. Y. 655, 25 N. E. 909,—cited by the counsel for the alleged bankrupts. But a careful reading of these cases will discover points which make them clearly distinguishable from the case at bar. In Hackett v. Stanley the agreement was "to divide equally the net profits of the business," and recited that the arrangement was not merely in consideration of the loan, but "in further consideration of services of the said party of the second part in securing sales in said business, and for any further moneys he may, at his own option, advance for use in said business." In Magovern v. Robertson the parties seeking to avoid partnership liability were by the agreement given one-third of the net profits "in consideration of their indorsement and their general interest in the business." In Bank v. Gallaudet the parties were to share equally in the profits after the partner who made the advances had been repaid. In other words, there was a sharing in the net profits. In all of these cases, too, the question arose between outside creditors and the alleged partners,—a very different proposition, on the equities, at least, from that at bar, where the question is between three persons who were parties to a written agreement fixing their rights. It is undoubtedly true, as urged by the counsel for the alleged bankrupts, that the giving of a proprietary interest in the lotions, etc., to McConnell, is strong evidence of a partnership. Magovern v. Robertson, supra. But I cannot agree with him that this element of the agreement alone should negative the numerous elements the other way,—certainly not on a preliminary objection of this kind; for I take it that this point will be brought to the attention of the court when the merits of this controversy are to be determined; that is, after the alleged bankrupts shall have filed their answer to this petition. The objection to the jurisdiction on the ground that McConnell is a partner of the alleged bankrupts, and therefore has not a petitioning creditor's debt, is overruled.

2. But has this creditor, who comes into court alleging his attachment, and not offering to surrender it, a petitioning creditor's debt? Manifestly if an attachment is a preference, he has not such a debt. In re Rogers Milling Co. (D. C.) 102 Fed. 687; In re Gillette, 5 Am. Bankr. R. 119, 104 Fed. 769. And Judge Seaman, in Re Burlington Malting Co., 6 Am. Bankr. R. 369, 109 Fed. 777, has held (the facts being strikingly similar to those here) that an attachment is a preference. That case, however, rests on the

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doctrine of equivalency between the two terms,—a doctrine with which, though with great respect, I cannot agree. The learned judge overlooks the very kernel of Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 46 L. Ed. —,—that without which it is as sounding brass,—namely, its ruling that section 60a defines a "preference." Thus: "Subdivisions 'a' and 'b' are concerned with a preference given by the debtor to his creditor. Subdivision 'a' defines what shall constitute it, and subdivision 'b' states a consequence of it,—gives a remedy against it. The former defines it to be a transfer of property which will enable him to whom the transfer is made to obtain a greater percentage of his debt than other creditors. The latter provides a consequence to be that the transfer may be avoided by the trustee, and the property or its value recovered, provided, however, that the preference was given within four months before the filing of the petition in bankruptcy, or before the adjudication, and the creditor had reason to believe a preference was intended. So far, so clear." Now, an attachment is neither a "judgment" nor a "transfer." It cannot, therefore, be a "preference." It need not be surrendered under section 57g. Unless there is other objection to it, it may coexist with a petitioning creditor's debt. Looked at from the broader ground of the policy of the law, the question is close.—so close that, were it urged on the merits, and not preliminarily to prevent an examination to which this petitioning creditor has some right, the decision here might be the other way. An attaching creditor, under the law of 1867, seems to have been admitted or excluded from the bankruptcy courts somewhat at will. Thus such creditors could intervene and object to an adjudication. In re Bergeron, Fed. Cas. No. 1,342; In re Mendelsohn, Fed. Cas. No. 9,420; In re Hatje, Fed. Cas. No. 6,215. Yet such creditors could not be counted when the question was whether an involuntary petition represented the required proportions in number and amount. In re Scrafford, Fed. Cas. No. 12,556, reversing same case below, Fed. Cas. No. 12,557. The reason for the distinction seems to be that in the former cases their attachments would be avoided by the bankruptcy; in the latter, their claims, if counted, might put the nonattaching creditors at the mercy of those who had attached. Under the law of 1867, no secured creditor could petition In re Frost, Fed. Cas. No. 5,134; In re Green Pond R. Co., Fed. Cas. No. 5,786. Contra, In re Stansell, Fed. Cas. No. 13,293. Compare, also, In re Rado, Fed. Cas. No. 11,522; In re Currier, Fed. Cas. No 3,492. This doctrine forced Judge Dyer, of Wisconsin, to hold in Re Broich, Fed. Cas. No 1,921, that an attaching creditor is not a secured creditor, and has, therefore, a petitioning creditor's debt. It is not necessary here to determine whether, under the present law, an attaching creditor is, strictly speaking, a "secured creditor." If unsecured, he surely has standing here. If secured, under the present law (§ 59b), this objection being in the nature of a demurrer, his allegation, which is, in substance, that the attachment is a security worth at least $500 less than his claim, is sufficient. The only case directly in point under the law of 1867 is In re Hazens, Fed. Cas. No. 6,285, decided by Judge Dillon after his decision in Re Scrafford, supra. He takes broad ground, seeming to admit that an attachment is a security, and, while decreeing that a creditor who is fully secured by attachment cannot, while holding on to his attachment, sustain on the same debt a petition to force his debtor into bankruptcy, adds: "If, however, a creditor is not fully secured, it is, I think, quite probable that, as to the excess of his debt over the value of the security, he is to be regarded as unsecured." Thus clearly implying that the case is authority only where the attachment lien equals the debt. This broad view has now become a part of our statute (Bankr. Act. §§ 59b, 57e). In a close question like this, it is safer to follow it, than would be the opposite course. I am not unmindful of the great force of Judge Seaman's remarks in Re Burlington Malting Co., supra, holding that an attaching creditor has elected his remedy. But it has been held that a lien creditor waives his lien by the mere fact of filing a petition. In re Bloss, Fed. Cas. No. 1,562. Under section 67f, this creditor would undoubtedly be admitted to prove his claim only on condition that his attachment lien be considered null and void. He does not give up his lien in so many words, but his petition is the first

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of a series of acts which make that surrender inevitable. There may be some cases—and this is apparently one—where the attachment did not reach the property at which it was aimed. If this creditor has a debt in $17.250, as he alleges, the security is palpably insufficient. The attachment and the petition were but a few days apart. The claims of other creditors are not involved, for there are no other creditors. It would be unjust, at least at this stage of these proceedings, to hold no jurisdiction on these grounds. This objection is, therefore, for the purposes of this examination, overruled.

3. Nor is it important whether this petition show insolvency. The act of bankruptcy alleged is the first. Section 3a (1). The quantum of this estate is kept under cover. Citizens' Bank of Salem v. W. C. De Pauw Co., 5 Am. Bankr. R. 345, 45 C. C. A. 130, 105 Fed. 926. There is a concealment here, which, if the facts alleged in the petition and affidavits are true, is with intent, at least, to hinder and delay this creditor. By section 3c the burden of pleading and proving solvency is on the alleged bankrupts. Compare West Co. v. Lea, 174 U. S. 590, 597, 19 Sup. Ct. 836, 43 L. Ed. 1098. They cannot be allowed at this time to object to jurisdiction on this ground.

The preliminary objections are therefore overruled, and the examination will proceed at 11:30 a. m. on January 13, 1902, unless on or before January 10, 1902, the alleged bankrupts shall file a petition for review, which will in that event be granted. William H. Hotchkiss, Special Master.

Percival M. White (Philip V. Fennelly, of counsel), for petitioning creditor.

Irving L. Fisk (Louis L. Babcock, of counsel), for alleged bankrupts.

HAZEL, District Judge. On November 7, 1901, a petition was filed by a creditor to adjudge Samuel Schenkein and Martin A. Coney, copartners, bankrupts. At the same time an application was made by the petitioner for a warrant to the marshal, directing him to bring the alleged bankrupts forthwith before the court for examination, as provided for by section 9b of the bankruptcy act. In obedience to the warrant the alleged bankrupts were brought into court by the marshal, and, by counsel, objected to the jurisdiction of the court on the grounds (1) that petitioner and the alleged bankrupts were partners; (2) that petitioner had obtained a preference in the state court in the nature of an attachment upon property of the alleged bankrupts, and, therefore, the attachment not being surrendered, the petitioning creditor has no provable debt; (3) that the petition to have debtors adjudged bankrupts does not disclose insolvency. The future appearance for examination of the alleged bankrupts whenever required having been satisfactorily arranged by counsel for petitioner and for debtors, an order of reference was made to Referee Hotchkiss, as special master, to decide and determine the objections to the jurisdiction of the court, and to continue the examination of the bankrupts if such objections were found untenable. The alleged bankrupts are therefore in the custody of the court pursuant to the warrant of arrest. The special master, after due deliberation, overruled all the objections urged to the jurisdiction. His reasons therefor are submitted in an opinion, wherein he exhaustively reviews the authorities under the bankruptcy act of 1867, bearing on the proposition presented, and disagrees with the holding of In re Burlington Malting Co., 6 Am. Bankr. R. 369, 109 Fed. 777, under the present act. The opinion accompanies the allowance of a peti-

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tion for review of his ruling upon the three preliminary objections raised by respondents. I concur with the special master in his decision, for the reasons stated in his opinion, upon the first and third of these questions. The special master found that the agreement entered into between the petitioner herein and the partnership proceeded against was not a copartnership; that, while there was evidence of a copartnership based on agreements between the parties, yet such evidence, standing alone, was not sufficient to negative contrary elements on a preliminary objection to the jurisdiction. The arrangement between the parties was very properly held to be a subject going to the merits of the controversy, and therefore not determinable at this time. The special master, however, found that, inasmuch as the act of bankruptcy charged was removal and concealment, the burden of pleading and proving solvency is on the bankrupts. This finding is also approved.

I am unable to approve the finding and conclusion on the second question certified for review. I am of opinion that a creditor who obtains an attachment has, in substance and effect, a lien upon the property covered thereby, until such attachment is vacated or becomes null and void by the adjudication. To this extent, and up to that period, the attaching creditor must be deemed to have a preference such as would give him a greater percentage of his debt than any other creditor not similarly secured or protected in his claim. Here we have a petitioner who has applied for, and obtained from the state court, a provisional remedy, which, if allowed to prevail, secures his indebtedness, or a part of it, to the exclusion of other creditors. A lien is created upon property of the alleged bankrupts to the detriment and hindrance of general creditors. The claim of the petitioner through legal proceedings is permitted to become a lien on the property attached. He holds an attachment on the property of the alleged bankrupts in one hand, and comes into this forum in the present case, seeking another provisional remedy, while maintaining his attachment as an anchor to windward in case of an adverse ruling. One remedy availed of inures to the petitioner's sole benefit. It may be quite true that a lien on property attached in a state court cannot strictly be construed as a transfer of property, within the contemplation of section 60 of the act, whereby a preferential transfer is created. Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 46 L. Ed. ——. Section 67, however, specifically provides that a lien created by attachment upon mesne process, begun within four months of filing the petition, shall be dissolved by the adjudication whenever "it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference." This section, construed with the other provisions of the bankrupt act bearing on the rights of an attaching creditor, and the provableness of his claim without formal release of any preference obtained, is strongly persuasive of the soundness of Judge Seaman's decision in Re Burlington Malting Co., supra, where the contention was similar to that presented here. It was there held that an attachment was a preference, within the meaning of the bankrupt act; that it was a lien sought and permitted in fraud of the pro-

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visions of section 67c. The claim thus secured to the creditor by attachment was held not to be provable unless the preference created thereby was surrendered, as required by section 57g. The spirit of the Pirie Case would seem to strengthen the position of Judge Seaman, rather than that of the referee, when all the applicable sections of the law are considered together. The opinion of Judge Seaman further points out that the failure by congress to recognize an attachment lien as belonging to that class of securities made valid and unaffected by an adjudication in bankruptcy gives force to his interpretation and conclusions. I concur in this view. The lien of an attachment, undoubtedly, by operation of law, creates a preference which enables the attaching creditor to obtain a superior right to the property levied upon. The referee views the proposition somewhat doubtfully. After stating that an attachment is neither a "judgment" nor a "transfer," and cannot, therefore, be a "preference," and that "it may coexist with a petitioning creditor's debt," he says:

"Looked at from the broader ground of the policy of the law, the question is close,—so close that, were it urged on the merits, and not preliminarily to prevent an examination to which this petitioning creditor has some right, the decision here might be the other way."

I am unable to take this view of the contention. The objection to the jurisdiction was made in due time to prevent an examination of the debtors, to which the petitioning creditor, under certain conditions, is entitled. By section 9, under which the petitioning creditor proceeds, it is provided that a bankrupt, under certain circumstances, shall be exempt from arrest upon civil process. Under certain circumstances, the judge may order the marshal to keep the bankrupt in custody not exceeding 10 days, but not imprison him, until he shall be examined and released, or give bail for his appearance for examination from time to time, not exceeding, in all, 10 days. On an application of this character, it must clearly appear upon satisfactory proof, by the affidavits of at least two persons, that the bankrupt is about to leave the district for the purpose of avoiding examination. Under section 2, subd. 15, it was held that the court may issue an order in the nature of a writ of ne exeat. In re Lipke (D. C.) 98 Fed. 970. The drastic remedy provided by section 9 is one directed against the liberty of a citizen, and therefore should be strictly construed and carefully applied. Manifestly, the rights of the petitioning creditor and the rights of the alleged bankrupts under this particular section must be determined at the very threshold of the proceeding. The language of Judge Seaman in the Burlington Malting Co. Case, supra, in reference to the dual position of a petitioner in involuntary bankruptcy, who also pursues a remedy to maintain an invalid lien against the same person in another forum, aptly applies. He says:

"Instead of the single proceeding on the part and for the benefit of the general creditors intended by this act, to save the assets of an insolvent debtor from spoliation by preferences, and secure equality in their distribution, this petitioner appears, with a claim disputed and fairly disputable, seeking, on the one hand, to obtain a preference by enforcing it through an attachment against the property, and, on the other, invoking the inconsistent remedies of bankruptcy."

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In no sense can it be urged as a justification for the continuance of the attachment that the bankrupt act does not afford complete machinery for the conservation of the bankrupt's estate. Simultaneously with the filing of the petition, the property of the alleged bankrupts might have been taken into the custody of this court. The petitioner did not adopt this course. He rests on his attachment, and must therefore be denied the equitable relief he now seeks of this court.

The ruling of the referee on the second question submitted for review is reversed, and the order of arrest is vacated.

CARY MFG. CO. v. STANDARD METAL STRAP CO.

(Circuit Court, S. D. New York. January 13, 1902.)

1. PATENTS—INFRINGEMENT—BOX-STRAP REEL—ANTICIPATION.
Cary patent, No. 403,247, dated May 14, 1889, for a reel for box straps, *held*, in view of a partial anticipation by Fleisher's reissued patent, No. 9,019, dated January 6, 1880, not to be infringed by defendant's reel.

2. SAME—SALE—INNOCENT PURPOSE—EFFECT.
While one selling a patented device for a use which would be an infringement might be liable as a participator, he would not be liable for an improper use made by the purchaser afterwards, and not contemplated in making the sale.

In Equity.

A. G. N. Vermilya, for plaintiff.
W. P. Preble, Jr., for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 403,247, dated May 14, 1889, and granted to Spencer C. Cary for a reel for box straps, consisting of a spool to coil the strap on, and arms from the ends of the spool, with holes through them there for a pin or nail for an axle, and at the outer ends for a pin or nail to hang it on for a support. The specification says:

"By this means the framed reel is held firmly in position on the support, and the spool and coil are free to revolve on the shaft, c, of the former in unreeling the strap. Furthermore, the fastening nails, together with the hollow shaft, c, may be made to serve to draw or hold the sides, d, d^1, of the frame closely to the edges of the strap coil, so as to hold the strap from uncoiling without the exertion of force by the operator on the free end of the coil."

The claim in question is for:

"(2) A reel for metal box straps, consisting of a spool, C, adapted to have the metal strap coiled upon it, an axle, c, upon said spool is journaled, and a frame, D, composed of parallel arms, d and d^1, in which said axle is mounted, and which extend diametrically across said spool, and reach in opposite directions beyond the rim thereof, as described, and are united at their outer ends, and therein have the respective corresponding openings, d^3 and d^4, adapted to receive fastening pins, substantially as and for the purpose set forth."

The patent is more fully set forth in Manufacturing Co. v. De Haven (C. C.) 88 Fed. 698, at page 701, where the conclusion was

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reached on what was then before the court that the second claim was valid because of the braking of the coil in unwinding by driving the nails into the support, and thereby binding the coil. Judge Lacombe there said: "The patent is an extremely narrow one. It would not be infringed by defendant's device if the latter had its arms rigid against compression, so that they could not act as a brake." Here the defendant has shown, among others, Fleisher's reissued patent, No. 9,019, dated January 6, 1880, for a similar reel for coils of braid, in which an elastic band over the outer ends of the arms in notches for drawing them together is specified. This narrows the patent still further. In the defendant's reel the arms are slotted, and the coil rests upon its lower edge for braking, and the arms would not brake unless the user should drive the outer nail or pin deep enough to bind the coil between the arms there; the moving center not permitting the pin, or whatever is used for an axle, to be driven into the support for that purpose. So there does not now appear to be sufficient scope left of the plaintiff's patent to cover the defendant's reel as it is furnished to users. The outer holes are for hanging it up, and not for braking in unwinding; and there are no central pins or nails to be driven into the support for binding the arms together upon the coil to brake it in unwinding. The defendant, by selling for an intended use that would be an infringement, might be liable as a participator, but not for a use by a purchaser afterwards not contemplated in making the sale. The driving of the outer nail or pin further to accomplish what was otherwise well provided for would not seem to be so within the purpose of the defendant as seller as to warrant a decree against such sales.

Bill dismissed.

ROLFE ELECTRIC CO. et al. v. STERLING ELECTRIC CO. et al.

(Circuit Court, S. D. New York. January 14, 1902.)

PATENT—INFRINGEMENT.

The Barrett patent, No. 445,217, for a thermal cut-out, *held* not infringed.

In Equity.

Seward Davis, A. Miller Belfield, and Charles A. Brown, for plaintiffs.

Charles C. Bulkley, for defendants.

WHEELER, District Judge. This suit is brought for alleged infringement of patent No. 445,217, dated January 27, 1891, and granted to Albert Barrett, for a thermal cut-out, and of another patent withdrawn from this case. In the specification of the remaining patent, the inventor says:

"The invention comprises an attenuated and relatively fragile portion of the circuit; a strong spring, or an equivalent device, capable, under certain conditions, of exerting a strong and sudden force upon the said fragile portion, and of breaking the same, and thus causing a wide gap in the continuity of said circuit; a normal support for the said spring, whereby the

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said fragile section is ordinarily freed from the tension thereof; and means, comprising a ball or mass of matter, solid and hard ordinarily, but capable of fusing, softening, or fracture under a moderate degree of heat when closely applied, which I term a 'heat-responsive mass,' and a heat-concentrating coil of the said attenuated conductor closely associated therewith (being, in fact, embedded therein), for enabling the said spring to come promptly and forcibly into action, and to break or tear away the said fragile conducting section to open the circuit. The heat of the circuit, being concentrated by the embedded convolutions, softens, breaks, or fuses the wax, and the spring which exerts a constant pull on the loop held thereby acts promptly to pull out the end loop to break the fine wire, and consequently the circuit, and thus to remove the danger. The spring itself, released by the softening of the wax, flies back with great force to the position indicated in Fig. 4. In fact, so promptly does it fly back that the wire is not merely broken, but usually is also torn completely away from its fastenings, leaving a gap in the circuit as wide as the distance between the binding screws. I have made these appliances sufficiently sensitive to break the circuit under a current developed on short circuit by a single Leclanché cell, and with greater currents they act so promptly that the wax ball seems rather to explode than to soften."

The claims particularly relied upon now are:

"(1) A thermal protector for an electric circuit, and apparatus included therein, comprising a ball or mass of material solid and hard at a normal temperature, but capable of fusing or softening when heated; a loop or hook having one end embedded in the said mass; a fixed ring or bracket for the said mass and its dependent hook; an attenuated and relatively fragile section of circuit conductor extending between terminals, and having a portion of its length coiled within the substance of said heat-responsive mass, and adapted to serve as a heat concentrator therefor; and a power device, such as a spring or weight, normally engaged and supported by the said loop, and held in tension thereby, and adapted to break the attenuated conductor when freed by the development of heat in the embedded coil section of said conductor,—substantially as described.

"(2) In a thermal protector for electric circuits, an attenuated and relatively fragile section of circuit conductor, a portion of which is coiled round the shank of a loop support, and embedded within a mass or ball of material adapted to become plastic when warmed, combined with a rigid support for said mass, and a spring engaged by said loop, and normally held in tension thereby, but adapted to overcome the same and to tear the said loop and the coils secured thereto from the heat-responsive mass on the passage of an unduly strong current through the said coils."

The defendants' cut-out consists of a stem and core, connected by solder in a coil of wire, between two posts, one of which is a spring pulling upon the solder, away from the other, all in the circuit. When an excessive current heats the wire and softens the solder, it yields to the spring, which pulls the stem away from the core and breaks the circuit. The use of a coil in or about softenable material holding a spring to release the spring and break the circuit by the heat of an excessive current was well known in various arrangements before this invention. Barrett was not an inventor of a cut-out composed of such devices, but of his arrangement of such devices in a cut-out. Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053. The defendants use the same or similar devices, but in different form, arrangement, and mode of operation. The part of the specification quoted and these claims show distinctly that the invention patented is the arrangement of the parts so that the excessive current will heat the coil, and soften the material holding it, and release the

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spring, which will rupture the coil and break the circuit. In the defendants' arrangement the excessive current heats the coil and weakens the solder so it will yield to the spring, which pulls it apart and breaks the circuit. The parts of the arrangements are different, and they do not do the same thing in the same way. That arrangements of the same or like devices shown in prior patents would not be commercially operative does not vary this conclusion. This patentee improved their defects in his way, but that did not prevent others from improving the same or other defects in their way, so long as they do not take his. The alleged infringement is not found, and accordingly the plaintiffs do not appear to be entitled to any relief.

Bill dismissed.

KEASBY & MATTISON CO. v. PHILIP CARY MFG. CO.

(Circuit Court, S. D. New York. December 27, 1901.)

BILL—CAUSES OF ACTION—JURISDICTION—IMPROPER JOINDER—DEMURRER.

A demurrer to a bill which includes a cause of action for unfair competition, of which the court is without jurisdiction for want of the necessary diversity of citizenship, with a cause of action on a patent, of which the court has jurisdiction, will be sustained, unless within 10 days plaintiff dismisses the former.

In Equity.

See 110 Fed. 748.

Allen D. Kenyon, for demurrer.

Edward K. Jones, opposed.

WHEELER, District Judge. The bill of complaint includes a cause of action for unfair competition in trade, of which this court is without jurisdiction for want of the necessary diversity of citizenship, with a cause of action on a patent, of which the court has jurisdiction. The demurrer must therefore be sustained for this multifariousness. The plaintiff may, however, discontinue the former within 10 days, and, if this is done, the demurrer may be overruled, the defendant to answer over by February rule day.

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HIGGINS OIL & FUEL CO. et al. v. SNOW et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,114.

1. FEDERAL COURTS—FOLLOWING DECISIONS OF STATE COURTS—LIMITATION AND LACHES.

A federal court, although sitting in equity, may follow the rule of decision of the state courts upon the questions of limitation and laches.[1]

2. EQUITY—LACHES—SUIT BASED ON LEGAL TITLE.

Under the rule of decision in Texas, where the title of a complainant to lands, upon which he bases his right to relief in equity, is a legal one, capable of being established at law, the doctrine of laches and stale claim does not apply, but his rights are barred only by adverse possession; and on general principles equity will follow the law on such question, where the jurisdiction is concurrent.

3. JUDGMENTS—PERSONS CONCLUDED—PARTY BY REPRESENTATION.

A widow entitled under the laws of Texas to a life estate in one-third of real estate owned by her husband, which consisted of an undivided interest inherited from his father, is not bound by a compromise judgment entered in an action brought by her children and the other heirs of their grandfather against an adverse claimant, to which action she was not a party. The fact that her co-tenants might have recovered her interest in their own names did not render her a party by representation.

4. ESTOPPEL—LIFE TENANT—ACCEPTANCE OF PROCEEDS OF SALE BY REMAINDERMEN.

The acceptance by a married woman, as a gift from her children by a former marriage, of a part of the money received by them in payment for their interest in lands inherited from their father, in which she had a life estate under the laws of Texas, did not estop her from asserting her rights as life tenant as against the purchaser, where her children did not undertake to convey anything more than their own interest.

5. DOWER—ESTATE OF SURVIVING WIFE UNDER TEXAS STATUTE—MINERAL RIGHTS.

The land and marital laws of Texas are derived largely from the civil law, and the life estate given thereby to a surviving wife in the lands of her deceased husband is broader than the common-law dower; such life estate being one which under the civil law could not have been impeached for waste, and which would have carried with it the right to open and work every kind of mines on the property.

6. SAME.

The statute of Texas governing "descent and distribution," after providing for the distribution of the personal estate of an intestate who leaves a surviving husband or wife and children, further provides (Rev. St. art. 1689) that "the surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate or their descendants." *Held*, that the word "land" is employed in such statute in its most comprehensive sense, and that a surviving husband or wife takes a one-third interest for life in the land itself, as such, including not only the surface, but also all minerals therein, and is entitled to a proportionate share of the income or profit derived from the extraction of such minerals during his or her lifetime, whether operations were commenced prior to the death of the decedent, or subsequently by the remaindermen or owners of the other undivided interests.[2]

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[1] State laws as rules of decision in federal courts, see notes to Griffin v. Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

[2] Dower in mines, see note to Black v. Mining Co., 3 C. C. A. 316.

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7. RECEIVERS—GROUNDS FOR APPOINTMENT—IMPOUNDING INTEREST IN OIL PRODUCTION.

Complainant's husband died intestate, leaving her and two children surviving, and being the owner at the time of his death of an undivided one-sixth interest in certain lands in Texas, in one-third of which, under the laws of the state, complainant took a life estate. No division of the lands affecting complainant's interest was ever made. Subsequently defendants acquired the interests of all of the other tenants in common of the property, including the interest of complainant's children as remainder-men, and drilled numerous oil wells thereon which produced large quantities of oil. *Held*, that complainant was entitled either to one-eighteenth of the net proceeds of the oil produced, or to the income which such share would produce during her lifetime, and that, while she was not entitled to the appointment of a general receiver to take control and management of the property, she was entitled to the appointment of a special receiver to collect and hold such share of the proceeds pending the determination of her rights therein; the defendants being numerous, and for the most part corporations formed for the sole purpose of producing and selling oil.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The opinion of the circuit court, filed December 6, 1901, is in full as follows:

BRYANT, District Judge. This is an application for the appointment of a receiver. The complainant, Annie E. Snow, a citizen of the state of California, joined pro forma by her husband, G. H. Snow, has filed a bill in equity against the defendants, Higgins Oil & Fuel Company and over 200 others, corporations and natural persons, citizens of the state of Texas, or of states other than California, alleging that she is the owner of a life estate in one-eighteenth, undivided, of the John A. Veatch survey of land in Jefferson county, Tex., less certain subdivisions that are excepted, embracing the greater portion of the Beaumont oil field, and including at the date of the filing of the bill 66 flowing wells, all in the possession of the defendants, who are engaged in marketing the oil. She seeks an accounting in regard to the oil taken and marketed, claiming an eighteenth thereof, and to recover the amount ascertained to be due. The bill also contains the prayer for the appointment of a receiver to take charge of the wells, so that they may be operated pending the litigation without risk or detriment to any party, or, in the alternative, that a receiver be appointed to collect one-eighteenth of the revenues from said wells, and to hold or invest the same pending the litigation, with such powers and duties as the exigencies of the case may warrant. Those of the defendants who have appeared in response to the rule to show cause why a receiver should not be appointed have filed demurrers and answers, and make substantially the following contentions: (1) That the complainant has been guilty of laches in not sooner asserting her claim, and should, therefore, be denied equitable relief; (2) that as to 500 acres of the land she is concluded by a judgment rendered in 1887 in a suit brought by her children and others, in which the 500 acres was awarded to one Charles L. Cleveland, a defendant in the suit; (3) that she received and used money from the estate of her first husband, Andrew A.

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Veatch, through whom she inherited the life estate here involved, equivalent to her interest in this land, and also received and used a portion of the proceeds of a sale made by her children of their interest, and is therefore estopped from asserting any claim here; (4) that as a life tenant the complainant is entitled to no interest in the oil produced, her estate being limited to the surface; and (5) that in no event should a receiver be appointed. The complainant filed a general replication.

It was established on the hearing that the land in question, about 3,400 acres, was granted by the Mexican government to John A. Veatch, February 6, 1835, and was owned by him at his death, April 24, 1870. He died intestate, and this land was inherited by his six children, one of whom was Andrew A. Veatch. The complainant was married to said Andrew A., January 20, 1869, and lived with him as his wife until his death, intestate, March 11, 1871, when, under the law of descent and distribution in force in Texas, an estate for life in one-third of his one-sixth interest vested in her, with remainder to their children, who were two in number. Afterwards on March 25, 1875, the complainant was married to her present husband, G. H. Snow, and they have ever since lived together as husband and wife. Prior to the year 1882 this land, which is practically all level prairie, lay out, wild and unoccupied. It was about that time inclosed in a pasture with other land by parties who paid the taxes for the use of the land until about the year 1896, when the fences were taken down and it became again uninclosed, with the exception of a few small tracts, of a few acres each, that were put into cultivation subsequent to 1896. Thus it was, nearly all lying out and unfenced, and used as commons by the public, when petroleum oil was discovered in January of the present year. The first well was on the Pelham Humphreys survey, a short distance from the line of the Veatch. Since then many wells have been sunk on the Veatch, and others are being drilled; but the present oil territory thereon does not exceed 200 acres. That portion, however, is thick with derricks, and has upon it tanks, pipe lines, and railroad tracks, and the surface soil is impregnated with petroleum, so that agriculture, or any use, except for the production of oil, is prevented. The greater portion of the remainder of the survey is shown to be capable of cultivation and adapted to rice culture or pasturage. Affidavits were read showing that for these purposes it has a value of from $15 to $35 per acre; but it is under a lease for oil mining. The wells have been drilled, and the tanks and pipe lines constructed, by the defendants, at great expense, as shown by their answers. With the exception of the complainant's interest, they own the land held by them, respectively, deriving title by mesne conveyances from the heirs of John A. Veatch for all except the 500 acres known as the "Charles L. Cleveland Tract," and they hold that under like conveyances from Cleveland. The latter acquired title to this as against all the children and grandchildren of John A. Veatch by a compromise judgment of the district court of Jefferson county, rendered June 7, 1887, in a suit brought by them. The complainant's two children were parties plaintiff, represented by their uncle, Samuel H. Veatch, as next friend;

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but she was not a party. Afterwards these children executed powers of attorney to their uncle, and he conveyed their interests thereunder, accounting to them for $300 as proceeds of the sale. This was in 1891, and it seems that they gave their mother a part of the money, and it was used in support of the family. After the Cleveland judgment some of the land was platted as a town, with lots, blocks, streets, and alleys, and some lots were sold; but no evidence was offered showing that the complainant knew of this,—that is, had actual knowledge. It also appears that she never exercised any acts of ownership over the land, or asserted any claim to it, until after the oil discovery. On May 25, 1901, however, she made a written demand on each of the defendants, the Higgins Oil & Fuel Company, the J. M. Guffey Petroleum Company, the Heywood Oil Company, the Lone Star & Crescent Oil Company, and the National Oil & Pipe Line Company, to be let into joint possession, and for an accounting as to the oil taken by them, which was refused. Of these defendants only one, the J. M. Guffey Petroleum Company, states in its answer the amount or value of oil marketed. All the defendants who have answered and are operating wells show their solvency and ability to respond to any judgment that may be obtained against them in the case. In fact, the complainant does not deny their present solvency, but makes a sworn averment as follows:

"Your orator further shows that the property of said corporate defendants operating and that will operate wells on said land consists mainly, and in some instances solely, of the interest owned by them in said land and in said wells; that the land is of but little value, except for the oil, and if said defendants are allowed to exhaust said oil, and pay the revenue to their stockholders, many of whom reside and have their property beyond the limits of the state of Texas, as your orator fears they will do, there would be no available and adequate fund and property out of which your orator could be compensated; that said defendants operating said wells are antagonistic and hostile to your orator, and therefore cannot be relied upon to render an impartial and just account of their operations; also that the oil is taken from the wells by means exclusively within the control of the defendants, and that the complainant has no way of ascertaining and proving by disinterested testimony the amount of oil taken and marketed from time to time."

The first question presented has been frequently decided by the supreme court of Texas, where it is held that, if the complainant's title is a legal one, as in the present case, capable of being established at law, the doctrine of laches and stale claim does not apply. It is simply a question of adverse possession. San Patricio Corp. v. Mathis, 58 Tex. 242; Moss v. Berry, 53 Tex. 632; Williams v. Conger, 49 Tex. 602; House v. Brent, 69 Tex. 30, 7 S. W. 65; Lumber Co. v. Pinckard (Tex. Civ. App.) 23 S. W. 723; Land Co. v. Hyland (Tex. Civ. App.) 28 S. W. 206. And, though sitting in equity, this court may follow the rule of decision in the state court on the question of limitation and laches. Balkam v. Iron Co., 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953; Tioga R. Co. v. Blossburg & C. R. Co., 20 Wall. 137, 22 L. Ed. 331. Again, since the complainant could go into a court of law and establish her title, and then come to this court for the desired equitable relief, there is no reason why she should be denied it in the first instance. In cases, thus, of

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concurrent jurisdiction, equity follows the law, and a court of equity will consider itself bound by the same rules that would apply in a court of law. Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431; Metropolitan Nat. Bank v. St. Louis Dispatch Co., 149 U. S. 448, 13 Sup. Ct. 944, 37 L. Ed. 799; Reugan v. Sabin, 3 C. C. A. 578, 53 Fed. 420; 11 Am. & Eng. Enc. Law, 476.

The contention that the complainant was bound by the judgment rendered in the suit against Cleveland, when she was not a party to it, cannot be sustained. The fact that her co-tenants might have recovered for her in their names does not alter the matter. Stovall v. Carmichael, 52 Tex. 383; Walker v. Read, 59 Tex. 187; Bass v. Sevier, 58 Tex. 567; Jeffus v. Allen, 56 Tex. 195; 1 Black, Judgm. 554. Nor can it be said that she was a party by representation. Williamson v. Jones (W. Va.) 19 S. E. 444, 25 L. R. A. 222; 15 Enc. Pl. & Prac. 627.

Coming to the next point, the proof offered on the hearing fails of showing that the complainant received from the estate of Andrew A. Veatch in California any more than she was entitled to as her part thereof, so that it becomes unnecessary to say what would have been the effect if she had appropriated more than her share. But it is urged that she estopped herself from asserting her life estate when she accepted as a gift, and used a part of the money realized by her children from the sale of their interests. There is no element of estoppel in it. They had not attempted to sell her interest, or the land itself; but if they had, and she had used the money, she would not have been estopped, because she was a married woman. Johnson v. Bryan, 62 Tex. 623; Owens v. Land Co. (Tex. Civ. App.) 32 S. W. 189, 1057.

A difficult question arises in regard to the rights of a life tenant, as respects petroleum oil obtained from the land. There seems to be no decision in Texas on the point, and but very few by the federal courts; in fact, none directly in point. The statute under which the complainant acquired her life estate appears under the head, "Descent and Distribution," and reads as follows:

"When any person having title to any estate of inheritance, real, personal or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows: (1) If the deceased have a child or children or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants." Rev. St. Tex. art. 1689.

It is noticeable that all property is classified, and its mode of descent regulated under two heads: First, "personal property," and, second, "land." The latter term is therefore employed in its most comprehensive sense, and is nomen generalissimum. A life estate is given the survivor in one-third of the land of a deceased husband or wife, in this sense necessarily, because all property of inheritance that is not land is classified as personal property, and if the mineral rights that belonged to Andrew A. Veatch by virtue of his fee simple

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ownership of one-sixth of this land did not pass, one-third to his widow for life, as land, it passed as personal property, one-third to her absolutely. The life estate is given, not in the surface of the land, but in the land as land, and it is elementary that the land itself in legal contemplation extends from the sky to the depths. Coke says:

"The term 'land' includes, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and it has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it." Co. Litt. 4a.

Blackstone says:

"Land comprehends all things of a permanent and substantial nature, being a word of very extensive signification; also, if a man grants all his lands, he grants all his mines of metals and his fossils, his woods, his waters, and his houses, as well as his fields and meadows." 2 Bl. Comm. 16–18.

Washburn says:

"Land is always regarded as real property, and ordinarily whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that 'cujus est solum, ejus est usque ad cælam' in one direction, and 'usque ad orcum' in the other." 1 Washb. Real Prop. 8.

The American and English Encyclopedia of Law (old edition) defines it as follows:

"Land is the surface of the earth, whatever is attached to it by nature or by the hand of man, and all that is contained within or below it." Vol. 19, p. 1032.

In Koen v. Bartlett, 23 S. E. 665, 31 L. R. A. 130, 56 Am. St. Rep. 887, the court discussed this question of whether a life estate in land is a mere interest in the surface, and said:

"It must be conceded that the life tenant is vested with the ownership thereof as land, as being seised of the immediate freehold of possession, which possession extends from top to bottom, to the subsurface as much as the surface, in other words, to the land as a whole, or the tenant for life has a freehold, as well as a tenant in fee, and that the owners of the inheritance have no more right to approach by a tunnel, and break and enter his superficial close, than they have to break and enter his close on the surface."

Lenfers v. Henke (Ill.) 24 Am. Rep. 263, is to the same effect, and in that case the court said:

"Land comprehends all things of a substantial nature, which includes all ground, soil, or earth whatever, and hath in its legal signification an indefinite extent upwards as well as downwards. Minerals are a part of the land itself, and, if not susceptible of division, the wife is entitled to be endowed of the profits and rents."

According to all the cases and text-books a life estate in land invariably extends to all minerals beneath the surface; but, the right being merely to use and enjoy, and not to dispose of, the land, the difficulty arises in determining what is proper use and enjoyment, and when a life tenant may and when he may not sever and dispose of minerals without being guilty of waste. It is obvious that a life tenant, if allowed to mine, might get a much larger proportion of the benefit of the estate than he would ordinarily receive. On the other

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hand, if not allowed to mine, he might get much less. The courts have undertaken to draw the line, and it may be stated as a general rule, at common law, that, while a life tenant may continue to work mines that were open when the tenancy commenced, and this even to exhaustion, and may construct new approaches, he cannot open new mines, for to do so would be to commit waste. The rule allowing life tenants to mine, when the operations are commenced before the tenancy is created, is based on the theory that in such cases mining is a mere mode of use and enjoyment, and to extract minerals is but to take the accruing profits of the land. Raynolds v. Hanna (C. C.) 55 Fed. 801; Koen v. Bartlett, 23 S. E. 664, 31 L. R. A. 130, 56 Am. St. Rep. 884; Seager v. McCabe, 52 N. W. 299, 16 L. R. A. 247; Wentz's Appeal, 106 Pa. 301. The matter resolves itself, then, into a question of when and under what circumstances mining may be adopted as a mode of using the land. The authorities all agree that there is no restriction when the land has once been used for mining purposes before the life tenant comes in; and they now go a step further, and hold that mining will be allowed if the owner of the preceding estate has fixed on it the character of mining land by lease or the like, though no mines were opened. Priddy v. Griffith (Ill.) 37 N. E. 999, 41 Am. St. Rep. 397; Koen v. Bartlett, supra; Seager v. McCabe, supra.

In the case at bar, the remainder-men, being also the owners of seventeen-eighteenths absolutely, have taken possession of the entire property to the exclusion of the life tenant, and have converted it into an oil field. The latter has committed no waste, and the point to be decided is, not whether she might drill for oil herself, but whether she may elect to acquiesce in the changing in the mode of use. The estates were joint when the change was made, and no partition was demanded. Consequently, any advantage that ensues must inure to the benefit of all the co-tenants in proportion to their interests. Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263, is an applicable authority, in principle at least. The case involved two questions: (1) Whether a widow is entitled to dower in mines not open when her right of dower attached, but opened by the reversioner before assignment; and (2) whether a certain verbal agreement was valid as an assignment of dower. Both were decided in the affirmative. After announcing that the first question presented was one of first impression, the court proceeds with a review of the authorities. Speaking of the rule that a life tenant or dowress may not open new mines, the court observes:

"In many of the later cases, as well as the earlier cases, no reason whatever is assigned for the adoption of the rule; but, where any is assigned, it is, the dowress cannot open new mines when discovered, because she would be committing waste, which she is not permitted to do. On principle, why may she not be endowed of mines opened by the heir or owner of the fee, after the dower attaches and before there has been any assignment? By all the decisions, it is not waste for her to work mines opened, although the same had been abandoned before the death of the husband. She may construct new approaches, and not be guilty of waste. The reason for the rule adopted that bars dower in all mines not opened during the lifetime of the husband failing, the rule ought not to be extended to cases not strictly within its meaning."

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And finally:

"The heir, by opening the mines, has destroyed all other profits of the land. There is no mode of enjoying mines, excepting by working them. If this cannot be done, they are profitless to the dowress. As we have seen, it is not waste in her to work mines opened by her husband, and, by a parity of reasoning, we reach the conclusion it is not waste for her to work mines opened by the heirs before assignment of dower."

Priddy v. Griffith (Ill.) 37 N. E. 999, 41 Am. St. Rep. 397 was decided by the same court, and language to the same effect used.

There is a slight difference between the facts of Lenfers v. Henke and the case at bar. In that case the widow's interest was consummate dower, while here it is a vested life estate in an undivided interest. But it is not perceived how this could affect the principle involved. The reasoning of that case is applicable here, and seems unanswerable, and it is certainly in keeping with the tendency of modern decisions. Still, it recognizes the rule that a life tenant may not open new mines, and it is not in conflict with any of the cases cited by counsel for defendants, unless it be Coates v. Cheever, 1 Cow. 460. It seems to have been there held by one of the courts of New York in 1823 that the widow was not dowable of mines opened by the heir after the husband's death. The land there had been devoted to mining purposes, however, by the husband, in his lifetime, and the decision for that reason was clearly wrong. Billings v. Taylor (Mass.) 20 Am. Dec. 533; Gaines v. Mining Co., 33 N. J. Eq. 603; Priddy v. Griffith, supra; Koen v. Bartlett, supra.

There is another well-established principle that supports the holding of Lenfers v. Henke, and it is this: As against the heir and his vendees, the widow is entitled to dower in her deceased husband's land according to value and condition at the time dower is assigned. A full discussion of this occurs in Allen v. McCoy, 8 Ham. 418. See, also, 1 Washburn, 238–240; 2 Scribner, 595; 5 Am. & Eng. Enc. Law (old) 929. The same rule applies in partition between cotenants, except that actual improvements are allowed to the one making them, but enhancements from independent causes, such as growth in the population of a town or discovery of mineral deposits, may be shared by all.

Thus far the question has been treated without distinction between conventional life estates and common-law dower on the one hand, and life estates inherited by the law of heirship and succession on the other. In Seager v. McCabe, supra, the supreme court of Michigan, construing a dower statute of that state, reviewed the decisions at considerable length, made the distinction, and announced the following conclusion:

"The rules applicable to a country where landed estates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is subsistence merely, and where there is a strong disposition to free estates from even that charge, do not obtain in a commonwealth like ours, where estates are small, and the policy of our laws is to distribute them with each generation, where dower is one of the positive institutions of the state, founded in policy, and the provision of the widow is a part of the law of distribution, and the aim of the statute is, not subsistence only, but provision commensurate with the estate. In the present case the grant is by

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operation of the statute, giving the use of all the lands of which the husband was seised. The grant must be held to include the use of these lands, irrespective of whether mines are opened upon them before or after the husband's death."

The statute there construed was not as broad as the one of Texas, and was directed at the subject of dower. The Texas statute makes no mention of dower, but defines that which under the civil law would have been a usufruct,—an estate not impeachable for waste. This is specially significant, when it is remembered that the Texas system of land titles and laws of marital rights is devised largely from the civil law. Carroll v. Carroll, 20 Tex. 743. Under the civil law the usufructuary had a right to seek for and open every kind of mines, stone and lime quarries, chalk pits, and gravel banks. 1 Dom. Civ. Law, 843; 2 Dom. Civ. Law, 945–968; Neel v. Neel, 19 Pa. 323.

Another noticeable feature of the statute is that it gives the surviving husband the same estate in the land of the wife upon her death that it gives her in his land at his demise. This is a complete answer to the argument that the rule shall depend upon whether mines are open or not at the time of the husband's death, because he, by reason of his position as the head of the family, is deemed to fix for the use of his property commensurate with the necessities of his family. I think the complainant is entitled to one-eighteenth of the oil produced, after deducting all expenses of producing and marketing. If she is not entitled to the net one-eighteenth absolutely, then she is entitled to have such net yield impounded and put at interest, the interest to be paid to her during her life, while the corpus of the fund is preserved for the remainder-men. Blakley v. Marshall (Pa.) 34 Atl. 564; Wilson v. Hughes (W. Va.) 28 S. E. 781, 39 L. R. A. 292; Bryan, Petroleum, 41; Macswinney, Mines, 65. In neither event, however, should a court of equity take from the defendants the control and management of the common property. But a special receiver, more in the nature of an auditor, will be appointed for the purpose of taking and keeping accurate accounts of all oil marketed by the defendants, together with prices obtained and expenses incurred, and to collect, receive, and hold, subject to the orders of the court, one-eighteenth of the net amount of all oil so marketed. Ulman v. Clark (C. C.) 75 Fed. 868, Williamson v. Jones, 19 S. E. 436, 25 L. R. A. 222.

From the evidence introduced it seems at least probable that the lines of the Veatch and Humphreys surveys coincide, and that the Ingalls and Douthett surveys are invalid. This, however, would still leave the location of the line in dispute. The line fixed by the judgment in the case of Pasture Co. v. Cleveland (Tex. Civ. App.) 26 S. W. 93, appears to have been acted upon as an agreed line for some years, and for the purposes of the present order it will be considered as the true line.

F. C. Proctor, Geo. C. Greer, Foster Rose, Gustave Lemle, D. Edw. Greer, A. T. Watts, and Wm. P. Ellison, for appellants.

Amos L. Beaty and R. R. Hazlewood, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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PER CURIAM. As, by the record, the appellee, Mrs. Snow, is seised of an estate for life in one undivided one-eighteenth part of the lands described in the decree appealed from, and to that extent is a tenant in common with the owners of the fee, we all agree that she is interested in and entitled to an accounting for all oil developed and produced on and from the said lands to the prejudice of her estate, and to that end a receiver was properly appointed pending the litigation necessary to finally determine the full rights of the appellee. On this appeal no other questions need be passed upon.

The decree of the circuit court is affirmed, with costs.

UNITED STATES v. TOWNSEND et al.

(Circuit Court of Appeals, Second Circuit. January 4, 1902.)

No. 76.

TARIFF ACTS—CONSTRUCTION—"PROFESSIONAL PRODUCTION OF A SCULPTOR."

In construing tariff statutes congress must be assumed to use words and phrases in the sense in which they have been applied by the treasury department and executive and administrative officers under earlier statutes, and, so construed, the phrase "professional production of a sculptor," as used in Tariff Act 1897, par. 454, providing that "the term 'statuary' * * * shall be understood to include only such statuary * * * as is the professional production of a statuary or sculptor," must be considered as synonymous with "productions of a professional sculptor." [1]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court reversing a decision of the board of general appraisers, which affirmed the assessment for duty of certain marble statuary.

See 108 Fed. 801.

Henry C. Plast, for appellant.

Howard T. Walden, for appellees.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. The articles in question are marble and alabaster busts, single figures, groups, and bas reliefs, which are designed for use chiefly for memorial or cemetery and church purposes, and include such subjects as Faith, Hope, Memory, Sorrow, the Resurrection, etc. They were assessed for duty, under paragraph 115 of the tariff act of 1897, as "manufactures of marble," at 50 per centum ad valorem. The importers contended that they should be assessed under paragraph 454, which reads as follows:

"454. Paintings in oil or water colors, pastels, pen and ink drawings, and statuary, not specially provided for in this act, twenty per centum ad valorem; but the term 'statuary' as used in this act shall be understood to

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[1] Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. U. S., 18 C. C. A. 545.

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include only such statuary as is cut, carved or otherwise wrought by hand, from a solid block or mass of marble, stone or alabaster, or from metal, and as is the professional production of a statuary or sculptor only."

There was a great deal of evidence presented to the circuit court which was not before the board of general appraisers, and which materially differentiated the case from the one it passed upon. The judge who heard the cause below discussed the questions presented in a careful opinion, in the reasoning and conclusions of which we fully concur. The appellant calls attention to the fact that in paraphrasing paragraph 454 that opinion states the concluding clause as requiring the statuary to be the "production of a professional sculptor," when the phrase used in the act is "the professional production of a sculptor." The change of phraseology is immaterial. It is a familiar rule of construction of tariff statutes that congress must be assumed to use words and phrases in the sense in which they have been applied by the treasury department and executive and administrative officers of the government under earlier statutes which contained the same words and phrases. Robertson v. Downing, 127 U. S. 612, 8 Sup. Ct. 1328, 32 L. Ed. 269. The phrase "professional production of a sculptor" is found in successive tariff acts for some years past. Under date of February 6, 1880 (Treasury Synopsis; 4416), the secretary of the treasury, in a letter to the secretary of state, says:

"The terms 'professional productions of a sculptor' and 'productions of a professional sculptor' are considered as having the same signification, and the articles must be a production of a professional sculptor or statuary in the true definition of that term, in order to be admissible at a duty of," etc.

And the instructions as to consular certificates evidently regard the one phrase as a synonym of the other. It must be assumed that congress used the phrase it chose with a like understanding of its meaning.

The decision of the circuit court is affirmed.

In re HENSCHEL et al. (two cases).

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

Nos. 74, 80.

1. BANKRUPTCY—CHOOSING TRUSTEES.
   Under Bankr. Act 1898, § 56a, requiring matters submitted to the creditors to be passed on "by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present," claims allowed are not to be counted in choosing a trustee, where the creditor is not present, and the power of attorney of his proxy is insufficient.

2. SAME—PROXIES—CERTIFICATE OF NOTARY.
   A notary's certificate of acknowledgment to power of attorney to proxy of bankrupt's creditor is sufficient though having no venue, as it complies with the form prescribed pursuant to Bankr. Act 1898, § 30, vesting the supreme court with power to prescribe rules and forms.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

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William M. K. Olcott, for petitioners.
E. J. Myers, for respondent.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is a petition of review of an order of a court of bankruptcy confirming the appointment of a trustee. 109 Fed. 861. At a meeting of the creditors of the bankrupt to choose a trustee of his estate 10 creditors, whose claims aggregated $8,173, voted for Mr. Whitney, and 4 creditors, whose claims aggregated $2,048, voted for Mr. Hough. The court confirmed the choice of Mr. Hough as trustee, he having been appointed such by the referee in bankruptcy upon the theory that the creditors had made no choice. This ruling proceeded upon the consideration that there were 24 creditors present at the meeting, and consequently the votes cast for Mr. Whitney were not those of a majority. In this number of 24 were 10 who were not allowed to vote. Proxies for these votes had been executed to certain attorneys, and these attorneys offered to vote for Mr. Whitney, but the votes were excluded by the referee upon the ground that the proxies were not valid. The district court, in confirming the choice of Mr. Hough, besides deciding that a majority of the votes present had not been cast for Mr. Whitney, also decided that Mr. Hough was the choice of the creditors, because 8 of the votes cast for Mr. Whitney were cast by proxies who voted on defective powers of attorney. We are of the opinion that creditors whose claims have been allowed are not present at a meeting within the meaning of section 56a of the bankrupt act, when they are not permitted to participate in its proceedings. The language of the clause is as follows:

"Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided."

The meaning of the clause is to vest the power of creditors in those who are present, and not allow the proceedings to be delayed by the absence of those creditors who do not take sufficient interest to participate; but it is not its meaning to treat those as present who are excluded from voting by the referee. The court below construed it as meaning that the proceedings are to be controlled by the majority in number and amount of the "claims" present at the meeting, and was of the opinion that the claims sought to be represented by the excluded proxies were present at the meeting. We do not understand how claims are present at a meeting when the creditors themselves are absent, and those who seek to represent the claims are not allowed to represent them. Such claims are present only in the sense that every claim that has been proved is present. The proof of claim has been filed with the register, and may be on his desk during the meeting, but it is not present for any vital purpose. The proxy who is excluded from participation in the meeting is for all practical purposes precluded from representing the claim, and is absent from the meeting in legal contempla-

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tion. We agree with the circuit court of appeals for the Sixth circuit that of the creditors giving proxies those only are to be counted whose powers of attorney were regarded as authorizing the attorney to appear and participate in the meeting. In re McGill, 45 C. C. A. 218, 106 Fed. 57.

The defects in the eight powers of attorney to the proxies voting for Mr. Whitney consisted in the absence of a venue to the notary's certificate of acknowledgment. The acknowledgment conformed literally to the form prescribed by the supreme court. Form No. 21 (18 Sup. Ct. xxviii.). In People v. Snyder, 41 N. Y. 397, a justice of the supreme court of the United States, in taking the acknowledgment to a deed, omitted the venue, and the question whether it was a valid acknowledgment was presented for decision. The court, in holding the acknowledgment to be sufficient, said:

"This officer was entitled to take the acknowledgment, and it must be presumed that he did it within the limits of his jurisdiction, even though that is not stated to have been the case in the certificate which he made, for the legal presumption is in favor of the validity of the acts of public officers where nothing appears warranting a different conclusion."

In Carpenter v. Dexter, 8 Wall. 513, 19 L. Ed. 426, the venue to the certificate of a notary was simply, "State of New York," and it was objected that the certificate had no assignable locality, and was therefore fatally defective; but the court in considering the objection used this language:

"The commissioner of deeds in New York had authority to act only in his city, and it will be presumed, although the state is named, that the officer exercised his office within the territorial limits for which he was appointed."

The proposition that, when the official character of the person taking the acknowledgment appears in the certificate, his authority and jurisdiction are to be presumed, is generally recognized by the authorities. There are, however, respectable authorities to the effect that the certificate is defective when it contains no venue, and the place where it was taken cannot be ascertained by a reference to the instrument to which it is attached. Bankr. Act, § 30, vests with the supreme court the power to prescribe rules and forms to be observed in proceedings under it. As the certificates in question comply accurately with the form which has been prescribed pursuant to this statutory authority, it must be deemed sufficient.

We conclude that the district court erred in approving the action of the referee. The cause is remitted to the district court with instructions accordingly.

SUN PRINTING & PUBLISHING ASS'N v. EDWARDS.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 71.

1. PAROL EVIDENCE TO VARY WRITTEN CONTRACT—ADMISSIBILITY.

Where letters between plaintiff and defendant show a contract by which plaintiff was employed as superintendent of defendant's printing and mechanical departments for a certain term at a certain salary, with power to employ and discharge all help, parol evidence is not

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admissible, in an action against defendant for the wrongful discharge of plaintiff, to show conversations and negotiations between the parties prior to the exchange of letters, for the purpose of showing that the contract actually made by the parties required plaintiff to bring with him into defendant's service a force of competent compositors and stereotypers, etc., as such oral agreement, relating to the same subject-matter, is not a collateral agreement which may be established by such evidence.

2. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—IMPLIED CONDITIONS.
The contract implies an undertaking on the part of plaintiff that he is competent to discharge his duties as superintendent of defendant's printing establishment, and that he will discharge such duties faithfully.

3. SAME—EVIDENCE—ADMISSIBILITY.
Where plaintiff introduces evidence of the conversations and negotiations between the parties before the exchange of letters constituting the contract, evidence of such conversations and negotiations is admissible on behalf of the defendant.

In Error to the Circuit Court of the United States for the Southern District of New York.

Franklin Bartlett, for plaintiff in error.

Thos. F. Bayard, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment entered for the plaintiff upon the verdict of a jury.

The action was for breach of contract. The plaintiff alleged in his complaint that a written contract had been made with him by the defendant, evidenced by a letter written by him to the defendant, and the defendant's letter in reply, by which he was to be employed by the defendant for the term of two years, and that he was discharged by the defendant, without cause, shortly after he entered upon the performance of his duties. The letter written by the plaintiff was as follows:

"I understand that I am to be employed by your corporation for the term of at least two years at an annual salary of $5.200, payable in equal weekly payments of $100 each. I am to have entire control of all the printing and mechanical departments and appliances of your corporation, and am to employ and discharge, at my discretion, all the employés of said departments. The office of 'superintendent of printing' is to be created, and by that designation I shall expect to be known. I submit this statement in full to you, in order that, if you see fit to take me on, there may be no misunderstanding as to the terms agreed upon, by either side."

The defendant's letter in reply was an unconditional assent to the contents of the plaintiff's letter.

The defendant's answer, among other defenses, besides alleging that the plaintiff was discharged for justifiable cause, alleged that the letters did not contain the whole agreement between the parties, and set up, in substance, that the plaintiff, on his part, undertook to bring with him into the employ of the defendant a force of 200 experienced and qualified compositors and stereotypers, and to supervise and manage the composing and stereotyping departments of the defendant in a manner to relieve the defendant of all trouble

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in printing its newspapers, and that he failed to fulfill these promises. The principal assignments of error are addressed to the rulings of the court at the trial in excluding evidence.

The trial judge excluded evidence offered by the defendant of the conversation and negotiations between the parties preliminary to the exchange of the letters. So far as this evidence was offered by the defendant for the purpose of establishing the agreement set up in its answer, we think that it was not competent.

When a contract is consummated by writing, the presumption of law is that the written instrument contains the whole of it. The agreement is to be ascertained exclusively by its terms, and oral representations or stipulations preceding or accompanying its execution, differing from or not contained in the instrument, cannot be proved. But when the writing is of a nature to import that it was not intended to embody the entire contract between the parties, oral evidence to prove the whole terms is admissible. An example of such a writing is a memorandum of purchase or sale. Allen v. Pink, 4 Mees. & W. 140; Potter v. Hopkins, 25 Wend. 417; Filkins v. Whyland, 24 N. Y. 338. So, also, a parol collateral agreement made prior to or contemporaneous with the written agreement, which does not qualify the terms of the instrument, and is not inconsistent with them, may be given in evidence. But in applying this rule the question what collateral agreements do qualify the written contract, and what do not, is one upon which there is much divergence in the adjudications. Thus, in Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512, there was an agreement in writing by which the plaintiff agreed to furnish, and the defendant to purchase, certain machines upon terms and at times specified; and the defendant was permitted to prove a parol agreement at the same time by which the plaintiff guarantied that the machines should be so made that they would do the defendant's work satisfactorily, and, if not, that the plaintiff would take them back. On the other hand, in Seitz v. Machine Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, there was a written contract whereby the plaintiff agreed to supply the defendant with a specified machine, and put it in operation under the superintendence of a competent man, and the defendant agreed to pay therefor a specified sum at specified times; and the court held the defendant could not be permitted to prove an oral agreement, entered into at the same time, that the machine purchased should have a certain capacity, and be capable of doing certain work. In referring to the rule that the existence of a separate oral agreement as to any matter to which the written agreement is silent, and which is not inconsistent with its terms, may be proved by parol, the court, in its opinion, used this language:

"But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it."

This court must be controlled by the principle of that decision. See, also, Bast v. Bank, 101 U. S. 93, 25 L. Ed. 794; Godkin v. Monahan, 27 C. C. A. 410, 83 Fed. 116, 53 U. S. App. 604.

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The implied conditions of a contract are as much a part of its terms as the written parts, and the rule which forbids the proof of a collateral parol agreement which is inconsistent with the written terms equally forbids the proof of one which is inconsistent with its implied conditions. As the trial judge correctly stated in his instructions to the jury, in this case the agreement between the parties implied an undertaking on the part of the plaintiff to be competent to discharge the duties of a superintendent of the defendant's printing establishment, and to discharge them faithfully; and this was the extent of his undertaking. By the contract, he was to have entire control of the printing department, and proof that he agreed to employ a force of a specified number of men, if it would not have established an undertaking inconsistent with that provision of the contract, certainly would have established one that did not relate to a distinct subject, but was so closely related as to form a part of it. Proof that he agreed to discharge his duties as superintendent in such manner as to accomplish a particular result would establish an undertaking inconsistent with the implied terms of the agreement. As, of the undertakings sought to be proved, one related to the same subject as the written contract, and the other would have qualified its purport, they were not available to the defendant.

Although, in excluding the evidence for the purpose of establishing the alleged collateral agreement the ruling of the trial judge was correct, we think the preliminary conversations between the plaintiff and the managing agents of the defendant were admissible on other grounds. The plaintiff had given testimony in respect to these conversations, and had detailed what was said; and when the defendant offered to prove its version of them, and the objection was made that the evidence would contradict the terms of the written contract, the defendant insisted upon its right to prove them because the plaintiff had been allowed to do so. Prior conversations and negotiations are often competent when the subject-matter of a contract requires the aid of extrinsic evidence to ascertain its meaning. It was important in this case to know what kind of a printing establishment was contemplated by the contract, as the question of the plaintiff's competency, and the right of the defendant to discharge him for inefficiency, would measurably depend upon the character of the establishment he was to supervise and manage. Was the defendant's printing department to be maintained on the scale, and its business conducted generally, in the future as in the past, or did the parties contemplate a new departure, and the maintenance of a larger or smaller concern? The contract is silent on these matters, and it may well be that the evidence excluded was competent for the purpose of making that determinate which was left vague and uncertain. But whether the evidence was competent in this view or not, it was admissible because the plaintiff, having opened the door and availed himself of its benefit, was foreclosed from precluding the defendant from its benefit. The testimony given by the plaintiff was of a character likely to influence the jury, and we cannot doubt it was prejudicial to the defendant.

The judgment is reverse'

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METROPOLITAN ST. RY. CO. v. HUDSON.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 22.

1. STREET RAILWAY—INJURY TO PASSENGER—INSTRUCTIONS.
Where, in an action for injuries to a passenger on a street car, the issues are whether plaintiff was injured by the careless starting of the car after it had stopped or by her own negligence in attempting to board it before it had stopped, it is error to instruct that if the car, even if not quite at a standstill, was moving with such extreme slowness that a person might fairly undertake to board it, and while plaintiff was about boarding it the conductor suddenly started it, so that it moved forward with a jerk, defendant's negligence would be established.

2. SAME—APPEAL—ASSIGNMENT OF ERROR.
An assignment of error complaining of an erroneous instruction is without merit where the court, on plaintiff's exception, qualified the instruction, and plaintiff took no further exception.

3. SAME—MEASURE OF DAMAGES—INSTRUCTIONS.
In an action for injuries, an instruction not to award plaintiff any damages for hysteria not directly caused by the accident is properly refused, as it restricts the recovery to damages directly caused by the accident, while those indirectly resulting from it may also have been recoverable.

In Error to the Circuit Court of the United States for the Southern District of New York.

Theo. H. Lord, for plaintiff in error.

J. Aspinwall Hodge, for defendant in error.

Before WALLACE, Circuit Judge, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff in an action for negligence rendered upon the verdict of a jury. The only assignments of error which have been argued relate to an instruction given by the trial judge to the jury in respect to the negligence of the defendant, and his refusal to give one in respect to the question of damages requested by the defendant.

The issues upon the trial, aside from those relating to the damages, were whether the plaintiff was injured by the careless starting of the defendant's car after it had stopped to receive passengers, or whether she was injured by her own negligence in attempting to board it before it had come to a stop. The trial judge instructed the jury that "if the car, even if not quite at a standstill, was still moving with such extreme slowness that a person might fairly undertake to board it, and while plaintiff was about boarding it the conductor suddenly started it, so that it moved forward with a jerk," negligence on the part of the defendant would be established.

This instruction was apparently given under the impression of the trial judge that the plaintiff may have received her injury while attempting to board the car after it had come to a stop and before it had got under much speed. The evidence did not authorize such a theory, and, if it had, we think the instruction would not have been

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correct without further qualification. Unless a car has reached one of its regular stopping places, or its speed has been slowed to permit an intending passenger to board it, or some invitation, express or implied, to board it has been given by those in charge, the conductor is under no obligation to anticipate that any person will attempt to board; and if, in ignorance of such an attempt, he causes the motorman suddenly to put on speed, he does not violate any duty towards an intending passenger. Conductors of street cars are at liberty to regulate the movements of their cars as they see fit so long as they do not violate their duties to others. If, however, while a car is proceeding slowly, the conductor is made aware that an intending passenger is attempting to board it, although it may not be his duty to stop the car, common prudence certainly forbids that he start it suddenly forward. No man is at liberty to do an act unnecessarily which he knows or ought to know is likely to imperil the person of another.

Notwithstanding the instruction was incorrect, in view of the issues which were presented by the evidence, we think the assignment of error based upon it is not well taken. The attention of the trial judge was not called to the erroneous theory of the facts suggested by the instruction, and when the plaintiff excepted to the instruction the trial judge qualified it, and the plaintiff took no further exception. Obviously, the plaintiff acquiesced in the instruction as qualified.

The other assignment of error is based upon the refusal of the trial judge to instruct the jury not to award the plaintiff "any damages for hysteria not directly caused by the accident." He did not instruct them specifically whether the hysteria was or was not an element of damages, but he defined adequately the general rule of compensation in actions for personal injury, and no exception was taken to that portion of the charge. The instruction was one of a character which the judge at a trial is at liberty to give or withhold at his discretion. It is open, however, to the criticism that it sought to restrict the recovery to damages directly caused by the accident, while those indirectly resulting from it may also have been recoverable. The author of the initial cause is responsible for the indirect damages which are its natural consequences. The suggestion that the instructions given did not confine the consideration of the jury to the damages arising solely from the accident is hypercritical. The only controversy as regarded damages was in respect to the extent of the injuries caused by the defendant's acts, and to urge that the jury might have given damages for hysteria not thus caused is an academic proposition, and does not appeal to common sense.

We conclude that the exceptions by the defendant were not well taken, and the judgment should be affirmed.

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McKNIGHT v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

1. CRIMINAL LAW—WRIT OF ERROR—STAY OF PROCEEDINGS—BAIL.
Under Rev. St. § 1007, providing that a writ of error, when granted within 60 days after the rendition of the judgment complained of, or afterwards, with the permission of a judge of the appellate court, shall operate as a supersedeas, and under rule 38 of the circuit court of appeals (31 C. C. A. cviii., 90 Fed. cviii.) such writ, in the case of a conviction of a crime not capital, stays execution, but such stay of proceedings does not involve the question as to whether, pending the writ of error, defendant shall be detained or go at large on bail.

2. SAME—POWER OF COURT.
Under the act to establish the circuit court of appeals (26 Stat. 829), section 11, providing that all provisions of law in force regulating appeals or writs of error, including provisions for bonds or other securities, shall regulate such proceedings in that court, and rule 38 of such court, the court has the power, and it is generally its duty, to admit to bail, after conviction of a crime not capital, pending a writ of error.

3. SAME—APPLICATION FOR ADMISSION TO BAIL.
Where defendant was convicted of embezzling funds of a national bank, and the trial court refused to admit him to bail pending a writ of error, in the absence of some great urgency, a further application for admission to bail should be made to the appellate court.

4. SAME—TIME.
Where one convicted of crime is admitted to bail pending a writ of error, the bail should be allowed for a time only sufficient to insure the filing of the transcript in the court of appeals within a reasonable time, reserving the question of further bail until the lapse of the time thus fixed.

5. SAME—THIRD CONVICTION.
The fact that defendant has been tried and convicted three times on the same indictment for embezzling funds of a national bank is not sufficient ground for denying bail pending a third writ of error.

On Application for Bail Pending Writ of Error.

See 111 Fed. 735.

W. C. P. Breckinridge, A. E. Richards, and A. G. Ronald, for plaintiff in error.

R. D. Hill, U. S. Atty., for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. The plaintiff in error has been convicted under an indictment charging embezzlement of funds of a national bank. After writ of error allowed and citation served, he applied to the court below for bail, pending his writ of error, but bail was refused him. Application was then made for bail to one of the members of this court, who, preferring that the application should be made to this court, suggested to the trial judge the propriety of admitting the petitioner to bail until such time as this court might have opportunity to hear and determine an application from the plaintiff in error. Upon this suggestion the trial judge acted, and the plaintiff in error has been admitted to bail until February 12th next. He has now filed a petition praying to be allowed to stand upon bail pending his writ of error. Under the rules of this court, and in due course of procedure, the petitioner's bail must expire long before a hearing

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upon his writ of error. In such circumstances it becomes necessary to determine whether he shall, pending his writ of error, be allowed to give bail for his appearance in the district court after the determination of his case in this court. The writ of error, when filed within 60 days of the judgment complained of, operates as a supersedeas or stay of proceedings; and a writ of error from this court to the circuit or district court, in the case of the conviction of a crime not capital, is a matter of right without giving any security. Section 1007, Rev. St.; In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409; Hudson v. Parker, 156 U. S. 277, 283, 15 Sup. Ct. 450, 39 L. Ed. 424; rule 38 of this court (31 C. C. A. cviii., 90 Fed. cviii.).

If the writ of error is not allowed until after the lapse of 60 days, it will equally operate as a supersedeas, provided the judge signing the citation shall so direct. But the stay of proceedings simply prevents the execution of the judgment of the trial court, and by no means involves the question as to whether pending the writ of error he shall be detained or go at large upon bail. Neither the power nor the general duty to admit to bail after conviction, and pending a writ of error, can be regarded as open, in view of the thirty-sixth rule of the supreme court, and the conclusions announced by that court in Hudson v. Parker, where Mr. Justice Gray, after a consideration of the statutory provisions in respect of bail, said:

"But, however it may be in a capital case, it is quite clear, in view of all the legislation on the subject of bail, that congress must have intended that under the act of 1891 (26 Stat. 827), in cases of crimes not capital, and therefore bailable of right before conviction, bail might be taken, upon writ of error, by order of the proper court, justice, or judge. And we are of opinion that any justice of this court, having power, by the acts of congress, to allow the writ of error, to issue the citation, to take the security required by law, and to grant a supersedeas, has the authority, as incidental to the exercise of this power, to order the plaintiff in error to be admitted to bail, independently of any rule of court upon the subject, and that this authority is recognized in the first paragraph of rule 36."

Rule 38 of this court is, in substance, rule 36 (31 C. C. A. cvii., 90 Fed. cvii.) of the supreme court. That this court has the power, by virtue of its jurisdiction over the proceedings in error, to admit to bail in criminal cases pending upon writ of error, is indisputable. The eleventh section of the act to establish circuit courts of appeals (26 Stat. 829) provides that:

"All provisions of law now in force regulating the methods and systems of review, through appeals or writs of error, shall regulate the method and system of appeals and writs of error, provided for in this act, in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit court of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

It follows from this broad power that this court, or its judges, may exercise, in aid of its appellate jurisdiction in criminal cases, the same powers in regard to the allowing of writs of error, or admission to bail pending a writ of error, which were formerly exercised in appellate criminal proceedings by the supreme court or its justices,

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by virtue of the provisions of statutory law in force, or by implication from the grant of jurisdiction over proceedings in error. Rule 36, said the supreme court in Hudson v. Parker, "was so framed as to give effect to the appellate jurisdiction conferred by the act of 1891 in the manner most consistent with the provisions of the various acts of congress concerning the same matter." The same rule has been adopted by this court to give effect to the jurisdiction conferred upon it by the act of 1891, and by the act of January 20, 1897 (29 Stat. 492), withdrawing from the supreme court jurisdiction of criminal cases not capital, and conferring the same on this court. There seems to have been no disagreement in the supreme court in respect of the power of the supreme court to admit to bail in criminal cases pending on writ of error; for Mr. Justice Brewer, in his dissenting opinion, expressed his agreement with the assertion that the court "has power to admit to bail in criminal cases pending in error," though he deduced the power "to let to bail solely from the grant of jurisdiction over the proceedings in error," and differed with the majority in respect to the power of a single justice, not assigned to the circuit to which the writ of error issued. From whatever source the power comes it is clear that this court, as an appellate court, has the power to admit to bail pending a writ of error. The granting of the writ of error in itself stays the execution of the sentence of the trial court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief. This seems to be the view taken of the thing and policy of the statute of the United States; for in Hudson v. Parker, cited above, the court said:

"The statutes of the United States have been framed upon this theory: that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

The fact that bail has been refused by the trial judge, though not conclusive, is a fact which would make it more seemly, in the absence of some great urgency, that further application should be made to the appellate court, which, by virtue of its appellate jurisdiction, may properly be called upon to make all proper orders for the custody of the defendant pending the hearing of his writ of error. We quite agree with the counsel for the government, that all presumption of innocence is gone after conviction, and that proceedings resorted to for the mere purpose of delay should be discouraged. We do not, however, deem it wise, or in harmony with the humane principles of our law, that proceedings to review alleged error committed upon the trial of a defendant should be so far discouraged as to altogether deny the right to bail in that class of cases deemed bailable before conviction. That it should be made the interest of defendants, after conviction, to speed the hearing in the appellate court, we quite agree, and all unnecessary delays, due to the conduct of the defendant seeking a review, may well be discouraged by allowing bail for a time only sufficient to insure the filing of the transcript in the court

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of appeals, reserving the question of further bail until lapse of the time thus fixed, when a new bond may be taken by the trial court on application to it, or by direction of the appellate court, for such time as the latter may prescribe. The district court denied bail upon the ground that this was the third trial and third conviction upon the same indictment. We cannot regard this fact a sufficient ground for denying bail during the pending of a third writ of error.

The application of the petitioner will be allowed on condition that he enter into bond in the same amount of the bond upon which he is now at large, conditioned to make his appearance in the district court for the Western district of Kentucky, at Louisville, on the first Wednesday in May, 1902, and from day to day thereafter until discharged from his obligation by a new bond or other order of that court. The bond to be executed may be approved by the court below or by any judge of that court.

CUDDY et al. v. CLEMENT et al.

PRINCE et al. v. OGDENSBURG TRANSIT CO.

(Circuit Court of Appeals, First Circuit. January 16, 1902.)

No. 393.

1. MARITIME LIENS—SUPPLIES—CONTRACT WITH OWNER.
The rule applied that by the maritime law no lien is presumed to arise for supplies or labor furnished a vessel on a contract made by the owner, and proof is required that the minds of the parties to the contract met on a common understanding that such a lien should be created. The Iris, 100 Fed. 104, 40 C. C. A. 301, considered.[1]

2. SAME—IMPLIED LIEN.
The rule that an owner of a vessel, who is not also the master, may create an implied lien on her for supplies, is a modern one, confined to the United States, and not a part of the maritime law, and the distinctions and limitations of such rule have never been clearly and fully declared; but the true rule undoubtedly is, with reference to implied liens created by the owner, as well as to express liens created by him in the form of bottomry or respondentia, that there must be a maritime necessity, and this implies both a need of repairs or supplies, and a reasonable impracticability of obtaining the same on the credit of the owner.

3. SAME.
A contract between a corporation owning and operating a large fleet of steamers on the Great Lakes, and having its principal place of business in the state of New York, and a firm of coal dealers having yards at Cleveland, Ohio, and Sandwich, Canada, by which the latter agreed to furnish such coal as the company's vessels might need at such ports during the navigation season, construed, and *held*, in the light of the circumstances, and of similar transactions between the parties in previous years, not to give the dealers liens on the vessels for coal supplied them thereunder.

4. SAME—STATE STATUTES—LIMITATION TO DOMESTIC VESSELS.
Rev. St. Ohio, § 5880, creating liens on steamboats for supplies, labor, etc., furnished under contract with the master or owner, must be restricted in its operation to domestic vessels.[2]

Webb, District Judge, dissenting.

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[1] Maritime liens for supplies and services, see note to The George Dumois, 15 C. C. A. 679.

[2] Maritime liens created by state laws, see note to The Electron, 21 C. C. A. 21.

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Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 107 Fed. 978.

Harvey D. Goulder (Goulder, Holding & Masten and Carver & Blodgett, on the brief), for appellants.

Louis Hasbrouck, for appellees.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PUTNAM, Circuit Judge. The petitioners in this case, now the appellants, were coal suppliers, doing business under the name of Cuddy-Mullen Coal Company. The rule of law which governs the parties was laid down by our opinion rendered on February 2, 1900, in The Iris, 40 C. C. A. 301, 100 Fed. 104, 106, 110. The Iris was reaffirmed by us in 41 C. C. A. 679, 101 Fed. 1006; and it came before the supreme court on a petition for certiorari, which was denied, under the title of Woodworth v. Nute, 179 U. S. 682, 21 Sup. Ct. 915, 45 L. Ed. 194. The portions of the opinion in The Iris, 40 C. C. A. 301, 100 Fed. 104, to which we refer, are as follows:

"By the maritime law, no lien for supplies or labor furnished a vessel is presumed to arise on a contract made by the owner, and proof is required that the minds of the parties to the contract met on a common understanding that such a lien should be created. Neither is it sufficient that the party who furnished the labor or supplies gave credit, so far as his own intentions were concerned, to the vessel, or would not have furnished them except on the belief that he was acquiring a lien for them. In this respect the status is different from what it is with reference to liens for labor and supplies furnished a vessel on the order of her master. * * * That understanding may, of course, be inferred from facts as well as from express language, as is ordinarily true with reference to all alleged contracts where it must be shown that the minds met."

In the case at bar, the vessels on which the petitioners claim liens were foreign to the ports where the supplies were delivered them, while in The Iris the vessel in question was domestic. Therefore many of the observations in The Iris are not applicable here.

The facts which relate to this appeal are sufficiently stated in the opinion of the learned judge who disposed of the case below, with few exceptions. The supplies, which were coal, were furnished in conformity with a contract, as follows:

"Memorandum of contract made and entered into this second day of May, 1898, by and between the Cuddy-Mullen Coal Company of Cleveland, O., and the Ogdensburg Transit Company of Ogdensburg, N. Y.:

"In consideration of the said Ogdensburg Transit Company hereby agreeing to take from the said Cuddy-Mullen Coal Company what coal the fleet of steamers operated by them may require at the points herein named, during the season of navigation of 1898, the Cuddy-Mullen Coal Company hereby agrees to furnish at its dock in Cleveland, at the following prices per ton: Youghiougheny R. M. coal, such as the steamers were supplied with last season, at the price of $1.70 per ton f. o. b. vessel and trimmed, or steam lump, same quality of coal, 10c. additional per ton, namely: To the steamers Governor Smith, F. B. Prince, W. J. Averill, J. B. Langdon, E. R. James, A. McVittis, W. L. Frost, W. A. Haskell. These prices are to continue in operation throughout the season of navigation of 1898.

"Whatever coal any of said steamers may require in Detroit river is to be furnished by the said Cuddy-Mullen Coal Company at its docks at

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Amherstburg or Sandwich, at the price of $2.20 per ton aboard and trimmed for steam lump Youghiougheny.

"It is also understood and agreed that if the price of coal goes down, and other boats under similar conditions are furnished coal at Cleveland at lower prices than $1.70 per ton for run of mine, and $1.80 per ton for lump, then, and in that case, the Ogdensburg Transit Company is to have the benefit of such reduced price during the time it prevails.

"This contract is to be subject, however, and contingent upon strikes, accidents, delays of carriers, and other delays unavoidable or beyond the control of either of the parties hereto.

"Ogdensburg Transit Company.
"By F. W. Baldwin, Manager.
"Cuddy-Mullen Coal Co.,
"By L. Cuddy."

"The additional clause, written in ink, is agreed to by the signers.
"F. W. Baldwin, Manager.
"Cuddy-Mullen Coal Company,
"By L. Cuddy."

The case came into the circuit court by reason of the fact that a receivership had been constituted of the assets of the Ogdensburg Transit Company, and the Cuddy-Mullen Coal Company intervened by summary petition, claiming admiralty liens. We do not pass on any question as to the jurisdiction of the circuit court. Moran v. Sturges, 154 U. S. 256, 276, 277, 14 Sup. Ct. 1019, 38 L. Ed. 981. It appears by the record, and also by the opinion of the learned judge who sat in the circuit court, that the coal was furnished at the ports named in the contract, to the various steamers as ordered by their masters, and as required from time to time during the season, and that for the number of tons received on each occasion each master gave a receipt to the Cuddy-Mullen Coal Company.

The receipt was attached to a voucher, forwarded by the Cuddy-Mullen Coal Company to the Ogdensburg Transit Company. All the receipts and vouchers were alike in form, the Cuddy-Mullen Coal Company using therefor printed forms, furnished by the Ogdensburg Transit Company, at the request of the latter. The vouchers contained a proper form for receipts showing payment. At the close of the season,—that is to say, on December 19, 1898, —these receipts were filled out and signed by the Cuddy-Mullen Coal Company, who on that day took therefor a note of the Ogdensburg Transit Company covering all the vouchers. This note contained the following, which was cited by the circuit court, but not especially noticed by it, and which, perhaps, was not brought pointedly to its attention; that is to say, it concluded with the words, "which, when paid, shall be in full for fuel supplied to the O. T. Co. steamers, season of 1898." It is stated that this note was on a form used by the Cuddy-Mullen Coal Company in its business in cases where a lien was claimed for coal furnished. It does not appear, however, that the Ogdensburg Transit Company knew, or had any intimation of this fact, or that the clause was ever brought specifically to its attention. Moreover, the day the note was given the vouchers were receipted by the Cuddy-Mullen Coal Company "in full," without any reservation like that contained in the note. This latter fact would not change the legal effect of this part of the transaction if its legal effect were directly involved, because,

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for that purpose, the receipt and note would be taken as one instrument; but it minimizes the force of this clause in the note for the only purpose for which it could be used. Of course, if liens were not given when the coal was furnished, they could not be created by any understanding which first had its origin at the time the note was given; so that the most that can be implied from this clause would be to the effect that thereby the Ogdensburg Transit Company recognized liens as already existing. It comes in, therefore, if for any purpose, as an admission, the importance and weight of which are to be tested by the other circumstances of the case.

One other fact not specifically set out in the opinion of the circuit court, and to which its attention was not directly called, was the precise terms of the contract in the particulars to which we will hereafter refer.

With regard to the coal furnished at Cleveland, the petitioners also rely on section 5880 of the Revised Statutes of Ohio, as follows:

"Any steamboat, or other water-craft navigating the waters within or bordering upon this state, shall be liable, and such liability shall be a lien thereon, for all debts contracted, on account thereof, by the master, owner, steward, consignee, or other agent, for materials, supplies, or labor in the building, repairing, furnishing, or equipping of the same, or for insurance, or due for wharfage, and also for damages arising out of any contract for the transportation of goods or persons, or for injury done to persons or property by such craft, or for any damage or injury done by the captain, mate, or any other officer thereof, of by any person under the order or sanction of either of them, to any person who is a passenger or hand on such steamboat or other water-craft, at the time of the infliction of such damage or injury."

We do not find that this statute was particularly commented on by the learned judge who sat in the circuit court. The counsel have brought it to our attention, and, although it is not clear that it is covered by the assignment of errors, yet it involves too important propositions to be overlooked. What effect shall be given to it will be considered hereafter.

Aside from the questions which may be involved in the application of the Ohio statute, no liens arose unless a mutual understanding that there should be liens can, as said in The Iris, be properly implied from the giving and receiving of the vouchers referred to, supported by the peculiar expression in the note of the Ogdensburg Transit Company which we have cited, so far as that expression can be regarded as an admission affecting the result. Before weighing the effect of these two elements, it is necessary to clear the case of some confusion appearing at some of its stages. The position of the petitioners is not an unmixed one with reference to the distinctions between supplies ordered by a master and those ordered by an owner. It proceeds on the hypothesis that this is the ordinary case where supplies are ordered by a master in a foreign port, so that the favorable rules as to presumptions apply which were stated in The Emily Souder, 17 Wall. 666, 671, 21 L. Ed. 683, and which have often been elsewhere expressed. The propositions of the petitioners in this connection twist the case from

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its natural relations to ordinary business transactions, and are properly disposed of in the opinion of the learned judge who sat in the circuit court, wherein he said:

"When the master, in any instance, notified the petitioners of the amount of coal he desired, it was presumably a notification under the contract, and the coal was presumably furnished under the contract. The situation is the same as if the manager of the defendant company had been present when the vessels arrived, and had personally notified the petitioners that he wished them to furnish under the contract the respective amounts of coal which were supplied."

Looking at all the circumstances of the case fairly, and according to the rules which we must assume govern, in their ordinary transactions, two business concerns like those involved here, and avoiding the distortion of facts for the purpose of creating a lien in behalf of the petitioners, it is too plain to require any elaboration that this extract from the opinion of the learned circuit judge states precisely the relations of the masters of the various steamers to the transactions in question; but the petitioners seek to meet this by affirming that the contract which we extract is so defective in its terms that it is a mere memorandum. They refer to the fact that it makes no provision for credit, and they claim that it only specifies what amount of coal is to be taken. Therefore they maintain that the contract amounted only to directions to the masters of the steamers with reference to the dealers or yards from whom they were to obtain their fuel. But it is formal in all respects. To be sure, it did not bind the Ogdensburg Transit Company to purchase any specific amount of coal, or, indeed, any coal at all, because it did not bind it to send the steamers named to the ports named. Its terms were clearly obligatory on the Cuddy-Mullen Coal Company to supply what coal might be required; and the fact that the Ogdensburg Transit Company was not bound to send steamers to the ports named did not change the nature of the instrument as obligatory and perfect within the terms of the law as well as from a commercial point of view. In this respect the contract was fully as specific as that under consideration by this court in Church v. Proctor (decided on February 2, 1895) 13 C. C. A. 426, 66 Fed. 240, where Judge Aldrich, speaking in behalf of the court, explained, at page 242, 66 Fed., and page 428, 13 C. C. A., that the contract was complete on its face, in the sense that it was as complete as contracts regulating undertakings of the character concerned could well be made. Maritime liens for repairs and supplies are in the nature of safeguards against the emergencies in which sea-going vessels may be placed at foreign ports, and the danger of such emergencies arising in this case was, at least, guarded against by the contract in the record before us.

Of course, it is not maintained that the mere fact that the contract failed to state whether the coal was to be paid for in strict cash affects its binding force in the eyes of the law; but this, apparently, is relied on as bearing on the proposition that, as personal credit was not stipulated for, it must be presumed that the coal was delivered in agreed reliance on a lien. Looking at the rela-

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tions of these parties under similar contracts for several years, the question whether the sales were to be for cash is to be determined, not so much by any formal terms as by the prior course of dealings and the usages on the Lakes, and by a knowledge whether the Ogdensburg Transit Company was entitled to credit. So far as concerns the latter element, there are no proofs or suggestions in the record, one way or the other, except the transaction between these parties in the particular to which we will hereafter refer, and except that this corporation was the owner of a large fleet of steamers, navigating the Lakes, and was actively operating them, without any evidence, direct or indirect, that, when the contract was made, it was under any considerable indebtedness. Therefore the ordinary presumption of fact applies which applies to all persons and corporations owning and actively operating large properties, without any suggestion of not meeting obligations in the ordinary course.

But the record shows plainly that credit was intended. To the petition are attached various schedules, stating the amount of coal and the prices thereof. The claim set out in the petition is for these specific amounts, with interest from December 19, 1898, which day we can take judicial notice was about the close of the season of Lake navigation. It is the same on which the note referred to was given. The note itself was made on six months' time, and included the interest for that period, and none of the schedules attached to the petition, and no allegations of the petition, claim any interest except from December 19th. The several vouchers which have been referred to were receipted in full on December 19th, without any addition of interest. Therefore the record shows that, by the understanding between the parties, the prices were made as of a date which represented the close of the season, and that no interest was to be paid for the intervening period. This demonstrates, not only that the Ogdensburg Transit Company was entitled to credit, but that it actually did receive credit, and that it was agreed that it should have it.

Important facts are found in the very frame of the written contract between the parties. Its caption formally describes it as one between the petitioners and the Ogdensburg Transit Company. It commences with these words, "In consideration of the said Ogdensburg Transit Company hereby agreeing to take," etc.; and to the same effect are the closing words that, under certain circumstances, "the Ogdensburg Transit Company" is to have the benefit of certain reduced prices. It is true that these expressions are in no sense peculiar; but they are appropriate to ordinary contracts between two parties for merchandise, when they rely on each other and on nothing else. Nowhere does the Ogdensburg Transit Company assume to act in behalf of its steamers, or as representing them; but throughout the contract is positively expressed as one between the parties who executed it, and as individual to them and them alone. It contains at all points such features, and none others, as properly belong to a contract between two parties dealing on their own personal credit for a series of transactions.

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On the other hand, the vouchers, so much relied on by the petitioners, did not assume, in any particular, to represent correctly the relations of the parties. In any event, the Ogdensburg Transit Company was liable personally for the fuel; yet it is omitted from the vouchers, which name, in each case, the vessel only. Therefore, as the vouchers were not exact in this substantial particular, there would seem to be no presumption that they intended to correctly represent the transactions. It is to be remembered that they were given at the request of the Ogdensburg Transit Company, and are exactly such, and only such, as a careful corporation, operating a line of vessels, would desire in order that it might receive the approval of the masters, and be able to keep the usual accounts with each steamer. In view of the ordinary course of transactions of careful merchants and operators, desiring proper accounts with their various properties, they are as consistent with one theory as with the other.

Some effective observations in this direction will be found in The Patapsco, 13 Wall. 329, 20 L. Ed. 696. That, also, was a case of coal furnished various steamers operated by the Commercial Steamboat Company. The coal was purchased by the agent of the corporation; but under the circumstances of the case, which, as appears in The Valencia, 165 U. S. 264, 269, 17 Sup. Ct. 323, 41 L. Ed. 710, was regarded as a very close one, it was held that the coal dealer had liens on the various steamers involved. On looking at the corresponding facts of the two cases, the reason why liens should be sustained in The Patapsco and denied here becomes apparent. As we have said, in each case the coal was ordered by the owner, but in The Patapsco there was no contract for a season, nor any other contract of a formal nature. The coal was delivered to each steamer on arrival, after requisition by the engineer on the owner's agent. The agent testified (page 331, 13 Wall., and page 697, 20 L. Ed.) that the owner was not known in the transaction. It appeared that, during the whole time the coal was being furnished, the owner was in an embarrassed condition, and that, almost simultaneously with the supplying of the first lot, all of its steamers were heavily mortgaged. At page 333, 13 Wall., and at page 697, 20 L. Ed., Mr. Justice Davis, in behalf of the court, observes:

"There is no reason to suppose that the master had funds or the owners of the line credit." "On the contrary, it is in proof that the company which owned the line of steamships was, at the date of these transactions, hopelessly insolvent, and was borrowing large sums of money on a mortgage of its steamers, away from home, and in the very city where the libelant resided."

Then the opinion follows up these facts, and says that, under the circumstances, it would be a "violent presumption" to suppose that the libelant relied on the credit of the corporation. It remarks, at page 334, 13 Wall., and at page 698, 20 L. Ed.:

"It is very clear that there was no credit to the company at the time of sale, because the coal was sold for cash, at the lowest market price."

In all the particulars which we have named, the case at bar is the reverse of The Patapsco. Under the circumsances, the court

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there held, as we have already said, that the coal dealer had liens on the steamers, although it was met with the fact that the entries on his journal charged the coal to the Commercial Steamboat Company, and in no instance to the steamers. Nevertheless, it says at page 335, 13 Wall., and at page 698, 20 L. Ed.:

"There is nothing besides this journal entry to indicate that the coal was furnished on the personal credit of the company, and, as the other facts in the case are in favor of a charge direct to the steamship, we do not think the legal inference of credit to the ship is removed."

In the case at bar the effect intended to be given to the method of making the accounts is the reverse of that in The Patapsco, but the observation cited applies here. In each case the accounts and vouchers, as kept and rendered, fail to agree with the actual credit given, and also in each case they are insufficient to overcome the weight of the more important and persuasive facts. Having thus determined that, in the present case, there is not enough in the vouchers and receipts to weigh against the effect of the formal contract between the parties, it is clear that there is nothing in the peculiar expression which we have cited from the note, minimized, as it is, by the other facts to which we have referred, to influence our judgment on the question of fact involved.

The circumstances of The Havana, decided by the district court for the Eastern district of Pennsylvania (87 Fed. 487), and affirmed by the court of appeals for the Third circuit (35 C. C. A. 148, 92 Fed. 1007), are strikingly like those at bar, and the result was the same as that reached in the circuit court. Referring to the fact that the libelants relied on the manner of charging supplies on their books, the district court observed that they were made in the method common to all cases where the owners are looked to for payment, the vessel being named simply to identify the work. It appears at page 489 that the bills were made against the vessel and her owners. The court added that "they would be naturally so made, whether a lien existed or not." The court of appeals, observing, in substance, that where repairs are ordered by an owner, even in a foreign port, no lien is presumed, and that in the case before it there was nothing to show an understanding or assent by the owner that the Havana should be subject to a lien, affirmed the decree of the district court dismissing the libel. In view of the conclusions in The Patapsco and The Havana, and considering the effect which we must give to the various facts appearing in the case at bar to which we have referred, when grouped, we are of the opinion that the decree of the circuit court should be affirmed.

One other topic, however, deserves comment. The petition alleges that the coal could not have been procured except on the credit of the vessels. The answer denies this allegation, and we have already seen that there is no proof in the record in support of it. On the other hand, the frame of the contract between the parties, together with the evident understanding, as shown by the facts to which we have referred, that credit was to be given until the end of the season, lead to the conclusion that the Ogdensburg Transit Company had credit, as we have already said. The rule

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that an owner of a vessel, who is not also the master, may create an implied lien on her for supplies, is a modern one, confined to the United States, and not a part of the maritime law. This is historically well known, and it is also stated by so eminent an authority as Fland. Mar. Law, § 241. Mr. Flanders understood this proposition to be supported by the opinion of Mr. Justice Johnson in The St. Jago de Cuba, 9 Wheat. 409, 416, 6 L. Ed. 122. The fact that the owner may hypothecate a vessel by an implied lien, without bottomry, must be regarded as established in the United States by The Grapeshot, 9 Wall. 129, 19 L. Ed. 651; The Guy, 9 Wall. 758, 19 L. Ed. 710; and The Kalorama, 10 Wall. 204, 214, 19 L. Ed. 941. The rule has been recognized in other cases, but it originated with those to which we have referred. It happens that, as the rule was developed, no proper distinctions or limitations have been given concerning it, except those explained by the extracts we have made from The Iris, and there shown to have been fully sustained by the supreme court.

In the case of supplies and repairs ordered by a master in a foreign port, their necesssity being shown, everything else is presumed prima facie in favor of a lien, and the burden is thrown on whomsoever disputes its validity; but, with reference to supplies ordered by the owner, it is difficult to say what the presumptions are. At one stage of the maritime law, it seems to have been understood that the owner might bottomry a vessel under circumstances which would make the bottomry valid although there were no maritime necessity therefor. Fland. Mar. Law, § 251. If such were the law, it might follow that, by a clear understanding, the owner might in like manner impress the vessel with an implied lien, although there were no maritime necessity therefor. On that hypothesis, there could be no inquiry, when repairs or supplies are ordered by the owner, whether a credit to the vessel was requisite. The true rule, however, undoubtedly is, with reference to implied liens created by the owner, as well as to express liens created by him, in the form of bottomry or respondentia, that there must be a maritime necessity. This implies both a need of repairs or supplies, and a reasonable impracticability of obtaining the same on the credit of the owner. The law is thus stated in the last edition of Abbott's Law of Merchant Shipping (London, 1892) 165. In The Kalorama, at page 214, 10 Wall., and at page 944, 19 L. Ed., this is also implied by the observation that, "undoubtedly, the presence of the owner defeats the implied authority of the master; but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners, and save the vessel and cargo from the perils of the seas." We think, therefore, that there can be no question that both the petitioner and the respondent correctly understood the law when they alleged on the one part, and denied on the other, that the coal could not have been obtained except on the credit of the vessels. This would leave only the question whether the same presumption as to the need of credit, the claimant having shown the necessity of the repairs or supplies, arises when obtained on the order of the owner as when obtained on the order

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of the master; but, as we have already stated, we are not disturbed by this, because the case shows that the Ogdensburg Transit Company had sufficient credit.

This leaves nothing remaining to be considered except the Ohio statute. In The Iris, we were careful to limit the case to the application of a state statute to a domestic vessel. Nowhere has it ever been said that a state statute is valid to alter the conditions as to maritime liens, with reference to supplies and repairs furnished vessels in foreign ports, as to which a complete set of rules has been framed by the federal courts. Whether or not an attempt of that nature would amount to a regulation of commerce, and therefore be unconstitutional, was expressly left open in The Kate, 164 U. S. 458, 471, 17 Sup. Ct. 135, 41 L. Ed. 512. A rule of construction, however, was given in The Kate which is sufficient to lead us to a conclusion with reference to the statute now in question, to the effect that we ought to restrict it to domestic vessels, as to which no other remedy exists than that given by it. It was observed that this statute originated when it was questionable whether the federal courts would exercise admiralty jurisdiction over the Lakes. If it had been finally determined that they would not, the statute might, perhaps, have had a broader range; but, as the law has been developed, we see no justification therefor. However, we can easily dispose of the case, so far as this statute is concerned, without absolutely determining its construction; because, as we said in The Iris, 40 C. C. A. 301, 100 Fed. 104, 110, even when the statute prima facie gives a lien, "the circumstances may be such, for example, when the supplies are furnished on a general account, as to show that the parties intended that credit should be given solely to the purchaser." Such is the condition of this case. With reference to this statute, our conclusions are practically the same as those of the circuit court of appeals for the Second circuit, in The Electron, 21 C. C. A. 12, 74 Fed. 689, 693, so far as that court had under consideration the application to foreign vessels of a state statute, attempting to give liens for repairs or supplies.

The decree of the circuit court is affirmed, and the costs of the appeal are awarded to the appellees.

WEBB, District Judge. I am unable to concur with the majority of the court in the disposition of this cause. In my opinion, the exceptions to the master's report should have been overruled, the report confirmed, and a decree upholding the liens entered in favor of the petitioners.

TELLER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1901.)

1. INJUNCTION—GROUNDS.

A court of equity is not justified in issuing a preliminary injunction or restraining order by the mere fact that it will do no harm, but there must be some affirmative ground shown calling for the exercise of the jurisdiction.

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8. JUDGMENTS—SUIT TO SET OFF CROSS JUDGMENTS — RESTRAINING TRANSFER.
A judgment against the United States can neither be enforced by process nor transferred so as to prevent the government from setting off against it any cross demand against the judgment plaintiff, especially in view of the provision of Act March 3, 1875 (18 Stat. 481), expressly requiring such set-off. Hence there is no necessity nor ground for the issuance of a preliminary injunction or restraining order by a court of equity, in a suit by the United States to set off cross judgments, to prevent the transfer of his judgment by the defendant.

Appeal from the Circuit Court of the United States for the District of Colorado.

On December 2, 1899, John C. Teller, the appellant, recovered a judgment against the United States of America, the appellee, in the circuit court of the United States for the district of Wyoming, in the sum of $18,843.16. On January 24, 1901, the United States recovered a judgment against Teller in the circuit court of the United States for the district of Colorado in the sum of $27,963.96. Afterwards, on the same day, January 24, 1901, the United States exhibited its bill of complaint against Teller in the circuit court of the United States for the district of Colorado, alleging therein the foregoing facts, and also that Teller was insolvent, and prayed for a temporary restraining order enjoining Teller from assigning his judgment, and for a final decree offsetting the judgment in favor of the United States against Teller's judgment so far as necessary to satisfy the same. Upon the filing of this bill, and on due notice of the motion therefor, the circuit court, on January 28, 1901, made an interlocutory order, based solely on the averments of the bill, restraining Teller from transferring, assigning, or in any manner disposing of his judgment until the further order of the court. From this interlocutory order an appeal was prosecuted to this court pursuant to the provisions of Act March 2, 1891 (26 Stat. 825). See 111 Fed. 119.

Willard Teller (Mr. Clayton C. Dorsey, on the brief), for appellant.

Robert A. Howard and John K. Richards, for the United States.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The only assignment of error deemed necessary to consider in disposing of this appeal is that the complaint fails to disclose that the United States could have suffered any injury if Teller had assigned or transferred his judgment. The subject of set-off, or applying a creditor's cross demands or counterclaims to the satisfaction of existing demands in favor of the debtor, is undoubtedly of equitable cognizance. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565. But, as said by Mr. Justice Jackson, in delivering the opinion of the court in that case, such cross demands "may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice." There must be in cases of this kind, as in all others seeking equitable relief in the nature of a restraining order, a reasonable ground to believe that some threatened or probable injury will result before a court of equity will subject a defendant to the annoyance, cost, and expense incident to a restraining order. It is not sufficient that such an order will do no harm. It should at least be made to appear

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that it would do some good. Applying the foregoing principles of equity to the case before us, we observe: First, that it was not in Teller's power to enforce his judgment against the United States by levy of execution as in cases between natural persons, the only possible resort for securing its payment being an act of congress making an appropriation therefor; and, second, that any transfer or assignment of his judgment would confer no greater rights upon a transferee or assignee than Teller himself had, and that all equities, whether of set-off, counterclaim, or otherwise, against him, would be enforceable against any such transferee or assignee. The foregoing propositions are not only obvious, but were conceded by counsel of the United States, at the argument of this case, to be correct. Not only so, but the act of March 3, 1875 (18 Stat. 481), affords an ample safeguard against any possible injury in such cases. It is as follows:

"When any final judgment recovered against the United States or other claim duly allowed by legal authority shall be presented to the secretary of the treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, * * * it shall be the duty of the secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States."

Any person to whom Teller might have sold his judgment would have taken it with knowledge of the provisions of the foregoing act, and subject thereto. Teller, no doubt, fully recognizing the restraints against him, never has taken any steps to enforce his judgment or to sell or dispose of the same, and never has threatened to do so. This appears by necessary inference from the fact that no averment to the contrary is made in the bill of complaint.

From the foregoing it clearly appears that no wrongful act has been threatened by Teller, and that, in the nature of the case, no wrong or injury in the matter complained of can, with or without a restraining order, be inflicted by him upon the United States. The restraining order was therefore a vain thing, and the court below was not, in our opinion, warranted in the exercise of a sound discretion in awarding the same. The order appealed from is therefore reversed, and the cause remanded to the trial court, with directions to deny the motion for a preliminary injunction.

UNITED STATES v. LEE YEN TAI.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 38.

1. CIRCUIT COURTS OF APPEAL—JURISDICTION—RIGHT TO CERTIFY QUESTION TO SUPREME COURT—CONSTRUCTION OF TREATY.

The circuit court of appeals, having no jurisdiction of any case in which the validity or construction of treaties is called in question, is authorized by Act March 3, 1891, § 6, to certify to the supreme court any question of law concerning which it desires the instruction of that court for its proper decision. An appeal to the former court presented the question whether the Chinese treaty of 1894 repealed the existing statutes authorizing the deportation of Chinese, but also included other questions, which were within the jurisdiction of the court. *Held*, that

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the court of appeals could reserve its decision on the latter questions, and certify the former to the supreme court, or might reverse or affirm the decision without passing on the former question, but was not authorized, by reason of there being other questions involved in the case, to pass on the former question.

8. APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY.
Assignments of error, on an appeal to the circuit court of appeals from an order in habeas corpus proceedings discharging a prisoner, that the trial court erred in discharging the prisoner, and in not ordering him back into custody, and in not dissolving the writ, are insufficient in not setting out particularly the error intended to be urged, as required by rule of the court.

9. HABEAS CORPUS—APPEAL—PRESENTATION OF QUESTIONS BELOW.
Where objections to the form of a petition for a writ of habeas corpus are not urged in the district court, they will not be considered on appeal.

Appeal from the District Court of the United States for the Southern District of New York.

A. U. Parsons, for the United States.
Max J. Kohler, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is an appeal from an order in habeas corpus made by the United States district court for the Southern district of New York discharging Lee Yen Tai from the custody of the marshal for the Northern district of New York. 108 Fed. 950.

The writ issued upon the petition of Lee Wah, a brother of Lee Yen Tai, setting forth, in substance, that Lee Yen Tai, being lawfully entitled to be and remain in the United States pursuant to the constitution and the laws thereof and the treaty with China promulgated in 1894, was imprisoned and held in restraint by the marshal by color of a warrant for his deportation issued by a United States commissioner for the Northern district of New York without jurisdiction. The return of the marshal set forth the warrant. The warrant recited, in substance, that the petitioner was arrested and brought before the commissioner on the charge of being a Chinese laborer seeking to enter the United States without producing the certificate prescribed by law, and not entitled to be or remain within the United States, and thereafter, upon a hearing and trial, was found guilty of the charge; whereupon the commissioner adjudged that he be immediately removed to the empire of China by the United States marshal for said district.

Upon the hearing in the district court no evidence was introduced, and the case was decided upon the facts set forth in the petition and the return. As no opinion was written by the district judge, it may be inferred that the decision proceeded upon the ground that the treaty of 1894 between the United States and China operated as a repeal of the pre-existing statutes providing for the deportation of Chinese citizens unlawfully within the United States.

The assignments of error assume that the decision proceeded upon this ground, and challenge the construction placed by the court upon the treaty. If the appeal presented no other question than the cor-

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rectness of this ruling, this court would be without jurisdiction to entertain it. The circuit court of appeals has no jurisdiction in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty is drawn in question. In such cases an appeal or writ of error lies directly to the supreme court, and the circuit court of appeals can only exercise appellate jurisdiction in cases other than those. Authority, however, is given the circuit court of appeals in every "subject within its appellate jurisdiction" to certify to the supreme court any question of law concerning which it desires the instruction of that court "for its proper decision." Act March 3, 1891, § 6. The supreme court in several cases has held that, although a case which has been brought to the circuit court of appeals by an appeal or writ of error may involve a question which that court has no jurisdiction to entertain, it may nevertheless, if the case also involves other questions, determine those questions, and certify to the supreme court the question which it may not entertain. U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; Carter v. Roberts, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861. In the latter case the court used this language:

"When cases arise which are controlled by the construction or application of the constitution of the United States a direct appeal lies to this court, and, if such cases are carried to the circuit court of appeals, those courts may decline to take jurisdiction, or, where such construction or application are involved with other questions, may certify the constitutional question, and afterwards proceed to judgment, or may decide the whole case in the first instance."

This language is relied upon by counsel for the appellant as meaning that the circuit court of appeals may in deciding the whole case decide the constitutional question, or, as in this case, a question involving the construction of a treaty. We do not regard it as intended to bear that meaning, and, as we read the language, it means simply that the circuit court of appeals may decide the whole case by affirming or reversing the decision under review without passing upon the constitutional or treaty question, or, if it sees fit, may reserve judgment and certify that question.

Passing to the questions which this court has power to determine, they may be summarily disposed of. The only assignments of error other than those respecting the construction of the treaty are that the court erred in discharging the defendant, that it erred in not ordering him back into the custody of the marshal, and that it erred in not dismissing the writ. The assignments do not comply with the rule, as they do not set out particularly the error intended to be urged. The court is at liberty, however, to notice a "plain error not assigned." The more important of the errors which have been urged allege defects of form in the petition which might have been cured by an amendment if they had been taken in the court below. They do not appear to have been taken there, and cannot be raised for the first time upon appeal.

There certainly is no "plain error" in the case to justify a consideration of questions not presented by the assignments. Except for the importance of the decision of the court below in its bearing upon other cases which may arise under the Chinese exclusion laws,

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we should consider it to be our duty to affirm the order of the court below, without certifying any question for instructions to the supreme court; but it is so desirable in the public interests that the error of construction, if there was one, be corrected promptly, that we have concluded to reserve judgment, and certify the question for instructions.

MACMAHAN PHARMACAL CO. v. DENVER CHEMICAL MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1901.)

No. 1,572.

1. TRADE-MARKS—COMMON-LAW RIGHT—HOW ACQUIRED.
The common-law right to the exclusive use of a word, symbol, or device as a trade-mark is not given merely by its adoption as such, but it must also have been used for such a length of time, and under such circumstances, as to identify the goods in connection with which it is used to the trade as those of a particular manufacturer or dealer as distinguished from those of other manufacturers or dealers.

2. SAME—NECESSITY OF PUBLIC USE.
A pharmacist in New York City for 20 years made and sold a liquid preparation for use by dentists under the name of "Macmahan's Concentrated (or saturated) Tincture, Aconite, with Iodine." After that time he was succeeded by a corporation which continued to make and sell the preparation, adding to the above designation on the labels the word "Antiphlogistine." On cards and circulars it was described by the name "Macmahan's Antiphlogistine," but such cards or circulars were not shown to have been distributed to any extent, and the preparation was not advertised in any other manner. In 10 years the company made but 362 sales, to 98 different customers, almost exclusively dentists, who purchased for their own use. The article was not known in the market generally, nor even to pharmacists in the city. *Held*, that such company did not have an exclusive right to the use of the word "Antiphlogistine" as a trade-mark, and especially as against another company which had adopted it, without knowledge of such use as a trade-mark, to designate a plastic preparation not adapted to the use of dentists, but intended for external application, and which, during a number of years, it had advertised extensively, and in which it had built up an extensive trade.

3. SAME—TRANSFERABILITY—DISASSOCIATION FROM ARTICLE.
A trade-mark is not by itself such property as can be transferred, and the right to use it cannot be assigned except as incidental to the transfer of the business or property in connection with which it has been used. A transfer of the right to use it in connection with a different article, or one of a different manufacture, would result in deceiving the public as to the article or its origin, which it is the sole legitimate purpose of a trade-mark to prevent, and a transferee will not be protected in such use by a court of equity.

Appeal from the Circuit Court of the United States for the District of Colorado.

In the year 1867 one Thomas J. Macmahan, a druggist of New York City, prepared a liquid mixture of tinctures of aconite and iodine for the use of dentists, and labeled it thus:

"POISON.
Sat. Tinct. Aconite Root,
with Iodine.
Prepared Expressly for Dentists' Use by
T. J. Macmahan.
188 Sixth Av., bet. 10th & 11th Sts.,
New York."

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Macmahan's general drug business consisted of the manufacture and sale of dental preparations, like tooth powder and mouth wash. He carried on that part of the business, consisting of putting up and selling the above-mentioned mixture, in a very small way under the name "saturated" or "concentrated tincture of aconite and iodine," until the year 1890, when he sold and transferred his entire business to the appellant, the Macmahan Pharmacal Company, a corporation then organized in New York by him to take over and conduct the same. He at once became, and has ever since continued to be, the vice president, treasurer, and general manager of the corporation. Between December 27, 1889, and October 8, 1900, when a new set of books was opened by the corporation, his private sales book shows that eight sales of the mixture in question were made by him and noted on his sales book as "Antiphlogistine," which word he claims to have adopted some time in 1889 as his trade-mark. The corporation soon made a change in the label for the mixture, and thereafter employed the following:

"POISON.
MACMAHAN'S
Concentrated Tinct. Aconite,
WITH IODINE.
ANTIPHLOGISTINE.
Prepared Expressly for Dentist's Use by
MACMAHAN PHARMACAL CO.,
No. 172 Sixth Ave., New York."

This mixture was put up in one-ounce bottles, on which was pasted the label. The business done by the corporation between 1890, when first organized, and April, 1900, when Macmahan's testimony was taken, in selling the mixture was as follows: Total number of sales, 362; gross amount of sales, $514.18; total number of customers, 98. The sales were made almost exclusively to dentists and dental supply houses in New York City. In a very few instances they were made on the prescription of general practitioners for other purposes. No advertisement of the mixture in question appears ever to have been made in newspapers or journals of the day by the Macmahan Company. The record shows that it had a business card as follows:

The Macmahan Pharmacal Co.,

Manufacturing Chemists,

SOLE PROPRIETORS OF
MACMAHAN'S
HANDICAP TOOTH POWDER.
MACMAHAN'S
EAU FAVORITE, A LIQUID DENTIFRICE.
MACMAHAN'S
ANTIPHLOGISTINE.

142 Sixth Avenue,

New York.

—and also that it prepared at different times between 1890 and 1900 two circulars which were employed by it as the interior wrapper of the bottles. These circulars gave the origin and history of the mixture and some of the uses to which it might be put, and each had a heading, in large letters, thus: "Macmahan's Antiphlogistine." There is some proof also to the effect that the company had letterheads, billheads, and envelopes substantially like the business card, but when they were first employed, or how long, or how extensively, they were used, does not appear. Accordingly, it is safe to say that the only substantial evidence of knowledge on the part of the public of the use of the word "Antiphlogistine" by the Macmahan Company is such as has been conveyed to it by the label last referred to, pasted on the bottle itself, and on its outside wrapper, and such as may have been discovered from an inspection of the circular constituting the

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inside wrapper of the bottle, in connection with the fact that 98 different persons, during the 10 years following the incorporation of the company, purchased some quantity of the mixture, presumably wrapped in the circular. The evidence in relation to the card, letterheads, billheads, and envelopes is so unsatisfactory, as to the time when they were used, that they are of no substantial value as evidence of knowledge on the part of the public of their contents. On the other hand, the evidence of two experienced pharmacists of New York, who were produced by the Macmahan Company as witnesses in its behalf, tends to show that its mixture was not known among the pharmacists of New York by the name of "Antiphlogistine," or by any other name, and that the preparation known there by that name was one made by the Denver Chemical Manufacturing Company, the appellee. This last-named company was organized as a corporation in 1893, and immediately engaged in business at the city of Denver, Colo. It appears from the record that between the years 1890 and 1893 one Dr. Sheets, a physician of Denver, compounded a certain medicinal preparation, consisting of a soft, plastic, antiseptic dressing, intended for external use only. Without any knowledge that the word "Antiphlogistine" had ever been employed by Macmahan, or any other person, as a trade-mark for the sale of liquid dentifrice, or any other article of merchandise, Sheets adopted the word as his trade-mark, and forthwith used it in connection with the sale of his preparation. The Denver company was incorporated for the purpose of acquiring the right to manufacture and sell the preparation of Dr. Sheets, as he had done. It afterwards acquired the same, and has since then carried on the business of manufacturing and selling that preparation solely. From the beginning, the Denver company advertised it extensively and at great expense, throughout the United States, Canada, and England, as "Antiphlogistine." The sales rapidly increased from year to year from 1894, when it sold 3,521 pounds, until 1900, when it sold 138,950 pounds. In April, 1895, the defendant company took the requisite steps, pursuant to the requirement of the act of March 3, 1881 (21 Stat. 502), to secure, and did secure, registration of its trade-mark. In October, 1896, this company for the first time received information by letter from the Macmahan Company that it claimed the exclusive right to the use of the word "Antiphlogistine" as its trade-mark. Dr. John Campbell was at that time one of the largest stockholders, a director, and for nearly five years had been president, of the Denver Company. In 1896 he was in New York engaged in prosecuting its business there. The communication from the Macmahan Company was referred to him for inquiry. He made an investigation, and reported to his company that Macmahan's preparation was a liquid, and not at all like the plastic compound of his company, that it was used exclusively by dentists, and known to but very few, and that there was no conflict between the two preparations. Nothing further was heard from the Macmahan Company until October, 1897, when Macmahan again wrote, notifying the Denver Company of his claim. Some correspondence ensued between counsel of the parties, but it ended in February, 1898. Soon after that, some disagreement arose between Dr. Campbell and the officers of his company, which resulted in his severing his connection with the company, resigning as an officer and selling out his stock. In April, 1899, Dr. Campbell entered into a written contract with the Macmahan Company, reciting that that company had been "engaged in making and selling a medicinal preparation intended for external application in liquid form" under the name "Antiphlogistine," and that Dr. Campbell had "devised, and is about to manufacture and sell, a medicinal preparation, not in liquid form, for external use, which he desires to make and sell under the said name 'Antiphlogistine,'" and concluding with an agreement conferring upon Campbell the right to use the word "Antiphlogistine" to designate his preparation, with a covenant on the part of the Macmahan Company not to sue Campbell for such use, but obligating Campbell to pay 5 per cent. of his gross sales to the Macmahan Company as a license fee for the privilege of using the word. This agreement also contained a provision as follows: "Fifth. Upon being requested so to do, and upon being duly indemnified for all expenses, costs, and charges which it may incur, the party of the first part [the Macmahan Company], its successors or assigns, shall bring such suits.

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actions at law, or take such other proceedings as the party of the second part [Campbell] or his assigns shall desire, to prevent the use of said word 'Antiphlogistine' by any other person or persons, in or about the sale of any medicinal preparation." Shortly afterwards Campbell requested the Macmahan Company to institute this suit, and it was accordingly done, in the name of the Macmahan Company as complainant, but at the expense and for the benefit of Dr. Campbell, pursuant to the aforesaid agreement. The general object and purpose of the suit was to enjoin the Denver Company, defendant below, from using the word "Antiphlogistine" in connection with the sale of its compound, on the ground that the Macmahan Company had the exclusive right thereto as a trade-mark. In due course of time it was brought on for a hearing on the facts, as hereinbefore substantially narrated, and resulted in a decree dismissing the bill. The substantial error assigned is that the circuit court erred in refusing to enjoin the defendant as prayed, for the reason, as is claimed, that the complainant had acquired the exclusive use of the word "Antiphlogistine" as a trade-mark for its mixture.

Lysander Hill, for appellant.

Edmund Wetmore (William G. Edwards, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

This is an action to restrain the alleged infringement of a specific trade-mark. No claim is made that defendant's goods are so put upon the market as to induce or tend to induce purchasers to buy them as and for the goods of complainant. In fact the packages containing them are so dissimilar in character, size, dressing, and display from the complainant's packages that it is impossible that any person could be deceived with respect to them, or that defendant could palm off its goods as and for those of complainant; and no claim is made that defendant adopted the word "Antiphlogistine" as its trade-mark with any knowledge that complainant or its predecessor had ever either adopted or used the same for any purpose whatsoever. No question, therefore, of fraudulent purpose or intent on the part of the defendant to circumvent the complainant or deceive the public is raised by this record.

Defendant concedes that it has made use of the word as its trade-mark continuously and extensively from and after 1893 to the present time, and claims that it has a legal right to continue so doing. It contends that complainant never acquired the exclusive right to the use of the word at all, and if it did that it was limited to use upon that particular class of merchandise known as "liquid dentifrice," with which alone it was associated.

The right to a trade-mark at common law, independent of the registration statute, is not created by invention or priority of adoption alone. A word, symbol, or device, to be a valid trade-mark constituting a right of property, must have been used by the owner in connection with the sale of his goods for such length of time, and under such circumstances, as indicates to the trade that the goods in connection with which it appears are his goods, as distinguished from those of other manufacturers or dealers. The mere adoption of such word, symbol, or device, unaccompanied by such

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a use, is not sufficient to create an exclusive right thereto. Mr. Justice Clifford in the leading case of McLean v. Fleming, 96 U. S. 245, 251, 24 L. Ed. 828, 831, expresses the rule thus:

"Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods, bearing that mark or brand, know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp."

In the Trade-Mark Cases, 100 U. S. 82, 94, 25 L. Ed. 550, 552, Mr. Justice Miller, speaking for the court, says:

"The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. * * * At common law the exclusive right to it grows out of its use, and not its mere adoption."

In the case of Levy v. Waitt (decided by the circuit court of appeals for the First circuit) 10 C. C. A. 227, 61 Fed. 1008, 1011, 25 L. R. A. 190, in a case somewhat analogous to that now before us, it is said:

"It seems to have been assumed in the discussions of this case that the common-law right to a trade-mark comes more from selection or discovery than from actual occupation of the market. * * * But this is not the law. The right to a trade-mark at common law must not be confused, as it too frequently is, with the prima facie right existing under registration statutes. It arises to such a limited extent from the mere matter of selection or discovery of the name or symbol used that this may be of trivial consequence."

The court then adopts the language employed by Vice Chancellor Sir W. Page Wood in Collins Co. v. Brown, 3 Kay & J. 423, as a good compendium of the common law of trade-mark, as follows:

"The simple question in these cases is, has the plaintiff, by the appropriation of a particular mark, fixed in the market where his goods are sold a conviction that the goods so marked were manufactured by him?"

In the case of McAndrew v. Bassett, 4 De Gex, J. & S. 380, 386, Lord Westbury states that property in words stamped upon a vendible article exists when "the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality, or some other circumstance which renders the article so stamped acceptable to the public." To the same effect are the following cases: George v. Smith (C. C.) 52 Fed. 830; Tetlow v. Tappan (C. C.) 85 Fed. 774; Hygeia Distilled Water Co. v. Hygeia Ice Co., 70 Conn. 516, 533, 40 Atl. 534.

According to the rule hereinbefore announced, the present case must be decided by answering the following question: Did the complainant make such use of the word "Antiphlogistine" in connection with its medicinal preparation as to cause it to be known and recognized in the market by that word? For a period of over 20 years, beginning in 1867, the preparation in question had been sold and known (if at all) by the name "Saturated" or "Concentrated Tincture of Aconite and Iodine, Prepared * * * by T. J. Macmahan." Afterwards, at about the time of the formation of the complainant corporation in 1890, the word "Antiphlogistine" first appeared on the label, but it then, and continuously thereafter,

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appeared immediately and prominently associated with the name of the discoverer of the preparation, the person who had been handling it and selling it for a period of 20 years theretofore. In that label the attractive and suggestive feature is the old word "Macmahan's." There was apparently a purpose manifested by the new corporation to continue the name by which the preparation had been so long known, and, accordingly, the label reads "Macmahan's Concentrated Tincture of Aconite, with Iodine. Antiphlogistine." Obviously the word "Macmahan's" was intended to be a catchword descriptive of the preparation; otherwise there would have been no necessity for using it at all. It was not thereby intended to indicate that the preparation was manufactured by the Macmahan Pharmacal Company, because that fact is explicitly stated at the bottom of the label. The only two circulars shown by the proof ever to have been published by complainant bear a striking heavy-leaded caption, not "Antiphlogistine," but "Macmahan's Antiphlogistine." The business card, billheads, letterheads, and envelopes also show that complainant was not content to describe its preparation as "Antiphlogistine" alone, but each and all of them have the forerunner "Macmahan's." For the reasons appearing in the statement of the case to the effect that there is no evidence as to when, or how long, or how extensively the business cards, billheads, letterheads, and envelopes were used, they afford no substantial evidence of the existence of the trade-mark prior to its adoption by the defendant, but they nevertheless evince a consistent attitude on the part of complainant to make the word "Macmahan's" a part of its trade-mark From the foregoing, we can readily understand that the decoy prescriptions shown to have been sent to old-established pharmacists in New York, calling for "Antiphlogistine" alone, shortly before the evidence was taken in this case, were not filled by using "Macmahan's Antiphlogistine." The pharmacists did not recognize the word "Antiphlogistine" as complainant's brand. Not only so, but the limited sales of the preparation by any name indicate an unfamiliarity with it certainly as "Antiphlogistine." Ninety-eight different persons only inquired for it during the decade following the supposed adoption of the trade-mark in question, and the aggregate amount paid by them for all the purchases made amounted to the sum of $514.18 only. There is no evidence in the record showing that complainant's preparation was kept in drug stores generally for sale. On the contrary, the only fair inference from all the evidence is that it was manufactured in very small quantities, kept for sale exclusively by complainant, advertised little if any, sold infrequently and in small quantities, and most generally to dentists located in near proximity to complainant's drug store, unknown to the trade generally by any name, and when known in the region where sold it was not known as "Antiphlogistine" but "Macmahan's Antiphlogistine." Such being the evidence, we are of opinion that complainant's mixture had obtained no such acceptance or reputation in the trade under the name "Antiphlogistine" as to confer upon complainant a right of property in that word alone. The test laid down by the supreme court, in cases supra, is not met. The use was not sufficient to ripen into a right of

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property. The mark "Antiphlogistine" on any package would not have been recognized by the trade as evidence of its origin, or as an indication of complainant's ownership. It follows that defendant's large and prosperous business, innocently and at great expense organized and developed by the use of this same word under the circumstances shown by the proof, cannot be destroyed on complainant's claim of a superior right thereto.

The question was much argued by counsel whether the liquid dentifrice of complainant prepared and offered for sale in small bottles is of the same class of merchandise as the plastic compound of defendant, prepared and offered for sale in tin cans. It is true both of them are intended, in a general sense, to reduce inflammation, but complainant's is practically a dental remedy, employed almost exclusively in connection with the teeth, while the defendant's is a general remedy, inapplicable to the use of dentists, but intended for and solely applicable to external use as a substitute for ordinary poultices, blisters, and counterirritants. It is conceded that if these were different classes of merchandise, within the accepted meaning of those words, in their relation to trade-mark, then each party might adopt and use the same trade-mark, as there would be no danger of confusion resulting therefrom. We, however, do not deem it necessary for the disposition of this case to pass upon the main question so argued. We feel, however, constrained to say this much, that, in our opinion, the complainant, by undertaking to sell the right to use the word in question to Dr. Campbell for his use in handling plastic compounds, evinced an intention to abandon its claim to the trade-mark, except in connection with its liquid preparation, and cannot claim in a court of equity that it does not belong to a separate class of plastic compounds, or that it will be damaged by defendant's use of the same word in connection with its plastic compound. In fact the complainant is making no such claim. This suit is prosecuted by Dr. Campbell, not for complainant's benefit, but for his own. He was a prominent executive officer, and largely interested in defendant corporation, had participated in the early and continued struggles of the company to secure a trade for its compound, had necessarily known and approved of the large outlays of money for advertising it as "Antiphlogistine," and had on behalf of his company investigated complainant's claim, and pronounced it invalid. For reasons unexplained, he afterwards sold his stock, resigned his position as an officer of the defendant company, made the contract referred to with complainant, and caused this suit to be instituted. The main purpose of the contract was to transfer from complainant company to Dr. Campbell the right to use the word "Antiphlogistine" as a trade-mark for his preparation, which, by agreement, was not to be in "liquid form." There was no transfer to him of complainant's business, or any part of it, and no license to operate at complainant's place of business. The sole purpose was to separate what complainant called its trade-mark, reserving to itself the right to use it on its preparation in liquid form, and transferring it to Dr. Campbell for his use on preparation not in liquid form. This contract betrays a false conception of the character of trade-mark property. A trade-mark cannot be assigned,

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or its use licensed, except as incidental to a transfer of the business or property in connection with which it has been used. An assignment or license without such a transfer is totally inconsistent with the theory upon which the value of a trade-mark depends and its appropriation by an individual is permitted. The essential value of a trade-mark is that it identifies to the trade the merchandise upon which it appears as of a certain origin, or as the property of a certain person. When its use has been extensive enough to accomplish that purpose, and not till then, it becomes property, and when it so becomes property it is valuable for two purposes: (1) As an attractive sign manual of the owner, facilitating his business by its use; (2) as a guaranty against deception of the public. By familiarity with the trade-mark attached to the owner's merchandise, purchasers are enabled to buy what they desire, and are thereby protected against imposition and fraud. Disassociated from merchandise to which it properly appertains, it lacks the essential characteristics which alone give it value, and becomes a false and deceitful designation. It is not by itself such property as may be transferred. Browne, Trade-Marks (2d Ed.) § 363; Heinisch's Sons Co. v. Baker (C. C.) 86 Fed. 765; Kidd v. Johnson, 100 U. S. 617, 620, 25 L. Ed. 769. To sustain complainant's contention in this case would, in effect, permit Dr. Campbell to commence a new business in 1899, with which he had theretofore in no manner been associated, and, on complainant's theory of its own exclusive right thereto, to falsely certify to the public that the merchandise manufactured and sold by him was in fact manufactured and sold by complainant. Not only this, but it would enable Dr. Campbell to antagonize the defendant's right to use the trade-mark which he himself had for six years recognized as valid and had encouraged the defendant to expend large sums of money in perfecting and establishing a business under its supposed protection. The language employed by the supreme court of the United States in Medicine Co. v. Wood, 108 U. S. 218, 223, 227, 2 Sup. Ct. 436, 439, 442, 27 L. Ed. 706, 708, 709, is so apposite to the situation disclosed by this record that we cannot refrain from quoting it.

"If one affixes to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess, in the estimation of purchasers. * * * Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that, by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

The foregoing quotations are alone applicable on the fundamental theory of the complainant in this case, namely, that it had made such use of the word "Antiphlogistine" as its trade-mark that the public recognized it, when found on any packages either of liquid or plastic medicinal preparations, as convincing evidence that they were put up

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by complainant company. On that theory, Dr. Campbell's use of the mark on his preparations would be such a flagrant imposition upon the public that no court of equity would permit, much less facilitate, it.

We are of opinion, for the reasons hereinbefore stated, that complainant never acquired any right of property in the word "Antiphlogistine" as a trade-mark, and, if it had, that the business arrangement made with Dr. Campbell forfeited all right to the equitable relief prayed for in this action.

Other interesting questions arising in this case were argued at the bar, but in the view we have taken of the propositions already discussed it becomes unnecessary to express our views concerning them.

The decree of the circuit court dismissing the bill was undoubtedly correct, and is accordingly affirmed.

ROTHCHILD v. MEMPHIS & C. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

No. 966.

1. RAILROAD—CORPORATIONS—STOCKHOLDERS — TENANTS IN COMMON — TRUST RELATION—JUDICIAL SALE—PURCHASE OF PROPERTY.
   Where a stockholder of a railroad corporation, though owning a majority of the stock, does not actually control the affairs of the company for his own benefit and to the prejudice of the minority stockholders, he does not occupy a trust relation towards them, and, as they are not tenants in common, he may purchase the property of the corporation at a judicial sale for his own benefit, if there be no actual fraud.

2. SAME—ACTION TO AVOID SALE—LACHES.
   Where the minority stockholders of a railroad made no objection to a judicial sale of the property to the majority stockholder and no effort to protect themselves for 17 months, and until the purchaser had expended large sums in the payment of debts and improvement of the property, an action to avoid the sale was then too late.

3. SAME—PURCHASE BY ANOTHER ROAD—POWER TO HOLD—RIGHT TO QUESTION.
   Where at a judicial sale of a Tennessee railroad it was purchased by a railroad company incorporated in Virginia, which had filed its charter in Tennessee, and was authorized to make the purchase under Acts Tenn. 1881, c. 9, § 2, providing that a railroad may acquire another road by purchase, after the sale is confirmed and title vested in the purchaser, the state alone can question the purchaser's power to hold such title.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

A bill was filed in the circuit court for the Western district of Tennessee by the complainant, who is a stockholder in the Memphis & Charleston Railroad Company, on behalf of himself and all other stockholders desiring to become parties complainant, against the Memphis & Charleston Railroad Company and the Southern Railway Company. The purpose of the bill is to have the title of the Southern Railway Company to the property and franchises of the Memphis & Charleston Railroad Company, purchased at a foreclosure sale, declared to be held in trust for the benefit of the shareholders of the Memphis & Charleston Railroad Company. The bill states: That in January, 1892, nearly if not all of the lines of the Southern Railway Company in the state of Tennessee were owned and operated by

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the East Tennessee, Virginia & Georgia Railway Company. That said last-named corporation owned as its main line a railway extending from Chattanooga, Tenn., via Morristown, to Paint Rock, N. C., where it connected with the lines of railroad forming the Richmond & Danville Railroad system, and such main line furnished said Memphis & Charleston Railroad at Chattanooga its main connection and outlet for the business of the Mississippi valley and beyond, which it received at Memphis. In addition thereto, prior to said 1st of January, 1892, said East Tennessee, Virginia & Georgia Railway Company had acquired and owned 106,264 shares of the capital stock of the Memphis & Charleston Railroad Company, the same being a majority of all its shares. By means of such ownership said East Tennessee, Virginia & Georgia Railway Company controlled said Memphis & Charleston Railroad Company. It elected its board of directors, a majority of whom were officers and directors of said Tennessee company. Its operating and traffic departments were under the control of the same persons, who were in control of the operating and traffic departments of the East Tennessee, Virginia & Georgia Railway Company, and it was entirely subordinated to said East Tennessee, Virginia & Georgia Railway Company, and under its control as a part of its system. That said East Tennessee, Virginia & Georgia Railway Company, through the ownership of large blocks of its stock, was closely allied with the Richmond & West Point Terminal Railway & Warehouse Company, having a majority of its directors in said last-mentioned company. And it alleges: That said last-mentioned company owned all of the capital stock except 22 shares of the Richmond & Danville Railroad Company, and that during the month of July, 1892, said Richmond & West Point Terminal Railway & Warehouse Company, said Richmond & Danville Railroad Company, said East Tennessee, Virginia & Georgia Railway Company, and the Memphis & Charleston Railroad Company were put into the hands of receivers in the several United States circuit courts having jurisdiction. That at the time the various bills were filed the complainant in the suit against the Memphis & Charleston Railroad Company was the chairman of the board of directors of the East Tennessee, Virginia & Georgia Railway Company, and filed the bill as a creditor in behalf of himself and all other creditors and stockholders. That the receivers took possession without resistance to their appointments, and that subsequently, on the 25th of November, 1893, the Central Trust Company of New York filed its bill against the Memphis & Charleston Railroad Company in the same court in which the receivers were appointed to foreclose a mortgage securing an issue of $1,000,000 of bonds, claiming default in the payment of interest. On the 25th of August, 1895, the Farmers' Loan & Trust Company likewise filed in said court its bill to foreclose a mortgage executed by the Memphis & Charleston Railroad Company to secure an issue of $2,264,000 of bonds. That, in order to reorganize and bring all of the railroad companies hereinbefore mentioned under the ownership and control of one corporation, a committee was appointed, who had incorporated, under the laws of Virginia, the Southern Railway Company, with authority to receive, hold, and operate the properties intended to be acquired. Under the sale of the property of the East Tennessee, Virginia & Georgia Railway Company the Southern Railway Company, with their other assets, acquired the 106,264 shares of the stock of the Memphis & Charleston Railroad Company, above mentioned. This sale was duly confirmed on the 14th of July, 1894, and the bill alleges that the Southern Railway Company has ever since owned said stock, and thereby controls the corporate action of the Memphis & Charleston Railroad Company, occupying a trust relation to the minority stockholders, and could take no action in regard to the Memphis & Charleston Railroad Company or its property, except as trustee for the equal benefit of itself and all its fellow stockholders therein; that the Southern Railway Company, being in the position of a tenant in common with the other stockholders, set about acquiring the property of the Memphis & Charleston Railroad Company for its own use, to wipe out the interest of the minority stockholders therein; and that, if the Southern Railway Company had used its power as a majority stockholder for the purpose of having the Memphis & Charleston Railroad Company refund its debt at a lower rate of interest, and operate

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its property to the best advantage, said railroad company could have saved to the stockholders a large part of the face value of their stock. But the bill alleges that, instead of so doing, the Southern Railway Company entered into an agreement, for its own benefit, with the holders of the securities of the Memphis & Charleston Railroad Company to have the property sold and bought in by the Southern Railway Company; that to carry out this plan the Southern Railway Company, instead of operating its lines in a way calculated to promote the business of said Memphis & Charleston Railroad Company, which was dependent thereon, and although such manner of operation would have been to the interest of the business of the Southern Railway Company as a common carrier, it so operated its other lines as to decrease the earnings of the Memphis & Charleston Railroad Company, and cut it off from business, and seriously embarass the operations of its receivers, which conduct was for the sole purpose of decreasing the value of the Memphis & Charleston Railroad so that it could be obtained at the lowest possible price; that while the Memphis & Charleston Railroad was in the hands of receivers, although its earnings were sufficient to have paid and kept down the interest on the mortgage bonds and prevented the maturity thereof, said earnings were used by the receivers at the instance of the parties controlling the East Tennessee, Virginia & Georgia Railway Company, and afterwards the Southern Railway Company, to thoroughly repair and put in use said Memphis & Charleston Railroad, and the charges were, in the main, reported as operating expenses, so as not only to greatly enhance the intrinsic value of the property, but at the same time to create the impression that its earning capacity had greatly diminished, and also to suffer its bonded debt to become entirely in default; that a decree of foreclosure in the suit wherein the Central Trust Company of New York was complainant was entered, under which the property of the Memphis & Charleston Railroad Company was sold on the 26th of February, 1898, and the property was purchased by the Southern Railway Company for $2,500,000, the upset price named in the decree, and, said sale being confirmed by the court, the Southern Railway Company became the owner of the said Memphis & Charleston Railroad and all its property and franchises. The bill sets out that the Southern Railway Company, being incorporated under the laws of the state of Virginia, has no power to operate the Memphis & Charleston Railroad, nor to own its stock; that the Memphis & Charleston Railroad does not connect with any line of railroad owned by the Southern Railway Company, and that its ownership, operation, or lease, or the ownership of a majority of its capital stock, would be without the authority of the laws of the states in which its railroad lies, and from which the franchises to operate the same are derived, and that the sale is therefore illegal and void; that the said Southern Railway Company holds the property so purchased by it as a trustee for itself and for all other stockholders of the Memphis & Charleston Railroad Company, subject alone to the payment of such sums of money as said Southern Railway Company has lawfully expended in the purchase of the same, and in payment of pre-existing debts.

The answer of the defendant Southern Railway Company denied every material allegation of the bill through which it was sought to charge it with conspiracy, fraud, or misconduct, actual or constructive, and alleged that neither the complainant nor any of his associate stockholders were willing or ever offered to pay or bear any of the obligations of the Memphis & Charleston Railroad Company; that that railroad company, from the 15th day of July, 1892, until the sale mentioned in the bill of complaint, was in the hands of receivers of the federal court, and that at the sale, it having complied with the laws of Tennessee in that behalf, the Southern Railway Company was enabled to and did purchase the property of the Memphis & Charleston Railroad Company without regard to its ownership of 106,264 shares of its capital stock, which at that time was without real or potential value; that while the Memphis & Charleston Railroad Company was in the hands of receivers neither the defendant nor any party controlling it made any suggestion to the receivers in regard to the application of the earnings of the said railroad, nor did they change any relations which had previously existed between the East Tennessee, Virginia &

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Georgia Railway Company and the Memphis & Charleston Railroad Company, nor did they discriminate against the Memphis & Charleston Railroad Company, but dealt with the receivers as it did with every other connection of the defendant; that the receivers made yearly reports to the court, and the management of the property was controlled by the court without any interference or suggestion from the defendant or any person controlling it; that since the sale the defendant has been in possession of and engaged in the operation of the Memphis & Charleston Railroad Company, and has expended large amounts of money in the maintenance of the road; that all of the proceedings leading up to its purchase and ownership of the Memphis & Charleston Railroad were consummated publicly and in the due and orderly course of business, with the knowledge of the complainant and other stockholders of the Memphis & Charleston Railroad Company, none of whom offered to intervene or participate in or bear any part of the expenses of such purchase, or in any other way unite with the defendant in the acquisition of said railroad property.

After proofs were taken and a hearing had, a decree was entered in the circuit court dismissing the bill, from which decree the complainant appealed to this court.

Tully R. Cornick and W. B. Henderson, for appellant.

Frank P. Poston, for appellee.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The proofs in this case fail to show any actual fraud on the part of the Southern Railway Company before or at the sale, or any actual control by it of the Memphis & Charleston Railroad. The road was in the hands of receivers appointed by the court from July 14, 1892, until the sale was made on the 26th of February, 1898. The defendant Southern Railway Company was not organized until 1894, and there is nothing in the proofs from which any manipulation of the affairs of the Memphis & Charleston Railroad by the Southern Railway Company since its organization, or by its stockholders before its organization, can be inferred. The relief, in the absence of this proof, must be founded on the allegations in the bill "that the relations of said Southern Railway Company and of your orator and the other stockholders of said Memphis & Charleston Railroad Company at the time when said sale took place (the said Memphis & Charleston Railroad Company having abdicated its functions of controlling said property, and it and its board of directors being entirely under the control of the Southern Railway Company) were the same as those of tenants in common, and the said Southern Railway Company could not acquire any right, title, or interest in the said property, except for the equal and common benefit of itself and the other stockholders of said Memphis & Charleston Railroad Company; and that the Southern Railway Company, a foreign corporation, did not have the right in law to become the purchaser of the Memphis & Charleston Railroad Company's property."

1. Stockholders are not tenants in common of the property of the corporation, and a stockholder, as such, even though he owns a majority of the stock, does not occupy a trust relation toward the other stockholders, and he may deal with them or with the corporation in good faith. In order to establish a trust relation, the ma-

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jority stockholder must actually control the affairs of the company for his own benefit and to the prejudice of the minority stockholders. If he is not in control of the property, and does not mismanage it to the prejudice of the minority stockholders, he may purchase, if there is no actual fraud, the property of the corporation at a judicial sale for his own benefit, and he is not accountable to any other stockholder for the property so purchased. In Mickles v. Bank, 11 Paige, 127, 128, 42 Am. Dec. 103, Chancellor Walworth uses this language, which seems apt when applied to the facts here, and has long been indorsed by courts and text writers:

"The principal object of the bill appears to be to set aside the sales of the property of the corporation upon the ground that the sales were invalid. In this the complainant must necessarily fall upon the allegations of the bill, even if the corporation is made a party; for the sales were valid, and gave a good title to the purchaser. And one stockholder of a corporation has a perfect right to become a purchaser, for his own benefit, at a sheriff's sale of the corporate property upon an execution against the corporation; nor is he accountable to any other stockholder for such property if there is no fraud in the sale, even where the property is bought in by him much below its value. The remedy of the other stockholders is to attend the sale upon the executions, and bid up the property to its cash value, and thus prevent the same from being sacrificed. The stockholders of a corporation are neither tenants in common of the corporate property nor copartners, either before or after the dissolution of the corporation."

There is nothing in the proof in this case from which it can be found that the Southern Railway Company ever operated or controlled the property of the Memphis & Charleston Railroad Company, so that no mismanagement of its corporate affairs for the purpose of obtaining advantage at the expense of the minority stockholders can be attributed to it. The sale of the property was not brought about through its manipulation, and it is not shown that the property did not bring a fair price. If the minority stockholders desired to become purchasers, they could have devised a plan of reorganization, and bid in the property if it did not bring what they thought was its full value at the sale. Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328. This the complainant did not do, but waited until after the sale had been made and confirmed, and the purchaser had been in possession of and operating the property from February 26, 1898, until August 7, 1899, when he filed this bill, the allegations of which would, if action had been promptly taken, have brought the defendant Southern Railway Company within the principles laid down in the cases holding the majority stockholder a trustee in the purchase of the corporate property for the benefit of all of the stockholders of the corporation. But the proofs lack the essential elements of control and mismanagement, without which the relief could not be given, even if the bill had been seasonably filed. The allegations of control, mismanagement, and fraud are emphasized throughout the bill of complaint, but seem to be wholly lacking in the proof, the complainant apparently relying on the position that, when it is shown that a person holding a majority of the stock of a corporation purchases all of its property, there is a presumption of fraud which makes him a trustee for all of the stockholders, and proof of fraud becomes unnecessary. No case in the large number cited by counsel for the complainant justifies this posi-

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tion. In each one there had been actual fraud in the control and mismanagement of the property for the purpose of bringing about its acquisition by the majority stockholder. It is true that every transaction of a majority stockholder with the corporation will be viewed by the courts with jealousy, and set aside on slight grounds; but it is not void, and, if the relations of the majority stockholder are fair and open, there is no rule which forbids his dealing with the corporation, and no presumption that such dealing is fraudulent. The actual control of the property, which is the basis in all of the cases of the trust relation, not existing, and the sale not having been brought about by the fraudulent action of the defendant, it did not, by its purchase, become a trustee for the complainant and other stockholders of the Memphis & Charleston Railroad Company. Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; McKittrick v. Railroad Co., 152 U. S. 473, 14 Sup. Ct. 661, 38 L. Ed. 518; Rogers v. Railway Co., 33 C. C. A. 517, 91 Fed. 313; Gillett v. Bowen (C. C.) 23 Fed. 625; Lucas v. Friant, 111 Mich. 426, 69 N. W. 735; Bank v. Walker, 66 N. Y. 424; Spurlock v. Railway Co., 90 Mo. 200, 2 S. W. 219; Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Thomp. Corp. §§ 1071, 1076, 1079; Cook, Corp. §§ 6, 653.

There is nothing in the case of Farmers' Loan & Trust Co. v. New York & N. R. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689, which is relied upon by this complainant, at variance with these views. In that case the New York Central & Hudson River Railroad Company purchased a majority of the stock and bonds of the New York & Northern Railway Company, and while its officers were in control of the New York & Northern Railway Company they declined to accept traffic from other roads that would have produced a fund with which to pay the interest on the bonds; the income of the road which should have been employed to pay the interest was diverted to other and improper purposes, which action occasioned the inability of the company to meet its obligations, the default in which resulted in the foreclosure suit. After making an elaborate review of the authorities, Judge Martin, for the court, states the rule as follows:

"The principle of these authorities renders it quite obvious that a corporation purchasing a majority of the stock of another competing one cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders."

The elements of control and mismanagement there existed, and were the basis upon which the judgment rested, and will be found in the cases reviewed by Judge Martin, and in the cases urged by counsel for complainant here. Their absence in this case is fatal to the appellant's contention.

2. The minority stockholders, as the proof shows, with the full knowledge of all of the proceedings culminating in the sale, made no objection, but permitted the property to be sold to the Southern Railway Company for a large sum, and that company to expend a

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large amount of money in its improvement, without making any effort to impeach the sale until the filing of this bill. There is no excuse given for this delay, and the complainant would have thereby lost any right to the relief sought, if he ever had any. Oil Co. v. Marbury, 91 U. S. 591, 592, 23 L. Ed. 328; Simmons v. Railroad Co., 159 U. S. 278, 16 Sup. Ct. 1, 40 L. Ed. 150; Miles v. Vivian, 25 C. C. A. 208, 79 Fed. 848–853; Harwood v. Railroad Co., 17 Wall. 81, 21 L. Ed. 558. In the case of Oil Co. v. Marbury, above cited, Justice Miller says:

"The doctrine is well settled that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question."

3. The Southern Railway Company has filed its charter in the state of Tennessee, as provided by the laws of that state, and is thereby authorized to make the purchase of another railroad sold under judicial proceedings, as provided by its statutes. Acts Tenn. 1881, c. 9, § 2; Rogers v. Railway Co., 33 C. C. A. 517, 91 Fed. 299. The transaction has been executed, and the title has passed, and the state would be the proper party to now question the transaction, if it were illegal. In Rogers v. Railway Co., 33 C. C. A. 534, 91 Fed. 316, 317, this court, speaking through Judge Lurton, says:

"We do not think that this complainant, in his character as a stockholder of the Nashville, Chattanooga & St. Louis Railway Company, is in a position to make this question. The railroads in question were sold at a judicial sale. The purchaser at that sale has conveyed them by deed to the Louisville & Nashville Railroad Company. The transaction is an executed one, and the title has actually vested in the purchaser. * * * If the contract was in fieri, it might be open to a stockholder of the Louisville & Nashville Railroad Company as such, and upon a bill properly framed to restrain his company's officers from completing such an illegal transaction. But that is not this case. This is an executed transaction. The title has vested. It may be a defeasible title, but it has passed out of Phillips by his deed, and is vested in his conveyee. Until the state shall institute proceedings for the forfeiture of the charter, or for the purpose of defeating the title, it is a sound legal title, and will support this lease, unless it be subject to other objections."

The decree dismissing the bill was correct, and it is affirmed.

W. J. LEMP BREWING CO. v. ORT.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1902.

No. 1,078.

EVIDENCE—SUBJECTS OF EXPERT TESTIMONY—MATTERS OF COMMON KNOWLEDGE.

The question what would have been the result, under circumstances shown if the driver of a wagon had made a sharp turn for the purpose of avoiding a collision with a buggy, is not one for expert testimony, but the matter is one of common knowledge.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

John Lovejoy, M. L. Malevinski, and Alex. Sampson, for plaintiff in error.

Jas. B. Stubbs, for defendant in error.

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Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The refusal to permit the witness Nichols to testify as an expert in regard to what would have happened in case he, as driver of the beer wagon, had made a sharp turn to the right, whereby the fore wheels of his wagon would have missed the plaintiff's buggy, was not reversible error, because the matter was one of common knowledge; and, further, because the witness Nichols was thereafter examined and cross-examined fully with regard to all actual details of the collision.

There was no error in overruling the objection to the introduction in evidence on the trial of the stenographer's report of the testimony of Demetri Petropol, Amelia Petropol, and H. C. Nichols, taken on a former trial, because the stenographer's report was fully and sufficiently verified.

The refusal of the trial judge to give the special instructions requested before the court's charge was given did not constitute reversible error, because all the propositions and definitions involved were embraced in the charge as given, to which charge there was no objection except as to the rule of damages.

An examination of the pleadings in connection with the proceedings as set forth in the bill of exceptions will show that the rule of damages given in the general charge, and to which exception was taken, was correct generally and in detail, and, in our opinion, was proper to guide the jury in assessing damages, and in no wise tended to mislead them into giving double damages.

Finding no reversible error in the record, the judgment of the circuit court is affirmed.

CARLING v. SEYMOUR LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1902.)

No. 1,110.

1. GEORGIA INSOLVENCY ACT—SUSPENSION BY BANKRUPTCY ACT.
   The Georgia insolvency laws (Code Ga. 1895, c. 4, §§ 2716–2722), providing for the distribution of the assets of insolvents, and authorizing the chancellor to recommend to the creditors of the defendant that they release him from further liability, being in effect a state bankruptcy act, its operation was suspended by the passage of the bankruptcy act of 1898, and proceedings under the former act are void.

2. SAME—MORTGAGE—FORECLOSURE—PETITION—SUFFICIENCY—STATE RECEIVER—TRUSTEE IN BANKRUPTCY—RIGHT TO POSSESSION OF PROPERTY.
   A petition in equity filed in the Georgia superior court, which, under Code Ga. § 2770, has jurisdiction of mortgage foreclosure suits, alleged that the plaintiff was a mortgage creditor of defendant, and contained all allegations necessary to authorize a foreclosure, alleged that defendant was insolvent, and asked the foreclosure of the mortgage, and the appointment of a receiver for the debtor's property; but other allegations and prayers for relief showed that the plaintiff had the insolvency law in view in framing his petition. *Held*, that the proceedings would be sustained as a mortgage foreclosure suit within the jurisdiction of the superior court, even though the bill was imperfect, and required amendment; and that the proceedings were not void as taken under the Georgia insolvency law (Code Ga. 1895, c. 4, §§ 2716–2722),

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which was suspended by the passage of the bankruptcy act; and therefore that the possession of the mortgaged property by a receiver appointed by the state court would not be disturbed in bankruptcy proceedings against the debtor.

3. SAME.

A trustee in bankruptcy, of a bankrupt whose property has been seized under a mortgage and is in possession of a receiver appointed in the mortgage foreclosure suit by a state court of competent jurisdiction, is entitled to the possession of the property not covered by the mortgage, and to the excess of the proceeds of a sale of the mortgaged property over the mortgage debt and costs of foreclosure.

4. SAME—COMITY.

Where a trustee in bankruptcy is entitled to assets of the bankrupt which are in possession of a receiver appointed by a state court of competent jurisdiction, comity requires, as a general rule, that the trustee should first make application to the state court instead of the bankruptcy court for an order for the possession of such assets.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Georgia.

For decision of district court reversed by this opinion, see 112 Fed. 323.

This is a petition in equity to this court, under the jurisdiction conferred on it by clause "b" of section 24 of the bankruptcy act of July 1, 1898 (30 Stat. 553), to superintend and revise in matter of law certain proceedings in bankruptcy of the district court of the United States of the Southern district of Georgia. A full statement of the facts will be necessary to make clear the questions that are raised by the petition.

Proceedings in the State Court.

On the 1st day of October, 1900, the Exchange Bank of Macon, Ga., a corporation, filed in the superior court of Bibb county, Ga., a petition in equity against the Macon Sash, Door & Lumber Company, also a Georgia corporation, doing business in Bibb county. It is alleged in the petition that the defendant corporation was indebted to the petitioner in the sum of $13,350, evidenced by 18 promissory notes, each indorsed by W. J. Beeland and T. C. Hendricks. These notes were secured by a mortgage executed by the defendant company to the petitioner. This mortgage is on personal property and real estate described in the petition. It is alleged that the object of the mortgage was to create in favor of the petitioner a lien, not only on the entire contents of the defendant's storehouse and the entire plant and materials situated upon the described real estate, but also upon all additions that may be made thereto, until the said notes have been fully paid. The defendant, at the petitioner's request, on July 21, 1897, made to petitioner a second mortgage for the purpose of securing the same debt, shown by renewal notes. The second mortgage embraced other and additional property to that described in the first mortgage. Copies of the two mortgages were made exhibits to the petition. It is alleged that the defendant and the indorsers on the defendant's notes are insolvent, and that the property described in the mortgages is deteriorating in value, and that the defendant owes other debts, evidenced by notes and open accounts, amounting to $11,500.10, and that judgments amounting in the aggregate to about $700 have been rendered against the defendant, which the defendant is unable to pay. It is also alleged that petitioner has demanded of the defendant payment of its indebtedness which had matured, and that defendant had failed to pay the same; that petitioner has no adequate or complete remedy against the defendant except in a court of equity, and that the interposition of a court of equity is demanded, both in the interest of all the defendant's creditors as well as of the defendant itself; that, in order to avoid a multiplicity of suits at law and the needless sacrifice of defendant's property, it is necessary that a court of equity, through its receiver, should administer and wind up the affairs of the said company,

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converting its property and assets into cash. There is a prayer for process, and the following special prayers: "Wherefore it prays: (1) That the said defendant company be restrained and enjoined from selling, incumbering, or in any wise disposing of any of said property upon which plaintiff has its mortgage lien, and which is hereinbefore fully set forth and described. (2) That a permanent receiver be appointed by this court to take possession of the entire property and assets of every description, to administer the same under the direction and orders of this court, and to convert the same into cash at some early date for prompt distribution among defendant's various creditors, according to their respective priorities. (3) That all the other creditors of the said defendant company be allowed to become parties to this proceeding, which plaintiff prays may be taken as a creditors' bill, for the purpose of protecting the rights of all parties at interest. (4) Plaintiff prays that it may have a judgment and decree against defendant for the amount of its debt, and foreclosing its said two mortgages, and that the same may be decreed to be the highest and best lien upon the fund realized from the sale of the mortgaged property." This petition was signed by counsel, and duly verified. On October 2, 1900, the judge of the superior court of Bibb county, at chambers, made an order for the defendant to show cause on October 11th why the prayers of the petition should not be granted, and in the meantime restraining the defendant from incumbering or selling or in any way disposing of the property owned by it, and appointing Dupont Guerry temporary receiver of the defendant's property to take possession of and to hold the same subject to the further order of the court. Certain orders of continuance were then made on different dates. On the 27th of November, 1900, the defendant, the Macon Sash, Door & Lumber Company, filed an answer to the petition. The mortgage debt was admitted, the averment of insolvency was denied, and it was admitted that the machinery had deteriorated in value. It was claimed in this answer that its assets were largely in excess of its liabilities. On November 30, 1900, the superior court entered a formal decree appointing Thomas J. Carling permanent receiver to take possession, subject to the orders and directions of the court, of all the property, both real and personal, and choses in action, of every character, belonging to the defendant company. Carling was required to give and did give bond as such receiver in the sum of $10,000. There were many orders made in reference to the receivership, which it is unnecessary to state. It appears from the record that the receiver came into the possession, under these orders, of all the property embraced in the two mortgages, and of choses in action and other property not covered by the mortgages.

Proceedings in the United States District Court.

On the 17th day of November, 1900, the Seymour Lumber Company and two other creditors of the Macon Sash, Door & Lumber Company filed a petition in the district court to have the latter company adjudged to be a bankrupt. On December 3, 1900, the lumber company filed an answer to the petition in bankruptcy, resisting the same, denying that it had committed an act of bankruptcy, denying that it was insolvent, and demanding a trial by jury. On motion of the Seymour Lumber Company and the other creditors, petitioners in said bankruptcy proceedings, on May 21, 1901, the district court made an order restraining the Exchange Bank of Macon, Ga., and others who had become parties to the said suit in the superior court of Bibb county, Ga., from further prosecuting that suit until the 1st day of July, 1901, and until the further order of the court. On November 25, 1901, the Macon Sash, Door & Lumber Company, having withdrawn its answer and demand for jury trial, was by said district court adjudged a bankrupt. On the same day, November 25, 1901, the district court made an order directing the marshal to take possession of the property of the bankrupt, and ordered Thomas J. Carling, the receiver theretofore appointed by the superior court of Bibb county, Ga., to surrender the same to the marshal. That part of the order relating to Carling is as follows: "That the said T. J. Carling be, and he is hereby, ordered and directed to deliver to said marshal all of the property, money, deeds, books, and papers of the said Macon Sash, Door & Lumber Company in his possession, custody, or control." The marshal

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demanded of Carling that he surrender the property to him, and, Carling having failed to do so, the district court, on the petition and motion of the Seymour Lumber Company and others, the original petitioning creditors in the cause in bankruptcy, on November 29, 1901, made the following order: "Upon considering the foregoing petition, it is ordered by the court that the said T. J. Carling be and appear before the undersigned, judge of the United States district court for the Western division of the Southern district of Georgia, at the United States court house in Macon, Georgia, at 10 o'clock a. m., on the 2d day of December, 1901, then and there to show cause, if any he can, why he has refused to surrender the property, money, deeds, books of account, and papers of the said bankrupt, the Macon Sash, Door & Lumber Company, in his possession, custody, or control, described and mentioned in the order and warrant of seizure issued out of the said United States district court on the 25th day of November, 1901, and, in case he should fail to show such cause as aforesaid, why an attachment should not be issued against him for his disobedience to the orders of the court. Let the said T. J. Carling be served with a copy of the foregoing petition and this order forthwith."

Thomas J. Carling filed a written answer to this rule to show cause, in which he stated that he made the answer under the direction of the superior court of Bibb county, state of Georgia; that he held the property demanded of him by the marshal, not in his own right or personally, but as the receiver appointed by said state court in the case of the Exchange Bank of Macon against the Macon Sash, Door & Lumber Company. In this answer he stated that Dupont Guerry had been appointed the temporary receiver on October 2, 1900, and that subsequently, on November 30, 1900, he had been appointed permanent receiver by said state court; that the property had been continuously in the possession of the state court from October 2, 1900, when Dupont Guerry was appointed temporary receiver, up to the present time; that he employed counsel by leave of said court that appointed him, and had incurred expenses, and had not been paid anything for his services; and that he was under bond in the sum of $10,000 for the faithful performance of his duties as receiver. He attached to his answer a copy of the proceedings in the state court showing the petition, answer, and orders. Carling claimed in this answer that, the superior court having first taken jurisdiction of the property and having taken possession of it through its temporary and permanent receiver, the possession and control of the property ought not to be interfered with by the district court, and that in all of these proceedings he had acted in good faith, and without the purpose and intention to treat with disrespect any of the orders of the district court, and that he had not treated any of the orders of the court with disrespect; that in good faith he was advised and believed that as an officer of the superior court of Bibb county charged with the administration of the property, and under a bond for the faithful performance of his duties as receiver, he could not surrender the property except upon the order of the judge of the superior court, under which court he held his appointment. He attached to the answer copy of an order of the state court directing him not to surrender the property, but to show the fact and date of his appointment as receiver to the district court.

After hearing argument, the district court held that Carling's answer was insufficient, and on the 6th day of December, 1901, made the following order: "A rule having been issued out of this court requiring T. J. Carling, one of the defendants in the above-stated cause, to show cause before this court why he refused to surrender the property, money, deeds, books of account, and papers of the said bankrupt, Macon Sash, Door & Lumber Company, in his custody, possession, and control, described and mentioned in the order and warrant of seizure out of this court on the 25th day of November, 1901, with which order and warrant of seizure he had been duly served, and, in case he should fail to show such cause, why an attachment should not be issued against him for his disobedience to the order of this court; and the said T. J. Carling, for showing cause as required by said rule, having filed his answer and response therein, and the court having heard and considered the evidence in said matter submitted and the argument of counsel: It is now ordered, adjudged, and decreed by the court that the response

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and showing made by the said T. J. Carling is insufficient; that the said T. J. Carling be, and he is hereby, peremptorily ordered, directed, and required to surrender and deliver to John M. Barnes, marshal of the United States for the Southern district of Georgia, all the said property, money, deeds, books of account, and papers of the said bankrupt, Macon Sash, Door & Lumber Company, in his possession, custody, and control, described and mentioned in the order and warrant of seizure issued out of this court in the above-stated cause, on the 25th day of November, 1901, by 10 o'clock a. m. on the 7th day of December, 1901, and, in case he should not so surrender and deliver the same, he shall be attached as for contempt of court."

Carling having failed to obey this order, the district court on December 7, 1901, made the following additional order: "It having been adjudged and decreed by the court in the above-stated cause, on the 6th day of December, 1901, after due notice and hearing, that T. J. Carling, one of the parties in said cause, was in contempt of this court in resisting and refusing to obey an order and warrant of seizure issued out of this court in said cause on the 25th day of November, 1901, requiring the marshal of said district to seize and take possession of, and the said T. J. Carling to deliver to said marshal, the property, money, deeds, books of account, and papers of the said bankrupt, Macon Sash, Door & Lumber Company, in his possession, custody, and control, and described and mentioned in said order and warrant of seizure, with which said order and warrant of seizure the said T. J. Carling has been duly served; and the said T. J. Carling having appeared in open court this day, and admitted that he had purged himself of said contempt so adjudged and decreed against him, by surrendering and delivering to said marshal said property, money, deeds, books of account and papers by 10 o'clock this day: It is now adjudged and decreed by the court that the said T. J. Carling is still in contempt of this court in refusing to surrender and deliver said property, money, deeds, books of account, and papers by 10 o'clock this day, as ordered and directed to do by this court on the 6th day of December, 1901. It is now ordered that the marshal of said district be, and he is hereby, directed and required, immediately after the expiration of 10 days from this date, unless the judgments, orders, and decrees adjudging and decreeing said T. J. Carling to be in contempt as aforesaid shall be sooner superseded according to law, to attach and seize the body and person of said T. J. Carling, and confine him in the common jail of Chatham county, Georgia, in said district, and there him safely keep until he shall have purged himself of the said contempt adjudged and decreed against him, by surrendering and delivering to the said marshal all of the property, money, deeds, books of account, and papers of the said bankrupt, Macon Sash, Door & Lumber Company, in his possession, custody, and control, described and mentioned in the order and warrant of seizure issued out of this court on the 25th day of November, 1901, or until the further order of this court."

The purpose of the petition for revision and review filed in this court is to revise, as matter of law, the foregoing proceedings in the court of bankruptcy; and it is alleged here that the court erred in making the foregoing orders of December 6 and December 7, 1901.

Washington Dessau and N. E. Harris, for petitioner.
John R. L. Smith and J. T. Hill, for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court. Under the Georgia system the superior courts have exclusive jurisdiction in cases affecting the title to lands and in equity cases. The superior court of Bibb county, Ga., is a court of general jurisdiction, and has the powers and jurisdiction of a court of chancery. Code Ga. 1895, § 5842. It has, by express statute, jurisdiction of suits to foreclose mortgages (Id. 2770); and to appoint receivers (Id. 4904). The judges of the superior courts

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are, in equity cases, chancellors. While bills in equity are "abolished" (Id. 4931), they survive in the "petition," which is addressed to the court, and sets forth the cause of action, legal or equitable, or both, and claims legal or equitable relief, or both. Id. 4937.

Chapter 4 of the fourth title of the Georgia Code is entitled "Insolvent Traders." It embraces sections 2716 to 2722, inclusive, which are copied in the margin.[1] These sections, in brief, provide that when any corporation not municipal, or any trader being insolvent, fails to pay debts at maturity, creditors representing one-third or more of the unsecured debts of the insolvent may invoke by petition the power of a court of equity to collect the debts and distribute the assets of such insolvent. The chancellor is authorized, in cases where the insolvent has fairly surrendered his property for distribution, "to recommend to the creditors of the defendant that they may release him from further liability." This insolvent traders' act is held by the supreme court of Georgia to be a kind of state bankrupt law. Describing the procedure, the court said: "It is putting a trader in bankruptcy, and relieving him from past debts, as far as state legislation can do so." Comer v. Coates, 69 Ga. 491–495. In a later case this language is repeated and approved, and the court added: "The act does in many respects resemble the bankrupt acts of congress." Ryan v. Kingsbery, 88 Ga. 361–389, 14 S. E. 596, 605. The constitution limits the power of a state to legislate on this subject, for it is not permitted to so legislate as to impair the obligation of contracts. U. S. Const. art. 1, § 10. This act is clearly a state insolvency law, within the power of the state to enact when the congress has not exercised its power to pass a uniform bankrupt law. The administration of the estates of insolvents by the state courts under this statute would be inconsistent with the exclusive jurisdiction of the courts of bankruptcy under the bankrupt law. The passage of the bankrupt law by congress, therefore, suspended the operation of this state statute. Sturges v. Crowninshield, 4 Wheat. 122–196, 4 L. Ed. 529; Tua v. Carriere, 117 U. S. 201–210, 6 Sup. Ct. 565, 29 L. Ed. 855; Butler v. Goreley, 146 U. S. 303–314, 13 Sup. Ct. 84, 36 L. Ed. 981.

The main question of contention between the parties to this suit is whether or not the state court had jurisdiction of the suit in which it appointed the temporary and the permanent receiver. The solution of this question will answer others raised in the record.

It is contended by the creditors of the Macon Sash, Door & Lumber Company, who procured the adjudication in bankruptcy, that the state court had no jurisdiction of the case made by the petition in equity, and that, therefore, the appointment of the receiver is void. The argument is that the proceeding in the state court is based on the general insolvency laws, and that its purpose is to wind up and distribute the estate of an insolvent debtor. And it is asserted that the congress is vested by the constitution with power to establish uniform laws on the subject of bankruptcy for the purpose of administering and distributing the estates of insolvent persons (Const. art. 1, § 8); and

[1] See note at end of case.

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that congress having exercised this power, and committed the administration of the bankrupt's estate exclusively to the courts of bankruptcy, proceedings in state courts in insolvency are void. If the state court's jurisdiction depended alone on the insolvent traders' law (Code Ga. 1895, §§ 2716–2722), its order appointing Carling receiver would be void. This is true because the passage of the bankrupt law by the congress rendered conflicting state insolvent or bankrupt laws void. Tua v. Carriere, 117 U. S. 201, 210, 6 Sup. Ct. 565, 29 L. Ed. 855; Butler v. Goreley, 146 U. S. 303, 314, 13 Sup. Ct. 84, 36 L. Ed. 981.

But was the jurisdiction of the state court dependent on the validity of these Georgia statutes relating to insolvency? We have seen that it had jurisdiction to foreclose mortgages and to appoint receivers. The only pecuniary claim asserted by the petitioner in the state court was secured by two mortgages. The petition contains a prayer to foreclose these mortgages. The notes secured by the mortgages have two indorsers. The insolvent traders' act, before it was superseded, must have been put in operation at the suit of "unsecured" creditors. Code Ga. 1895, § 2716; Cracker Co. v. Brooke, 91 Ga. 243, 18 S. E. 136. The appointment of a receiver is a jurisdiction often exercised by equity courts in foreclosure suits. The insolvent traders' law provides for a proceeding against insolvents only, and the petition alleges that the defendant therein is insolvent; but that allegation is proper, if not necessary, to obtain a receiver in a foreclosure suit. So of all the averments as to the business embarrassments of the defendant in the petition. They are usual in bills seeking the appointment of a receiver. It is true that the petition contains other averments that are unnecessary and unusual in a foreclosure suit, such as demand and refusal to pay, that the petition is for the benefit of the petitioner and other creditors, etc. These and other averments show that the pleader had in view the insolvent traders' law. But the bill contains all the allegations necessary to a valid decree appointing a receiver and foreclosing the two mortgages. The fact that it contains other and unnecessary averments, even if made to conform to a statute no longer operative, does not deprive the petition of equity, and defeat the jurisdiction as to the matters well pleaded. Conceding that the petition was imperfect and required amendments, it would not follow that the state court was without jurisdiction. The purpose of the petition was, among other things, the foreclosure of the mortgages and the possession of the property by a receiver to be appointed by the court; and when the court adjudged the petition sufficient, and made the appointment, that appointment cannot be questioned by another court, or the possession of the receiver appointed disturbed. Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660, at page 178, 157 U. S., page 574, 15 Sup. Ct., and page 660, 39 L. Ed.

A demurrer or plea to the entire petition for want of jurisdiction would not have been sustained, although part of its statement and prayer were based on matters as to which relief could not be granted. The Georgia statute in question being void, only that part of the petition dependent on it would have been subject to demurrer. Beach, Mod. Eq. Prac. 241. A demurrer or plea to the whole petition for want of jurisdiction would have been overruled. We think, therefore,

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conceding the "traders' insolvent" law to be superseded and made void by the bankrupt law, that the state court had jurisdiction of the suit as one to foreclose a mortgage, and to appoint a receiver of the property covered by the mortgages.

The bankrupt act was unquestionably designed by the congress to secure the possession of the property of the bankrupt for administration under the proceedings in bankruptcy. The district court has authority, under paragraph 3 of section 2, to appoint receivers, or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition, and until it is dismissed or the trustee appointed. Other provisions are in the act for the recovery of the bankrupt's property by the trustee when appointed. By authority so conferred, the district court, in a proper case, may direct the marshal, under summary process, to seize the property of the bankrupt in the hands of third persons claiming to own it (Sharpe v. Doyle, 102 U. S. 686, 26 L. Ed. 277; Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984); may compel the return of property of the bankrupt illegally taken out of the possession of the referee in bankruptcy (White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183); and may take property from the possession of the purchaser from the assignee of the bankrupt under a general assignment (Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814). But it has not been held that property of the bankrupt in the hands of a receiver of a state court having jurisdiction can be so taken out of his possession. It is indicated in Moran v. Sturges, 154 U. S. 256, 283, 14 Sup. Ct. 1019, 38 L. Ed. 981, that the federal courts, in the exercise of their exclusive jurisdiction to enforce maritime liens, will not interfere with the actual possession of a state court. It was there said: "When its [the state court's] jurisdiction has determined, the admiralty courts may proceed." However this may be in cases of the exclusive jurisdiction of the federal courts, it is clear, on precedent and principle, that the federal courts will not interfere with the actual possession of a state court, through its receiver, of mortgaged property, in a case where the state court has jurisdiction to foreclose the mortgage. The case of Davis v. Railroad Co., 1 Woods, 661, Fed. Cas. No. 3,648, decided on circuit by Mr. Justice Bradley, is directly in point, so far as it applies to the property covered by the mortgages sought to be foreclosed in the state court. It was there held that a receiver in possession of mortgaged property under order of a state court of chancery, in proceedings for foreclosure begun prior to the commencement of proceedings in bankruptcy, cannot be dispossessed by order of the district court in the bankruptcy proceedings; "that a proceeding to enforce a mortgage or other specific lien involves the right of property, and possession in pursuance thereof, legally or judicially taken, before proceedings in bankruptcy, cannot be interrupted by those proceedings." This proposition is sustained by Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; for it is there decided that the foreclosure suit may proceed notwithstanding the proceedings in bankruptcy, and that the purchaser at the foreclosure sale will obtain a good title.

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The orders made by the bankruptcy court which are under review were made on the theory that the proceeding in the state court was based alone on the insolvent traders' act, and that the appointment of the receiver was void. These orders, in effect, require the receiver of the state court to surrender to the marshal all of the property held by him as receiver. Part of this property, but not all of it, is covered by the mortgages sought to be foreclosed in the state court. No separate questions are raised as to the property not mortgaged. The orders made by the bankruptcy court which are submitted for review and revision relate to all the property held by the receiver.

A receiver or trustee, when appointed in the bankruptcy proceedings, while not entitled to the mortgaged property, will be entitled to any excess arising from the foreclosure sale, when made by order of the state court after the payment of the mortgages and costs of foreclosure. He will also be entitled, when appointed, to the possession of the choses in action and the other property in the hands of the state court's receiver which is not covered by the mortgages. The bankrupt law is equally binding on the state and the federal court, and we cannot doubt that the former will, on proper application, give full effect to it. Where assets are in the hands of the receiver of one court which legally and equitably belong to the trustee or receiver appointed by another court, comity requires, as a general rule, that application should be made for a proper order to the former court whose officer has possession of the property. This rule is reciprocal between the federal and state courts, each respecting the possession of the other. Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470; In re Tyler, 149 U. S. 164.

The jurisdiction and authority of the bankruptcy court for the enforcement of the bankrupt law is paramount. State insolvency laws are superseded by the bankrupt act. While it is a general rule that a federal court may not enjoin proceedings in a state court, an exception is made in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. Rev. St. U. S. § 720. When the state court is in possession, through its receiver, of assets that it is without jurisdiction or authority to hold against a receiver or trustee appointed in bankruptcy proceedings, instead of making a peremptory order on the receiver of the state court to surrender the funds, an injunction, if necessary, might be granted by the bankruptcy court to prevent the unlawful distribution of the assets, until application could be made to the state court for an order to its receiver to surrender the assets to the proper custodian. The laws of the United States being equally binding on all the courts, we cannot assume that the state court would refuse to administer them. We are not now called on to decide what course should be taken in the event of a disregard of the bankrupt law by the state court. That such application should be made in the first instance to the state court is sustained, not only by the analogous cases relating to comity, but by adjudications directly in point on this question of practice under the bankrupt law. Mauran v. Carpet-Lining Co. (R. I.) 50 Atl. 331; In re Lesser (D. C.) 100 Fed. 433, 439; In re Kersten (D. C.) 110 Fed. 929, 931; In re Lengert Wagon Co. (D. C.) 110 Fed. 927; Ex parte Waddell, Fed. Cas. No.

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17,027; In re Seebold, 45 C. C. A. 117, 105 Fed. 910; Scheuer v. Stationery Co. (C. C. A.) 112 Fed. 407.

The judgments of the court of bankruptcy rendered December 6, 1901, and December 7, 1901, are reversed.

NOTE.

Georgia Code 1895—Insolvent Traders.

"Section 2716 (3149a). Receiver for Insolvent Trader. In case any corporation not municipal, or any trader, or firm of traders, shall fail to pay, at maturity, any one or more matured debts, payment of which has been properly demanded of such debtor, and by him refused, and shall be insolvent, it shall be in the power of a court of equity, under a creditor's petition, to which one or more creditors, representing one-third in amount of the unsecured debt of such insolvent corporation, trader, or firm of traders, whose debts are matured and unpaid, shall be necessary parties, to proceed to collect the assets, real and personal, including choses in action and money, and appropriate the same to the creditors of such trader, firm of traders, or corporation.

"Sec. 2717 (3149b). Chancellor's Power in Such Cases. The chancellor, under such proceedings as are usual in equity, may grant injunctions, and appoint receivers for the collection and preservation of the assets in the cases provided by this chapter, and may at any time appoint an auditor and take all proper steps to bring the matter to a final hearing.

"Sec. 2718 (3149c). Who May Be Parties. Any creditor may become a party to said petition, under an order of the court, at any time before the final distribution of the assets, he becoming chargeable with his proportion of the expenses of the previous proceedings.

"Sec. 2719 (3149d). No Preferences; Assets, How Distributed. Upon the appointment of a receiver, no creditor shall acquire any preference, by any judgment or lien, on any suit or attachment, under proceedings commenced after the filing of the petition, and all assignments and mortgages to pay or secure existing debts made after the filing of said petition shall be vacated, and the assets be divided pro rata among the creditors, preserving all existing liens.

"Sec. 2720 (3149e). Allowance for Defendant's Support. It shall be in the power of the judge to make a suitable allowance for the defendant for a support during the pendency of the proceedings, having in so doing respect to the condition of the defendant and the circumstances of the failure.

"Sec. 2721 (3149f). Who is a Trader. Any person or firm shall be considered a trader who is engaged, as a business, in buying and selling real or personal estate of any kind, or who is a banker or broker or commission merchant, or manufacturer manufacturing articles to the extent of five thousand dollars per annum.

"Sec. 2722 (3149g). Chancellor may Recommend Debtor's Release. It shall be in the power of the chancellor, in his final judgment in the cases provided for, to express his opinion, if the facts authorize it, that, from the facts as they have transpired during the progress of the cause, the defendant has honestly and fairly delivered up his assets for distribution under the law, and to recommend to the creditors of the defendant that they release him from further liability."

PITCAIRN v. PHILIP HISS CO.

(Circuit Court of Appeals, Third Circuit. February 5, 1902.)

No. 43.

1. APPEAL—ADMISSIONS—EVIDENCE.

Plaintiff's request to charge that the jury should not disallow all his bill because there are defects in the woodwork, but should deduct from that bill on this account what it would cost, under the evidence, to put the woodwork in as good condition as it should have been under the

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contract, having been affirmed, is sufficient basis for the statement of the court in its charge that plaintiff admits there are defects in the woodwork, and has given evidence that they could be remedied at a cost of not over $500, so as to make it an admission.

2. SAME.
A party, by adopting and making part of its brief on appeal the statement of the court, in its opinion refusing new trial, wherein it was alleged that the evidence showed the woodwork could be put in condition for $500, admits there was evidence of defects.

3. ENTIRE CONTRACT.
A contract to decorate walls of room, do the woodwork therein, and furnish it for $5,200 is an entire contract.

4. CONTRACTS—SUBSTANTIAL PERFORMANCES—QUESTION FOR JURY.
Whether there has been a substantial performance of a contract to decorate walls of a room, do the woodwork therein, and furnish it for $5,200, so as to allow recovery thereon, is a question for the jury; there being evidence of defects in the woodwork which it would take $500 to remedy.

5. SAME—INSTRUCTION.
Instruction to jury, in action on entire contract for decorating room, doing woodwork, and furnishing it, that the defective woodwork would not preclude a recovery, if the contract was "otherwise" substantially performed, takes from the jury the question of substantial performance of the entire contract.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Wm. W. Smith, for plaintiff in error.
Wm. M. Hall, Jr., for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge

GRAY, Circuit Judge. In this case the defendant in error, which was the plaintiff below, sued for a balance claimed to be due under five written contracts for decorating, furnishing, and refitting the dwelling house of plaintiff in error, who was the defendant below, and also for the value of some extra work and articles not included in the written contracts. These contracts were in the form of letters written by plaintiff below, promising to do certain work and furnish certain articles at a price stated therein, to each of which there is a written acceptance by the defendant below. Three of the letters are dated January 28, 1899, another dated July 14, 1899, and another without date, but accepted September 14, 1899. The offer in each of the letters covered different rooms in the house, or different articles of furniture, and in some cases the offer in each letter was divided into separate groups, stating an amount for which the material and work in each group would be furnished. In the contract with which we are here concerned, the letter accepted September 14, 1899, after making separate estimates for the office, library, billiard room, and son's room, contained the following:

"Daughter's Room. Walls and ceiling redecorated, woodwork and mantel (shutters not included) of maple (bird's-eye panels), curtains and furniture covers of damask selected, new rug, 2 bureaus, 1 bed (5' 6") and bedding, 1 easy chair, 1 rocker, 2 small chairs, 1 work table (3x2) of bird's-eye maple, cost to be $5,200."

The learned trial judge properly instructed the jury that the five written contracts on their face were distinct, and were to be treated as

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severable; "that is to say, although there might be a breach of performance in one of these contracts, yet, if the other contracts were substantially performed, the plaintiff would be entitled to recover the price or prices stipulated in the contracts thus substantially performed." He also correctly charged the jury that as these written contracts are divided into separate groups of articles or work, in each of which there is a fixed price of its own, these subdivisions in respect to performance or nonperformance are also to be treated as severable and distinct.

All the foregoing appears by the pleadings, and the bill of exceptions brings before us, as part of the record, the charge of the court, with the exceptions made to particular portions thereof. The assignments of error founded thereon are as follows:

"First. The court below erred in instructing the jury as follows, viz.: 'In respect to the defective woodwork, such defect would not preclude a recovery upon the contract which included that work, if the contract was otherwise substantially performed; but the defendant would be entitled to a deduction for the cost of repairing such defect, and the plaintiff would only be entitled to recover the contract price, less this deduction.'

"Second. The court below erred in this: that almost at the end of the charge to the jury the court, after having previously answered all the points submitted by defendant, and after having previously delivered to the jury the portion of the charge above set forth, affirmed plaintiff's fourth point, which point and the court's answer thereto are as follows: 'Fourth. That the jury should not disallow all of plaintiff's bill because there are certain defects in woodwork, but should deduct from that bill on this account what it will fairly cost, under the evidence, to put the woodwork in as good condition as it should have been under the contract.' 'This point is affirmed.'

"Third. The court below erred in its charge to the jury in this: that the court, having previously affirmed defendant's fourth point, which point and the answer thereto are as follows: 'No one is obliged to accept defective and improper work, and, if new work is so constructed as to be so defective and improper as not in substantial performance of the contract therefor, the purchaser has a right to refuse to accept the same, and the contractor cannot, after such rejection, patch up or repair such defective and inferior work, and then compel the purchaser to accept the same; neither can he recover the contract price therefor, less the amount necessary to put such defective and improper work in proper condition.' 'This point is affirmed,'—yet subsequently in the charge the court affirmed plaintiff's fourth point as stated above, which point and the answer thereto are as follows: 'Fourth. That the jury should not disallow all of plaintiff's bill because there are certain defects in woodwork, but should deduct from that bill on this account what it will fairly cost, under the evidence, to put the woodwork in as good condition as it should have been under the contract.' 'This point is affirmed,'—plaintiff's fourth point and the answer thereto being inconsistent with and contradictory to defendant's fourth point and the answer of the court thereto, as above set forth."

The bill of exceptions contains no transcript of the testimony as a whole, or any portion of it, or any statement of what the testimony tends to prove, pertinent to the portions of the court's charge excepted to. The assignments of error follow the exceptions, and the sole question raised thereby is as to the correctness with which the court instructed the jury in the particulars mentioned.

The plaintiff in error has stated in his brief that "on trial of the case plaintiff [below] admitted that the woodwork in the daughter's room was defective, and called witnesses, who testified that it would cost $500 to repair this defect," and in lieu of any testimony or evidence in the record to that effect, he relies, in the first place, upon the statement by the court in its charge, as follows:

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"The plaintiff admits that in the daughter's room there are defects in the woodwork, and has given evidence tending to show that those defects could be remedied at a cost of not over $500, and also that the admitted defects in the newel posts could be remedied at a cost of not over $25."

To this the plaintiff in error appends the statement that:

"These facts are correctly stated by the court, and are part of the conceded facts in this case."

A binding admission may be made by parties, not only on the record, but by their statements to the court. Such an admission as would support the statement of the learned judge, just quoted, was made by the plaintiff below, defendant in error here. One of the requests submitted by the plaintiff below to the court, for a charge to the jury, was the fourth, which, with the answer of the court, is the subject of one of the assignments of error, above quoted. The defendant in error, however, strenuously contends that, in the absence of any evidence brought up by the bill of exceptions bearing on the point in controversy, there is nothing before this court on which it can review the ruling of the trial court in that respect; but the affirmance of this point must be taken as an admission of the fact of defects in the woodwork, and the cost of repair, under the evidence, and not a mere hypothetical statement of the same. As a statement from the plaintiff below, it is a sufficient basis, not only for the ruling upon the point presented therein, but for the statement of the court in its general charge, in regard to the admission as to defective woodwork.

Again, the plaintiff below adopts, and makes part of its brief before this court, the statement of the court below, as to this admitted defect, in its opinion refusing the motion for a new trial, referring to the page of the record where it is found. It is as follows:

"The plaintiff actually did this specified woodwork. After the completion of the work, however, the wood therein shrunk and warped some, and the joints opened. What caused this was the subject of dispute. The plaintiff alleged, and at the trial gave evidence tending to show, that the mischief was occasioned by the damp condition n which the house was kept. The defendant alleged, and at the trial gave evidence tending to show, that the plaintiff had used in this work insufficiently seasoned wood, and that that was the cause of the trouble. But, whatever the cause, the uncontradicted evidence in the case showed that the woodwork could be put in perfect condition at a cost not exceeding $500. It was testified that this could be done at a much less expense, but no witness named a higher sum than $500 as the very outside cost of complete repairment."

We do not have to "look, therefore, to the charge of the judge for the state of the evidence in which that very charge is to be held right or wrong." The admissions made by the plaintiff below in court, appearing in the record and above referred to, present to this court a state of facts which form a sufficient basis on which to review the ruling of the court excepted to. In this, the case at bar is distinguishable from that of Worthington v. Mason, 101 U. S. 149, 25 L. Ed. 848, and from the other cases cited in the brief of defendant in error. We have, therefore, distinctly presented the question whether, in this state of the evidence, the instructions which were given by the court were correct, and to the consideration of that question (the important one in the case) we now turn.

The defendant below contended to the court and jury, as appears

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by the record, that, by reason of a defective construction of the woodwork in the daughter's room, there could be no recovery of the amount agreed to be paid to the plaintiff, under the contract for its furnishing and decoration; that the contract was an entire one, and, with this admittedly defective construction, there was not a substantial performance of the same. The plaintiff below, on the other hand, contended that the defect in the woodwork resulted from no fault on its part, but that, if it did, it was of such a character as would be easily remedied at an expense of not more than $500, and that it should be allowed to recover the difference between that amount and the contract price. In this state of the controversy, the court charged the jury on this point, as follows:

"In respect to the defective woodwork, such defect would not preclude a recovery upon the contract which included that work, if the contract was otherwise substantially performed; but the defendant would be entitled to a deduction for the cost of repairing such defect, and the plaintiff would only be entitled to recover the contract price, less this deduction."

The court also affirmed plaintiff's fourth point, which, as already quoted, is as follows:

"Fourth. That the jury should not disallow all of plaintiff's bill, because there are certain defects in woodwork, but should deduct from that bill, on this account, what it will fairly cost, under the evidence, to put the woodwork in as good condition as it should have been under the contract."

We think the learned judge in the court below erred in these instructions to the jury. The contract in question is an entire contract. $5,200 was the price to be paid for its performance. The contract itself did not attempt to apportion this sum among various items, and there was, therefore, no basis for such apportionment, if otherwise it could have been appropriately made. The contract being entire, the price to be paid is single, and the consideration is solely for the performance of the whole work contracted to be performed. Whether this entire contract had been substantially performed was a question of fact for the jury. They might well be told that, in determining this question, they need not take into the account any slight or unimportant defect, or one that could be easily remedied by a deduction from the agreed price, as such do not necessarily make it impossible to truthfully declare that an entire contract has been substantially performed; but whether such alleged defects are substantial or unimportant is a question of fact for the jury. Substantial performance of the entire contract is sufficient, and the jury may properly so find. This, however, is not the proposition of the charge as excepted to. The instruction of the court below takes away from the jury the question of fact as to whether there had been a substantial performance of the entire contract, and the subordinate and related one, whether the defect in the woodwork was so slight and trivial as to be immaterial in the consideration of the question of substantial performance, or so serious as to negative a substantial performance of, and thus preclude a recovery upon, the entire contract. The language of the court is:

"In respect to the defective woodwork, such defect would not preclude a recovery upon the contract which included that work, if the contract was otherwise substantially performed."

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The question here submitted to the jury was not as to a substantial performance of the entire contract, but whether, with the defective woodwork excluded from consideration, the contract was otherwise substantially performed. By this instruction the court took away from the jury the question of fact, whether there had been a substantial performance of the entire contract, and decided itself that certain deficiencies were not material. The question as to defective woodwork, as we have said, should have been submitted to the jury, to be determined as a part of the general question of substantial performance of the entire contract. This erroneous view of the function of the jury is repeated and emphasized in the affirmance of the plaintiff's fourth request to charge. Such an instruction to a jury could not fail to be prejudicial to the defendant, by depriving him of the right, that was his, to have the jury consider the whole question of substantial performance, including the determination of the fact whether any alleged deficiency was important and material or not. We do not think that the error here pointed out was rendered innocuous by the other portions of the charge, in which the learned judge correctly stated to the jury the law in regard to substantial performance.

It should not be passed without notice that the learned trial judge affirmed defendant's fourth point, as follows:

"No one is obliged to accept defective and improper work, and if new work is so constructed as to be so defective and improper, as not in substantial performance of the contract therefor, the purchaser has a right to refuse to accept the same, and the contractor cannot, after such rejection, patch up or repair such defective and inferior work, and then compel the purchaser to accept the same; neither can he recover the contract price therefor, less the amount necessary to put such defective and improper work in proper condition."

This is a very clear statement of what we think the doctrine applicable to the case in hand to be, and strengthens our confidence in the correctness of the view that we have taken, and, but for the opinion of the court on the motion for a new trial, it would suggest that possibly the view we have criticised was inadvertently taken by the learned judge who charged the jury. However this may be, we are of opinion that error in so vital a point as the one to which we have called attention cannot be passed over as unimportant, by reason of the correct and cogent statements of the law in other portions of the charge. We have carefully examined the authorities and cases cited in behalf of the defendant in error, but can find in none of them sanction for the proposition that, where the question in controversy is whether there has been a substantial performance of a contract, the court can take from the consideration of the jury, by deciding for itself, the question whether an alleged defect is material or immaterial to such substantial performance, or that the question in such case to be submitted to the jury is whether the contract in suit has been otherwise substantially performed, after the question of performance as to a certain portion thereof has been excluded from their consideration.

For the reasons stated, we are compelled to the conclusion that the judgment below should be reversed, and the case remanded, with directions for a new trial.

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In re LEVIN.

(District Court, S. D. New York. April 2, 1901.)

BANKRUPTCY—FAILURE TO ACCOUNT FOR ASSETS—CONTEMPT.

A bankrupt will be adjudged in contempt for failing to comply with an order directing him to turn over assets, where he claims that robbers broke into his store and stole between $7,000 and $8,000 of his stock of goods, worth $10,000, and that after continuing business with the balance for about four months he deserted the store and left its contents to the mercy of any one choosing to take them; he having at the time of robbery told the police and his creditors that practically nothing was taken.

In Bankruptcy. The following is the opinion of Referee Seaman Miller:

This is a motion on behalf of the trustee to compel the bankrupt to pay over certain money and merchandise which the bankrupt failed to specify in his schedules as belonging to him. The bankrupt herein has been engaged as a cloak merchant in this city for the last six years. A portion of that time he was in partnership with his brother, but since 1897 he was in such business on his own account; having started with about ten thousand dollars capital. A few months prior to being adjudicated a bankrupt, he occupied the fifth loft at No. 97 Wooster street, which was reached by an elevator and a stairway. In that loft the bankrupt admits that he had on the 5th day of September, 1899, in the neighborhood of ten thousand dollars' worth of stock. The bankrupt now claims that on the following day his store was entered and all his merchandise was stolen, except between two and three thousand dollars' worth of stock; but his statement to the police at the time was that practically nothing had been taken, and his boast to his creditors was that he was in great luck,—that, while his store had been broken open, he had come opportunely upon the scene before anything had been taken. The conclusion is irresistible that the alleged robbery never occurred, and that the stock which the bankrupt now claims was stolen is still under his control, or the avails thereof are still in his possession. With the balance of stock on hand the bankrupt continued to do business until the 29th day of December, 1899, when, according to his own story, he literally deserted the store, and left the contents thereof to the mercy of any persons who chose to take them. There are other grounds upon which this motion is based, but the evidence is not clear as to them. As the liabilities set forth in the schedules herein amount to but $6,833.30, an order may be entered compelling the bankrupt to pay over to the trustee herein the sum of $7,000.

Hays & Hershfield and I. Gainsburg, for trustee.
Manheim & Manheim, for bankrupt.

THOMAS, District Judge. The bankrupt has failed to comply with the order of the court directing him to surrender assets of the value of $7,000, and for that reason is in contempt of court. The trustee will prepare order accordingly.

In re H. J. ARRINGTON CO.

(District Court, E. D. Virginia. February 18, 1902.)

1. BANKRUPTCY—COMPOSITION—CONFIRMATION—BEST INTERESTS OF CREDITORS—NATURE OF ASSETS—AMOUNT OFFERED—ACCEPTANCE.

Under Bankr. Act, § 12, subd. "d," providing that the judge shall confirm a composition, if satisfied that it is for the best interests of the creditors, and that the bankrupt has not been guilty of any acts or failure to perform any of the duties which would be a bar to his discharge,

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and the offer and its acceptance are in good faith, and have not been made or procured except as in the statute provided, or by any means, promises, or acts therein forbidden, where a bankrupt's assets consisted of a stock of goods and accounts due in a country mercantile business, the estimated value of contracts for cutting and shipping cord wood, and real estate situated in the country, in the absence of any acts on the part of the bankrupt which would debar him of his discharge a composition of 25 per cent. on the dollar offered to the unsecured creditors, and accepted in good faith by 86 out of 89 of them, representing $11.170, as against only 1 opposing it, representing only $400, should, upon the recommendation of the referee, showing that there was no probability of the estate paying over 10 per cent. more than offered, be confirmed, as being for the best interests of the creditors.

2. SAME—OBJECTIONS—CORPORATIONS—DIVIDENDS—SUBSEQUENT CREDITORS—EVIDENCE.

An application for confirmation of a composition offered by a bankrupt corporation was opposed by one creditor upon the ground that the corporation, previous to the passage of the bankrupt act, had paid dividends which diminished its capital, and that the recipients of such dividends should, therefore, be compelled to pay them back. The evidence showed that, at the time of the payment of the dividends complained of, the corporation was very prosperous, and was able to pay such dividends without impairing its capital; that the dividends were declared in good faith by the board of directors; and that the objector's debt was contracted long thereafter. *Held*, that no case having been made which would justify the annulling of the action of the corporation in paying the dividends complained of, upon proper proceedings for that purpose, the objection to the confirmation could not be sustained.

Application in involuntary bankruptcy proceedings against the H. J. Arrington Company to confirm a composition offered by the bankrupt. To the report of the referee recommending the confirmation of the composition, the Greenesville Bank excepts. Composition confirmed.

Wolcott, Wolcott & Gage, for bankrupt Leo.
D. Yarrell, for exceptant.

WADDILL, District Judge. This case is now before the court upon application to confirm a composition of 25 per cent. offered by the bankrupt company to its unsecured creditors. Upon due notice being given of the application to confirm the proposed composition, one creditor (the Greenesville Bank of Emporia, Va.) appeared and opposed the same. The matter was referred to D. Lawrence Groner, Esq., referee in bankruptcy, who, after taking considerable evidence, reported, recommending the confirmation of the same; and, upon further exception, another reference was had, and a second report made, recommending the acceptance and confirmation of the composition, to which, likewise, the Greenesville Bank excepted.

The duty of the court in determining whether a composition should be approved or rejected is one of more than ordinary delicacy and difficulty, in this: that the court is called upon to determine what is best for the rights of parties on a subject about which they naturally feel equally as competent to deal as the court. The statute (Bankr. Act, § 12, subdiv. "d") provides:

"The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty

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of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden."

Under the evidence in this case, as viewed by the court, it will only be necessary to determine as to the first requirement of the statute; that is, whether the acceptance of the proposed composition will be for the best interests of the creditors. In passing upon this question under the bankrupt act of 1867, Judge Lowell, in Re Morris, 11 N. B. R. 443, Fed. Cas. No. 7,303, well said:

"A burden is cast upon the court that is not easily sustained,—of instructing parties concerning their own interests. In the absence of fraud and concealment, the question for the court seems to be not whether the debtor might have offered more, but whether the estate would pay more in bankruptcy."

And in a later case (In re Whipple, Fed. Cas. No. 17,513) the same learned judge, in discussing the propriety of a court's rejecting a composition, if opposed by a small minority of the creditors, because it appeared that a settlement in bankruptcy would be more for their interest, announced the rule to be that the judge must make his comparison, not with what the debtor might possibly have done, but, rather, with what the assignee in bankruptcy could do. In commenting on this rule, Mr. Justice Brown, of the supreme court, then United States district judge for the Eastern district of Michigan, in Re Weber Furniture Co., Fed. Cas. No. 17,330, said:

"I am entirely content with this view of the law, and, indeed, I hardly see how any other construction can be placed upon the words 'being satisfied that the same is for the best interests of all concerned.'"

In this same case, in which the composition was rejected by the district court, and subsequently approved by the circuit court, Mr. Justice Brown, in discussing the subject of the court's approving the action of the creditors where taken after full consideration, further said:

"But where a composition deed has been signed by a large majority of the creditors upon a full consideration of the condition of the debtor, I should be very reluctant to overrule their judgment simply because I thought the estate would yield a larger dividend in bankruptcy. Much would depend upon the character of the property and the state of the markets. In the case above cited Judge Lowell intimated 'that a difference of five per cent. upon the amount of the debts and the probable amount of the assets would not be sufficient to induce me to reject the resolution.' I would go even further than that, and say that where the property consisted of real estate or of goods, the value of which depended upon the caprices of fashion, or other like contingencies, I would not overrule the discretion of the creditors, fairly exercised, if the difference were ten or even fifteen per cent."

In the circuit court, on appeal, in the same case (Fed. Cas. No. 17,331), the English and American cases upon the subject were fully reviewed, and the opinion there expressed, as deduced from them, that the decision of the majority of the creditors was conclusive as to the amount of compromise, when such judgment on their part was exercised in good faith, and there was nothing to indicate fraud, accident, or mistake.

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The question of the approval or rejection of compositions under the present bankrupt law has been under review by the courts several times,—noticeably by the circuit court of appeals for the Fifth circuit, in Bank v. Doolittle, 5 Am. Bankr. R. 736, 46 C. C. A. 258, 107 Fed. 236, and in the circuit court of appeals for the Sixth circuit in Adler v. Jones, 6 Am. Bankr. R. 245, 48 C. C. A. 761, 109 Fed. 967. In the last-named case, Judge Day, speaking of whether the composition should be accepted or not, said (page 248, 6 Am. Bankr. R., page 763, 48 C. C. A., and page 969, 109 Fed.):

"It comes, then, to this: If the court is satisfied upon the hearing that the composition offered would be very considerably less than they might reasonably expect to realize in the administration of the assets in due course, then the composition is not for the best interest of the creditors. In determining this question the court will doubtless be influenced by the consideration that a man can ordinarily do better with his own property, and realize more therefrom, than can be obtained in course of judicial proceedings, with compulsory sales and expenses of administration."

Reference may be also had to Coll. Bankr. (3d Ed.) 148; Loveland, Bankr. 556.

In the case under consideration, of the bankrupt's unsecured creditors, eighty-six out of a number of eighty-nine, and representing an indebtedness of $11,170.88, have accepted, and ask for confirmation of, the composition; and only one creditor, with a debt of $400, opposes it. The referee, who heard and saw the witnesses, and devoted considerable time to the case, twice reports in favor of the acceptance of the composition of 25 cents on the dollar of the indebtedness, offered by the bankrupt to the unsecured creditors. He also reports that it is probable that an amount something larger —sufficient, possibly, to pay as much as 30 or 35 per cent. of said debts—may be realized from the assets of the bankrupt estate, though this he considers problematical only. Under these circumstances, the court should be very slow to reject the composition, and to place its judgment against that of the creditors themselves, acting with practical unanimity, and particularly in dealing with assets of the character involved here, made up of accounts due in a country mercantile business, a stock of goods, wares, and merchandise in such store, the estimated value of contracts for cutting and shipping cord wood, and real estate situated in the country. Nothing could well be more doubtful than a correct estimate of just what would be realized from this class of property when subjected to the crucial test of realizing upon it by legal proceedings. The bankrupt has not been guilty of any improper conduct in connection with the composition, nor committed any of the acts or failed to perform any of the duties which would debar him of his discharge; and the offer appears to have been made and accepted in good faith, and not had or procured by any of the means, propositions, or acts forbidden by the statute.

Counsel for the exceptant raises the further question that the bankrupt corporation in the year 1897, prior to the passage of the bankrupt law, declared certain dividends, and paid the same to three of its stockholders, contrary to law, and, in effect, took that much money from its capital, as contradistinguished from its profits, and for that reason insists that these persons, then holding stock in the company,

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should, by proper suit instituted for the purpose, be required to pay back the amount thus received by them out of the assets of the company; and he also raises various technical questions affecting the payments as made. This exception presents at least the prospect of lengthy litigation, if not an increase of assets; and, as viewed by the court, the exceptant has failed to make out such a case as would justify the annulling of the particular transactions referred to upon proper proceedings had for that purpose. The place of business of the corporation was in the country, and its transactions were doubtless not conducted with the formality, regularity, and ceremony that would have been adopted by larger concerns in populous cities; but the transaction complained of, so far as the evidence shows, seems to have been conducted in substantial compliance with the law. At the time of the payment of the dividends referred to, the corporation was very prosperous, had on hand a large surplus, and was able to pay the dividends declared without impairing its capital; and with the action of the board of directors, taken in good faith at the time, complaint should not now be had, and that by creditors whose debts have long since been contracted. They have certainly no moral, if a legal, claim against the persons referred to. Mor. Priv. Corp. §§ 446, 467.

It follows from what has been said that, in the opinion of the court, it will be for the best interest of the creditors to accept the offer of composition, and an order will be accordingly entered confirming the same.

WELLER et al. v. PENNSYLVANIA R. CO. SAME v. NEW YORK CENT. & H. R. R. CO. SAME v. BALTIMORE & O. R. CO. SAME v. NEW YORK, C. & ST. L. R. CO. SAME v. ERIE RY. CO. SAME v. LAKE SHORE & M. S. RY. CO. SAME v. CHICAGO G. W. RY. CO. SAME v. ILLINOIS CENT. R. CO. SAME v. PITTSBURG, FT. W. & C. RY. CO. SAME v. MICHIGAN CENT. R. CO. SAME v. WABASH R. CO. SAME v. MISSOURI, K. & T. RY. SYSTEM. SAME v. CLEVELAND, C., C. & ST. L. RY. CO.

(Circuit Court, D. Colorado. February 5, 1902.)

Nos. 4,198, 4,204, 4,214, 4,215, 4,217–4,224, 4,425.

1. CORPORATION—DOMICILE—INFRINGEMENT OF PATENT—CIRCUIT COURT—JURISDICTION.

A corporation not incorporated in Colorado is not an "inhabitant" of the district of Colorado, within Act Cong. March 3, 1897, declaring that in suits for the infringement of patents the circuit courts of the United States shall have jurisdiction in the district in which the defendant is an inhabitant, etc.

2. SAME—SERVICE—APPLICABILITY OF STATE STATUTE.

The act of the state of Colorado relative to service of process is not applicable to a suit against a corporation brought in a federal court in the district of Colorado, where the corporation is not an inhabitant of such district; and in such case service must be had according to the acts of congress.

3. SAME—COMPLAINT—AVERMENT OF CORPORATE DOMICILE.

Act Cong. March 3, 1897, provides that in suits for infringement of patents the circuit courts shall have jurisdiction in the district where

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defendant is an inhabitant, or where the infringement is committed and defendant had an established place of business, and that in the latter case service may be made on the agent conducting the business. *Held*, that in a suit against a corporation, in order to authorize service on an agent, the complaint must show the place of incorporation, so as to show that defendant is not an inhabitant of the district.

4. SAME.

An averment that defendant is incorporated in a certain other state named is sufficient to show that it is not an inhabitant of Colorado.

5. SAME—WHAT CONSTITUTES ESTABLISHED PLACE OF BUSINESS.

A railroad company which maintains an office in the district of Colorado, but whose agent there has authority to solicit business only, and who makes no contracts for the carriage of freight or passengers, has no "regular and established place of business" in the district, within Act Cong. March 3, 1897, declaring that in suits for infringements of patents the circuit courts shall have jurisdiction in any district where the infringement is committed and defendant has a "regular and established place of business."[1]

Dyrenforth, Dyrenforth & Lee, S. D. Walling, and J. R. Burton, for plaintiffs.

Rogers, Cuthbert & Ellis, Robert J. Fisher, Wolcott & Vaile, and George S. Payson, for defendants.

HALLETT, District Judge (orally). Several suits are pending in the circuit court, in which Simon P. Weller and others are complainants and different railroad companies are defendants. They are suits for infringement of a patent, and motions have been filed to quash the marshal's return upon the summons issued in the several cases. These motions were discussed before the court a few days back, and they are now to be decided.

Some of the motions were made and are put upon the ground that the service was not according to the statute of this state relating to service upon corporations, and others were upon the ground that persons upon whom the service was made were not representatives of the corporations defendant in the suits. In all of the cases the service is subject to the act of congress of March 3, 1897, defining the jurisdiction of the circuit courts of the United States in cases brought for the infringement of letters patent. This act declares that in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction in law or in equity in the district in which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. In the cases referred to, the defendants were not inhabitants of this district, not being incorporated in Colorado. In the case entitled "Galveston, Houston & San Antonio Railway Co. v. Gonzales," 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, the supreme court decided that a corporation is an inhabitant of that district only in which it is incorporated; so that these corporations are none of them "inhabitants" of this district in the

[1] Foreign corporations "doing business" in state, see note to Wagner v. J. & G. Meakin, 33 C. C. A. 585.

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sense in which that word is used in the act of congress. The act provides in its last clause that, if such suit is brought in a district in which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought. In the case in which the defendant is not an inhabitant of the district, the jurisdiction of the court depends, under the first clause of the act, upon the question whether there have been acts of infringement within the district, and also whether the defendant has a regular and established place of business within the district.

In the cases first to be mentioned the motion to quash the marshal's return upon the process is upon the ground that the service has not been made according to the act of the state of Colorado in relation to such process, that the marshal has not shown by his return that the principal officers of the defendant were not found within the district, and that the service was not upon such agent as is mentioned in the act of the state as competent to receive service. The act of the state, it may be remarked in the first place, is not applicable in any of the cases, because in none of the cases is the corporation defendant an inhabitant of the district of Colorado. Therefore service must be according to the terms of the last clause of the act of congress; so that counsel is in error in supposing that he may, by his motion, raise a question as to the service of process according to the law of the state. But I consider, with reference to such cases, that it is not improper to decide and determine whether the service is according to the terms of the act of congress. And, first, upon that point it is to be observed that in some of the cases the place in which the defendant was incorporated is not alleged in the complaint. It is averred in the complaint that the defendant has a regular and established place of business within the state, which conforms to the last clause of the act of congress; but the place in which the defendant is incorporated—the state in which it is incorporated—is not alleged in the complaint. Therefore there is nothing in those cases to show that the defendant is not an inhabitant of the state of Colorado, and the service is defective for that reason. In others of the cases it is averred that the defendant was incorporated in a certain other state named,—that is, a state which is not the state of Colorado,—and this is sufficient to show under the act of congress that the defendant is not an inhabitant of the state of Colorado. In those cases it is also averred that the service was upon a person who is engaged in conducting the business of the defendant in the district of Colorado, and, it being averred in the complaint that the defendant has a regular and established place of business in the state of Colorado, and then in the return it being certified that the process was served upon an agent in charge of that business, the return is sufficient. These remarks explain the ground upon which the return of the marshal must be quashed in No. 4,215, against the New York, Chicago & St. Louis Railroad Company; No. 4,218, against the Lake Shore & Michigan

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Southern Railway Company; No. 4,219, against the Chicago Great Western Railway Company; and No. 4,224, against the Missouri, Kansas & Texas Railway System. In all of these cases there is no averment of the state or district in which the defendant is incorporated. In No. 4,217, against the Erie Railway Company; No. 4,220, against the Illinois Central Railroad Company; and No. 4,222, against the Michigan Central Railroad Company,—the state in which the defendant is incorporated is averred in the complaint, and therefore it is shown that the defendants in those cases are not inhabitants of the state of Colorado.

We will now refer to several cases in which the form of the return of the marshal is not objected to, but the motion to quash is based upon the ground that the defendant corporation has no regular and established place of business in the state of Colorado, and is not doing business in this state, and therefore the return should be quashed. In No. 4,193, against the Pennsylvania Railroad Company; No. 4,214, against the Baltimore & Ohio Railroad Company; No. 4,221, against the Pittsburg, Ft. Wayne & Chicago Railway Company; No. 4,223, against the Wabash Railroad Company; and No. 4,204, against the New York Central & Hudson River Railroad Company,—it is shown that the various companies have offices in the city of Denver, in which there is an agent of the company, and that this agent has authority to solicit business only. He is an agent of the company in the sense that it is his duty to advertise the company and solicit business amongst the people who may apply to him. Some of the offices are somewhat elaborate and others are very limited indeed. The agent does not make any contracts for carrying freight, nor does he sell tickets to passengers who may desire to go over the road which he represents. Upon this a question arises whether such an office is a regular and established place of business within the meaning of the act of congress. I am of the opinion that it is not of that character. It seems to me that in an act applying to all who may be doing any kind of business whatsoever,—that is, applicable to all kinds of business,—what is meant by a regular and established place of business is one in which some substantial part of the business of the company or corporation shall be carried on; and this, in the case of any kind of business, would seem to me to be, in a general way, the sale of the commodities which the defendant may offer to the public. In the case of a manufacturer it would be the sale of the product of his works. In the case of a railroad company I suppose it would be the sale of something which the defendant does for the public. Its business is to carry freight and passengers, and the making of contracts for that purpose would be the transaction of some substantial part of its business. But the men in charge of these offices are not authorized to make such contracts. According to statements in affidavits which have been filed, they have authority only to solicit business. They are what is called in mercantile business "drummers," who are trying to work up business for their employers; and in that view it seems to me that they do not transact any substantial part of the business of the parties whom they represent. This subject has arisen in many of the states under acts

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which authorize service upon defendants who may be found within the state, and has been variously decided. Some of the courts have held under the act of congress of 1887 that service upon just such agents as are described in these proceedings is sufficient to give the court jurisdiction, and others have held that the service was not sufficient to give the court jurisdiction. In regard to such decisions in a general way it is to be observed that the act of congress passed March 3, 1897, is somewhat later in date than the act of 1887, and it is indicative of the mind of congress that rulings of courts under the act of 1887 were not entirely satisfactory, and that the rule adopted in respect to suits brought under that act, which were in the main damage suits,—especially those against railroad companies,—the service held good in those cases should not prevail in patent suits. This act, applicable to patent suits only, seems to give a more restricted meaning to the question of service than had been adopted under the act of 1887 in respect to other suits. As illustrating that, it may be observed that the damage suits were often brought upon causes of action which arose wholly without the jurisdiction in which the suit was brought. That is the character of a case upon which complainants in this suit rely very strongly,—a suit against the Denver & Rio Grande Railway Company, which is a corporation of this state. Railroad Co. v. Roller, 41 C. C. A. 22, 100 Fed. 738, 49 L. R. A. 77. In that case the liability of the defendant arose in the state of Colorado, and suit was maintained in the district of California upon service upon an agent in the state of California having the character of the agents in these records. In the act of March 3, 1897, it is provided that the cause of action must arise in the district; that is to say, by the express terms of the act there must be acts of infringement in the district. The right to sue upon a patent, therefore, must arise in the district. And, in addition to that, the defendant in the suit must have a regular and established place of business,—probably with reference to the acts of infringement, which are also mentioned in the act. I think, therefore, it is reasonable to assume that the provision of the act of congress in respect to doing business within the district, which is necessary to give jurisdiction to the court, is something more than was held to be sufficient in some instances under the act of 1887.

If I am mistaken in that, there are decisions made under the act of 1887 which appear to me to be satisfactory, and they are to the effect that under that act an agent to solicit business within the district is not a representative of the corporation in the sense that he may receive service of process in the district. The cases are N. K. Fairbanks & Co. v. Cincinnati, N. O. & T. P. Ry. Co., 4 C. C. A. 403, 54 Fed. 421, 38 L. R. A. 271, which was followed in Wall v. Railway Co., 37 C. C. A. 129, 95 Fed. 399. These are decisions of the circuit court of appeals of the Seventh circuit. There is a circuit court decision to the same effect of earlier date. Maxwell v. Railway Co. (C. C.) 34 Fed. 286. In these cases, and in all, I think, that I have examined, the question considered was as to the character of the agent and the scope of his authority. Under the act of congress the question is whether the defendant has a

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regular and established place of business, without reference to the character of the agent who may be in charge. The question of the business done in the place, which may be regular and established, of course is somewhat dependent upon the scope of authority of the man in charge of it, but it is not wholly so. A solicitor of business may not have any office at all. He may not need an office. Ordinarily, drummers of mercantile houses do not have offices, and they are solicitors of business. Probably in the case of railroad companies the maintenance of an office is more a matter of advertising than anything else. The company desires to be known to the public as one which is engaged in eastern states in the transportation business. Therefore it sets up offices in various cities and towns of the country. But this is not significant of its intention to do business in a regular and established place in all of the cities and towns in which it may set up such offices.

The case of the Pittsburg, Ft. Wayne & Chicago Railway Company (No. 4,221) is distinguishable from the others last mentioned, in that it is shown in that case that the defendant named therein leased its lines to the Pennsylvania Company many years ago, and therefore is not doing business actively as a railway corporation anywhere. Probably in that case there would be no ground for pretending or claiming that it has any regular and established place of business here or anywhere else.

The case of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (No. 4,425) is distinguishable from some of the others in that the return of the marshal does not show that the person upon whom service was made was in charge of the business in Denver, whatever it may be, which was done by that company. But it is also shown in that case that the company has an agency for soliciting business and an office. In this case the return is deficient in not showing that the agent was in charge of the company's business, and it will be quashed.

In the cases mentioned (Nos. 4,193, 4,204, 4,214, 4,221, and 4,223) the motion to quash is sustained.

On Motion to Dismiss.

These causes were heard upon motion to quash a return of the summons, and the return was quashed. Whether rightly heard upon such motion or not, and whether the question ought to have been raised in some other way, is not now a question for consideration. It was competent for the court to have dismissed the suit at the time of quashing the summons, but it was thought better to hold over the case with a view to give the plaintiffs an opportunity to suggest some other method of service than that which had been adopted in the case when it was first filed. No suggestion of that kind has been made, and it is fair to presume that the plaintiffs are not prepared to make any other service than that which was made in the first instance. If that be true, the suits must be dismissed, and the order will be made.

The suits will be dismissed, at plaintiffs' costs, for failure to serve process. Sixty days will be allowed for a bill of exceptions to be

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filed. This order in respect to the bill of exceptions applies to what took place upon the motion to quash the return as well as to this motion.

DUNCAN v. MAINE CENT. R. CO.

(Circuit Court, D. Maine. February 7, 1902.)

No. 154.

CARRIERS—INJURY TO PERSON RIDING ON PASS—ASSUMPTION OF RISK.

One riding on a pass, given without consideration, and after assent to conditions that he should assume all risk of accident and that the carrier should not be liable, cannot recover of it for injuries from negligence of its servants; and it is immaterial that the giving of the pass was a breach of the federal statutes in reference to interstate traffic.[1]

George E. Bird, William M. Bradley, and Philip Mansfield, for plaintiff.

N. & H. B. Cleaves and Stephen C. Perry, for defendant.

PUTNAM, Circuit Judge. This case comes before us on the general issue, accompanied with a brief statement of special matter of defense, as provided in the practice acts of Maine, followed by a demurrer by the plaintiff to the special matter.

The plaintiff was injured in a collision occasioned by the fault of the defendant's servants, and without corporate fault on the part of the defendant itself. At the time of the collision the plaintiff was journeying on the defendant's train on a free pass given him by the defendant at his own solicitation and request, without compensation, and accepted and used by the plaintiff as a pure gratuity, and on the conditions appearing thereon. The conditions, according to the force of the pleadings, were so far assented to and accepted by the plaintiff when he received the pass, and before he commenced his journey, that he thereby assumed all risk of accidents, and that he expressly agreed with the defendant that it should not be liable under any circumstances, whether by negligence of its servants or otherwise, for any injury while using the pass. In view of the pleadings, we have no occasion to recite the formal terms of the pass, or to consider the questions whether or not, or to what extent, an individual receiving a ticket from a common carrier is bound by any special notice appearing on it,—a class of questions very lately under consideration in The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039, and in The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. ——.

The plaintiff maintains that the giving of the pass was a breach of the federal statutes in reference to interstate traffic. It may well be questioned whether there is enough in the record to bring the case within those statutes, but, independently of this, there are several answers to the proposition: Of course, if the foundation of the right against a common carrier were contract, it would be apparent that, under familiar maxims of the law, no action would lie, because,

[1] Rights of person traveling on pass, see note to Chamberlain v. Pierson, 31 C. C. A. 164.

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even though the plaintiff is not subject to any penalty imposed by the interstate commerce statutes, he would be in pari delicto. Indeed, he would be the party especially enjoying the benefit of the combination in violation of law. It is not, however, necessary to go into the question whether the fact that an action against a common carrier who has actually received into his custody a passenger or merchandise lies in contract, as well as in tort, establishes that the substantial relation is contractual, or whether the right against a carrier is fundamentally based on the "custom of the realm," as commonly said, precisely as a right against a public officer or a quasi public officer is so based, so that, in the absence of a bill of lading or its equivalent, the assumpsit arises only because it is implied from the acceptance of the custody of the passenger or the goods. It is the undoubted law that the maxims with reference to persons in pari delicto are not limited to causes ex contractu, and that no suit can be maintained whenever it springs from an illegal transaction to which the plaintiff was a party, and which transaction is necessarily a portion of his case. Pol. Cont. (6th Ed.) 363. In the present suit the plaintiff could not show that he was legally on the defendant's train, without exhibiting his pass in his pleadings or in his proofs. No exoneration or contribution between joint tort feasors, or between persons who have agreed together in violation of law, can arise out of the joint tort or the subject-matter of the agreement. But the case takes on even a more concrete aspect. Rejecting the pass as void, the plaintiff puts himself in the position of one who was on the train of the defendant without its permission, and without intention of paying the fare which would entitle him to be regarded as a passenger. The consequence, therefore, of the plaintiff putting himself in that position, is to leave him as an unauthorized intruder, and to place him outside of those rules of law which give protection against the mere negligence of the servants of a common carrier.

Coming now to the real question in the case, there is need of discussion of only few authorities. Those to which we will refer merely restate and apply well-settled rules. At the home of the common law, the situs of the birth and development of the rules relating to common carriers, no accepted text writer and no authoritative judicial decision gives the slightest support to the plaintiff's position. The preponderance of local judicial decisions in the United States is against him. If this case were of such a class that we were permitted to follow them implicitly, Rogers v. Steamboat Co., 86 Me. 261, would dispose of this part of it to our own entire satisfaction. The supreme court, which must be the final arbiter for us on questions of the class involved here, has held that the acceptance by a carrier of the custody of a person to be transported affords a sufficient consideration, in law, to raise an obligation of reasonable care, in the absence of any stipulation to the contrary. It has also held that there may be other considerations than the usual passage money, which will leave resting on a common carrier all the duties imposed by the common law, and prohibit it from denying that it is acting in its capacity according to the "custom of the

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realm," and therefore from asserting any defense inconsistent with such custom. But the precise issue before us has never been decided by that court, as was said by the circuit court of appeals for this circuit in Whitney v. Railroad Co., 43 C. C. A. 19, 102 Fed. 850, 854, 50 L. R. A. 615. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, decided nothing more than we have said; and in Railway Co. v. Voight, 176 U. S. 498, 505, 20 Sup. Ct. 385, 44 L. Ed. 560, it was stated to relate to "a passenger for hire." Inasmuch as the only federal case cited by the plaintiff (Farmers' Loan & Trust Co. v. Baltimore & O. S. W. R. Co. [C. C.] 102 Fed. 17, decided by the district judge for the district of Indiana) was based on a misapprehension in this respect of the various decisions of the supreme court, we must abide by what was said in Whitney v. Railroad Co.; and also we must add that not only is there no decision of the supreme court, but no federal authority which we should regard as determining the precise question before us. We might add that the entire line of reasoning in Railway Co. v. Stevens, 95 U. S. 655, 24 L. Ed. 535, rests on the hypothesis that the conditions of a pass like those of this at bar are valid, except against one from whom the carrier has received some consideration or benefit in exchange; but the precise point was not before the court, and therefore it was not passed on by it. In Railroad Co. v. Derby, 14 How. 468, 483–485, 14 L. Ed. 502, it appears that Derby, the plaintiff below, was a stockholder of the corporation, riding on one of its trains by invitation of its president, and paying no fare, but under no stipulation like that in the case at bar. He was injured by the carelessness of the agents of the corporation in operating another train, and in bringing it into collision with that on which Derby was riding. Mr. Justice Grier delivered the opinion in behalf of the court, and, first of all, observed that, inasmuch as Derby was lawfully on a train of the corporation, he was in the position of one who is lawfully on a street, and carelessly driven against by another's servant. This was sufficient to dispose of the case. But Mr. Justice Grier went on, and stated some other considerations which are undoubtedly law. All we need refer to is to the rule stated by him, that "the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." This is undoubtedly true where the service has been in fact entered on, and where, as applied to the transportation of an individual, his person has been in fact intrusted to the custody of the carrier. Mr. Justice Grier then proceeded to some further considerations, which show that reasonable care in the use of the powerful and dangerous agency of steam involves the greatest diligence. This, however, we are not concerned with; but what precedes this explains why it is that, in the absence of any stipulation one way or the other, the receiving of the person of an individual into one's custody raises a sufficient consideration to impose on the latter the duty of reasonable care, regardless of the question whether the individual is quâ passenger, or whether relations thus established are those out of which the "custom of the realm" evolves peculiar obligations for one who undertakes a public service. It follows, therefore, that

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neither the observations made by Mr. Justice Grier, nor the fact that the intrusting of one's person to the custody of another affords a sufficient consideration for an obligation to use reasonable care, determine the nature of the relation existing between the holder of a free pass with conditions and a common carrier issuing it.

The solution of what is thus left undetermined will be found in certain well-known principles more than once stated by the supreme court. In Liverpool & G. W. S. Co. v. Phenix Ins. Co., 129 U. S. 397, 441, 9 Sup. Ct. 469, 472, 32 L. Ed. 788, 792, Mr. Justice Gray, speaking in behalf of the court, said:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers, rather, to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

In Railroad Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, already referred to, Mr. Justice Shiras, at page 506, 176 U. S., page 387, 20 Sup. Ct., and page 565, 44 L. Ed., states the principles which justify the courts in holding that, as between common carriers and their customers, there are certain rules of public policy which require apparent interference with freedom of contract. He first refers to the importance which the law justly attaches to human life and personal safety; and he says that the second fundamental proposition relied on to nullify contracts to relieve common carriers from liability caused by negligence, is based on the position of advantage possessed by them over those who are compelled to deal with them. He thus refers to what underlies what we have cited from Mr. Justice Gray. The first topic to which he refers (that is, the importance which the law attaches to human life and personal safety) he evidently does not regard as essential to the issue, because, in the very case before him, he, and the court in whose behalf he was speaking, rejected all such considerations. At page 507, 176 U. S., page 388, 20 Sup. Ct., and page 565, 44 L. Ed., he sums up that exemptions claimed by carriers must be reasonable and just; "otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding." What the opinion meant, in what follows, by the word "passengers," appears at page 513, 176 U. S., page 390, 20 Sup. Ct., and page 568, 44 L. Ed., where it says that the relation between express messengers and common carriers under the contract then under discussion, which was the usual contract, "is widely different from that of ordinary passengers."

Now, it is plain that the plaintiff was not, within the language of Mr. Justice Gray, a customer who had no real freedom of choice. It is also plain that, in the matter of the pass in question, he and the defendant stood on a footing of entire equality, and that neither had occasion to deal with the other except at his or its absolute option. It is also, in the same way, clear, to apply the language of Mr. Justice Shiras, that in the transaction before us the defendant had "no position of advantage" over "one who was compelled to deal" with it, and that the plaintiff is in no sense one who came within that class

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described by him as yielding exemptions extorted from customers by duress of circumstances. Mr. Justice Shiras, at page 505, 176 U. S., page 387, 20 Sup. Ct., page 565, 44 L. Ed., further observes:

"It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

This opinion, at page 513, 176 U. S., page 390, 20 Sup. Ct., page 568, 44 L. Ed., observes that the relation of the express messenger to the transportation corporation resembles that of an employé of the latter, rather than that of a passenger; but from what immediately follows on the same page, and from what elsewhere appears, it is plain that the decision is not left to rest on that proposition. Its pith is well illustrated at page 518, 176 U. S., page 392, 20 Sup. Ct., page 569, 44 L. Ed., where it says that there is an obvious distinction between the cases of postal clerks, referred to, and the express messenger then before the court, in that the latter agreed to a contract exempting the railroad corporation from liability, while such was not the fact with the postal clerks. The opinion adds:

"To make the cases analogous, it should be made to appear that the government, in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company."

To paraphrase this quotation, and to apply the underlying principle thereof to Railroad Co. v. Derby, 14 How. 468, 14 L. Ed. 502, and other decisions of that character, it should be made to appear that Derby stipulated that the defendant corporation should be exempted from liability. To apply further the rules thus enunciated in the opinions rendered in behalf of the supreme court, which are undoubtedly correct expressions of the law, we must hold that the right of private contract cannot be contravened by us unless the conditions in question can be regarded as extorted from the plaintiff by duress of circumstances. What is more directly in point, in order to bring the plaintiff within the protection of the "custom of the realm," it must appear that when he entered the defendant's train he stood on his rights under that custom, and was prepared to perform his duty imposed by it, including, with the rest, to make payment of his fare, or to yield to the corporation some consideration or some benefit which in law would be the equivalent thereof. To sum up, he is not entitled to hold the defendant as a common carrier unless he placed himself in the position of one who at the common law was entitled to the rights of a passenger, and became so entitled because of the obligation of the defendant to perform the duties resting on it by virtue of the public nature of its employment. He did not put himself in this position, and therefore there is no principle of public policy, and no authoritative rule laid down by text writers or courts, which prohibited him and the defendant from making a valid contract in the terms set out in the pleadings.

There is one other topic which has been referred to in the decisions

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of the supreme court, which should not be left unspoken about. We refer to the fact that incidentally, both in Railroad Co. v. Derby and in Railroad Co. v. Voight, the opinions rendered in behalf of the court refer to the fact that the importance which the law attaches to human life forbids that relaxation of care in the transportation of passengers which might be supposed to be induced by special stipulations relieving common carriers. We have also referred to the fact that these observations were incidental, and were not in either case essential to the conclusions reached. They were mere explanations of the degree of diligence necessary to amount to reasonable care in the use of the dangerous and powerful element of steam. Nevertheless it has been frequently urged in support of the positions taken by the plaintiff that public policy forbids contracts of the kind under discussion under any circumstances, because they tend to the endangering of human life and personal safety. Such considerations, however, come into cases of this class only incidentally, because it is not apparent that, in granting passes with conditions stipulating against the results of mere negligence, there is any intention on the part of the carrier to increase the hazards to human life or personal safety. If they have such a tendency, it is only because all such stipulations between any persons—carriers or others—would have a like tendency; so that any rule of public policy which could be constructed on any such basis would be altogether too far-reaching, in that they would affect all the contractual relations of life. Inasmuch, herefore, as it is no part of the purpose of transactions like that at bar to create a public mischief, their limitation must be left to the criminal law and the legislature. Moreover, if propositions of this character could operate in behalf of the plaintiff, they would also have reached Railroad Co. v. Voight, and necessarily have compelled a different conclusion in that case, because they are in all respects as applicable there as here. Railroad Co. v. Voight directly involved this proposition, and therefore it is in point with reference thereto, although, for the other matters touched on by it, we have cited it because it conveniently expresses well-settled rules of law, and not as authoritative on the issues which we have to decide.

We will add that we do not find it necessary to refer to the other decisions of the supreme court in which practically the same result was reached as in Railroad Co. v. Derby.

It is to be observed that in the case at bar, as we have already said, the negligence out of which the injury to the plaintiff arose was not, as a matter of fact, that of the defendant corporation itself, but of its servants. We are not prepared to say that our conclusions would have been other than they are in either aspect, and it may be that our line of reasoning is sufficiently broad to cover both. Nevertheless we deem it proper to thus call attention to the particular circumstances of the case before us, reserving for further consideration in the future, if it ever becomes necessary, the question whether there could be any substantial difference in the result if the negligence had not been merely that of employés.

In Whitney v. Railroad Co., 43 C. C. A. 19, 102 Fed. 850, 50 L. R. A. 615, already referred to, the court observed at the conclusion of

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the opinion that, so far as concerns any moral obligations growing out of stipulations of the character of those at bar, the defendant, under the circumstances of that case, must appeal elsewhere than to courts of law; but the result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted.

The plaintiff's demurrer is overruled, and the special matter of defense demurred to is adjudged sufficient in law.

THE JUNEAU.

(District Court, D. Washington, N. D. January 17, 1902.)

SEAMEN—RIGHT TO WAGES—SET-OFF OF DAMAGES CAUSED BY NEGLECT OF DUTY.

The master, mate, engineer, and fireman in sole charge of a tug, who, through gross and culpable neglect of their duty, permitted her to become grounded, by which she sustained damage, are liable to the owner for such damage, which may be set off against their claim for wages.

In Admiralty. Suit by seamen to recover wages.

William Martin, for libelants.

Peters & Powell, for claimant.

HANFORD, District Judge. This is a suit by the libelants to recover wages for services on the steam tug Juneau, in the capacities of master, mate, engineer, and fireman. It is not disputed that the libelants worked on the steamer during the time alleged, and that they have not been paid their wages; the claimant, however, defends on the ground that by gross negligence on the part of the libelants the steamer was damaged to an amount exceeding the wages earned. It is proved by the admissions of the libelants and other evidence that on a dark, stormy night, they took the vessel into Port Susan and anchored, and then devoted their attention to a game of cards, to such an extent that they allowed steam to go down, and the vessel to drag her anchor until she grounded. The tide was ebbing at the time, and, before they could raise steam sufficient to get off the beach, the vessel was hard aground, and listed over so that the flood tide overflowed and filled her, and she remained submerged for several days, until another tug could be sent to her assistance. After the Juneau was floated and pumped out, having no fresh water aboard to fill her boiler, salt water was used, with damaging effect. The evidence proves that, by reason of the bad treatment of the steamer in the particulars mentioned, her owner incurred an expense of $89 in getting her off the beach, and $15 for towing her into Seattle, and that these expenses, together with the damage to her machinery, furniture, and paint, exceed the total amount of wages due to all of the libelants. The evidence does not make it clear whether all of the libelants did or did not participate in the game of cards, but it is certain that they were all negligent; for, according to their own statements, no person on

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the boat knew that she was dragging her anchor until she was on the beach, and then, by not having steam up, they were unable to pull off before the tide receded, leaving her hard aground; and no excuse whatever is offered for this negligence, except the pretense that the night was so dark they were unable to see that the vessel was dragging. In admiralty, justice is administered according to the principles of equity; and it is contrary to equity for the captain and crew intrusted with the care of a vessel, who by their culpable neglect of duty have suffered the vessel to be seriously damaged, so that by their employment the owner has been damaged, and not benefited, to have a lien upon the vessel for wages. Seamen may be subjected to deductions from their wages for neglect of their duty, and they are liable for losses of property occasioned by their negligence. Desty, Shipp. & Adm. §§ 178–181; Brown v. The Neptune, Fed. Cas. No. 2,022; Spurr v. Pearson, Fed Cas. No. 13,268; Wilson v. Belvidere, Fed. Cas. No. 17,790; Knap v. The Eliza and Sarah, Fed. Cas. No. 7,873.

Case dismissed, with costs.

PEOPLE OF STATE OF NEW YORK v. BENNETT.

(Circuit Court, S. D. New York. January 14, 1902.)

1. REMOVAL OF CAUSES—CRIMINAL PROSECUTIONS—DENIAL OF EQUAL CIVIL RIGHTS.

Rev. St. § 1977, which declares that all persons shall have the same right to the equal benefit of all laws for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishment, etc., has no bearing on a prosecution under Pen. Code N. Y. § 351, which provides for the punishment of persons who keep or occupy rooms for recording or registering wagers or selling pools, or who receive, record, or register the money of others bet or wagered, etc., the state statutes not subjecting white persons to one kind of punishment and other persons to another; and therefore the prosecution is not removable into a federal court, within Rev. St. § 641, authorizing the removal of criminal prosecutions against any person who is denied or cannot enforce in the state tribunal any right secured to him by any law providing for the equal civil rights of citizens of the United States.

2. SAME—DENYING EQUAL PROTECTION OF LAWS.

Laws N. Y. 1895, c. 570, which provides that any one who records a wager by some memorandum in his own possession, and does not transfer any memorandum thereof, shall not be punishable criminally if he makes that record on certain race courses authorized by the act, but shall be punished criminally if he makes it elsewhere, is not repugnant to the fourteenth amendment of the federal constitution, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws, no class being discriminated against in the statute, but every one recording a wager on any other place than the race course being punishable; and therefore a prosecution for a violation of the statute is not removable into a federal court, within Rev. St. § 641.

Motion to Remand to State Court.

Charles E. Lebarbier and Joseph S. Auerback, for the motion.
John R. Dos Passos, opposed.

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LACOMBE, Circuit Judge. This is a criminal prosecution of one Charles Bennett, who was indicted on four counts: (1) Keeping and occupying a room for the purpose of therein recording and registering bets and wagers and of selling pools upon the result of horse races; (2) keeping, exhibiting, and employing devices and apparatus for the purpose of recording bets and wagers and of selling pools upon the result of horse races; (3) recording and registering bets and wagers upon the result of horse races; (4) receiving, registering, and recording money bet and wagered upon the result of horse races,—all the above offenses being committed, as alleged, in a building in the city of New York, and not upon any race course such as is provided for in chapter 570 of the Laws of 1895. These acts are declared to be felonies, and punishable by imprisonment in the state prison, by section 351 of the Penal Code of New York. That section, it may be noted, defines the last above enumerated offense as receiving, registering, and recording any money bet or wagered, or offered for the purpose of being bet or wagered, "by or for any other person." Apparently the section does not prohibit an individual from merely betting or wagering his own money, so long as he does not complicate that transaction with recording, registering, keeping a room, using devices and apparatus, etc., and does not engage in pool-selling or bookmaking. "Bookmaking" imports some method of recording bets; "pool-selling" imports a transaction where the money of some person other than the seller of the pool is to be received by him. The indictment does not specifically aver that Bennett received, registered, and recorded money bet or wagered "for any other person," but the papers show that that is what he did in fact do. The act of 1895, supra, provides that any person who, upon certain race courses authorized by the act, shall make or record any bet or wager on the result of a horse race taking place thereon shall be liable in a civil action to recover the amount of such wager, and shall not be liable criminally, provided he does not exchange, deliver, or transfer any record, registry, memorandum, token, paper, or document of any kind as evidence of such bet or wager, and does not subscribe by name, initial, or otherwise any record, registry, or memorandum in the possession of another person, of a bet or wager, intended to be retained by such other person, or any other person, as evidence of such bet or wager. The result of an analysis of these acts—and they are the only ones to which the court's attention is directed by this motion—seems to indicate: First. That certain acts, viz., keeping a room, or occupying a stand, etc., with books, apparatus, etc., for recording or registering bets or wagers; receiving, registering and recording the money of others bet or wagered; becoming the custodian, etc., for hire, of money wagered; pool-selling, etc.,—are prohibited, and punishable criminally wherever committed. Second. That a person who bets his own money on the result of a horse race is not punishable criminally, wherever he bets it. Third. That an individual who records a wager (his own or that of some one else) by some memorandum in his own possession, and does not transfer any memorandum or token thereof, shall not be punish-

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able criminally if he makes that record on the race course, but may be punished criminally if he makes it elsewhere. Incidentally it may be noted that, according to the evidence, Bennett took another person's money, offered for the purpose of being bet or wagered on a horse race,—an act which would have been punishable criminally if committed on a race course. The cause may be disposed of, however, as if his acts were only those charged in the count, which is silent as to the fact that he registered and recorded money bet and wagered by another person. This cause was removed to this court under section 641, Rev. St. U. S., which provides for such removal when any criminal prosecution is commenced in any state court "against any person who is denied or cannot enforce in the judicial tribunals of the state * * * any right secured to him by any law providing for the equal civil rights of citizens of the United States." To warrant removal, it must be shown affirmatively that the defendant is denied or cannot enforce some right secured to him by some law of the United States providing for the equal civil rights of its citizens.

Defendant refers to section 1977, Rev. St. U. S. That provides that "all persons * * * shall have the same right * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishment, pains, penalties, * * * and no other." This section has no bearing on the case at bar. The state statutes do not subject "white persons" who make, register, and record bets and wagers and commit the other acts above enumerated to one kind of punishment and penalty and other persons to some other kind.

Defendant also refers to the fourteenth amendment to the constitution of the United States. Neal v. Delaware, 103 U. S. 392, 26 L. Ed 567, is authority for holding that the words "any law providing for the equal civil rights of citizens of the United States," in section 641, are broad enough to cover this amendment. The amendment provides that "no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Defendant contends that the statutes of the state deny the equal protection of the laws, because they punish individuals criminally for acts committed in one place, and not for the same acts committed elsewhere. In the multitudinous authorities construing the amendment, most of which are cited in the briefs, no case is found which sustains this proposition, or which holds that the state may not differentiate crimes and punishments as it pleases, so long as such differentiation is not an effort, more or less disguised, to discriminate against a class of persons by reason of their race, or color, or some other individual distinction. There is nothing of that sort here. No class is discriminated against. Every one, whoever he may be, who records a bet or wager in any other place than the race course, is subjected to the same punishment. No one who

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merely records such bet when he is on a race course is subject to any punishment. It seems preposterous to hold that the fourteenth amendment precludes a state from making the commission of some particular act a crime if committed in the streets of a crowded city, or in a church, or a public building, or on navigable waters, or on the seashore, or at night, and no offense if committed on the highway in some sparsely settled rural district, or in the open country, or on nonnavigable waters, or in the mountains, or by daylight. The amendment provides that:

"In the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. * * * But legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

In Moore v. Missouri, 159 U. S. 678, 16 Sup. Ct. 181, 40 L. Ed. 301, the court says:

"The fourteenth amendment means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989. The general doctrine is that that amendment in respect to the administration of criminal justice requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but * * * the state may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated. Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207."

In the case last cited the statutes of Alabama made the living in adultery or fornication an offense, prescribing a certain penalty, and further provided that, if one of the couple were white and the other of the African race, the penalty should be greater. The United States supreme court sustained the statute. The cases cited on the brief of counsel for defendant, in which it was held that the state statute or ordinance was obnoxious to the amendment are these: Yick Wo v. Hopkins, 118 U. S. 367, 6 Sup. Ct. 1072, 30 L. Ed. 220. The board of supervisors of San Francisco passed an ordinance providing, in substance, that it should be unlawful to conduct the laundry business in frame buildings within the city limits unless a permit therefor was first obtained from the board of supervisors. It appeared that there were some 320 laundries in the city. 310 of them were in frame buildings, and of these about 240 were owned and operated by Chinese. It further appeared that upon application the required permit was given by the supervisors to all persons but the Chinese, but was refused to all the latter. The supreme court held that this constituted a species of class legislation, which was prohibited by the constitution. It said:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms offered, of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administra-

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tion directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. * * * The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution."

To the same effect is the decision in Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546, where an ordinance directed that the hair of persons confined in jail should be cut, the object sought being to inflict an additional punishment upon the Chinese prisoners.

In Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664, it was held that, where state statutes secure to every white man the right of trial by a jury selected from and without discrimination against his race, and at the same time requires such discrimination against the colored man because of his race, they are obnoxious to the fourteenth amendment.

In Railroad Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, the statute provided that individuals who had claims against railroad companies might, upon recovery, in addition to damages, interest, and costs, include an attorney's fee in the judgment entered. Of this the court says:

"It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants, under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff. If it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right, while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In Cotting v. Godard (Nov. 25, 1901) 22 Sup. Ct. 30, 46 L. Ed. —, the statute which was held invalid provided that any stock-yards corporation doing more than a certain amount of business (which statute applied to only one corporation) should not be permitted to charge more than a certain tariff of fees and charges, and that any violation should be punished by fine and imprisonment.

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In the Stockton Laundry Case (C. C.) 26 Fed. 611, the ordinance made it an offense for any person to carry on a laundry where clothes were washed for pay within the habitable portion of the city. The court held that this violated that clause of the fourteenth amendment which says: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The legislation condemned in Re Parrott (C. C.) 1 Fed. 481, prohibited any corporation from employing any Chinese or Mongolian in any capacity whatsoever.

In Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075, the question discussed was legislation which should deny to citizens of the African race, because of their color, the right or privilege accorded to white citizens of participating as jurors in the administration of justice.

In none of these cases is there found authority for the proposition that the state may not, without violating the fourteenth amendment, prescribe a penalty for the commission of acts in certain specified localities, when the same acts, if committed in some other locality, are not prohibited, when it is not apparent that the legislation is directed against any class of persons whose classification is predicated upon anything else than the commission of the acts condemned. On the contrary, legislation of this character has been sustained in the federal courts. In U. S. v. Ronan (C. C.) 33 Fed. 117, it appeared that the statutes of Georgia provided that no license to retail spirituous liquors should be granted except in incorporated cities or towns, unless with the written consent of 10 of the nearest residents. It was held that the exception in favor of such towns and cities was not unconstitutional as denying to saloon keepers in the counties the equal protection of the laws secured to citizens by the fourteenth amendment. In Re Ah Kit (C. C.) 45 Fed. 793, a city ordinance making it a punishable offense to visit any gambling place located within certain specified limits (which designate what is known as the "Chinese Quarter"), and which ordinance applied to all alike, white men as well as Chinese, irrespective of race or color, was held not to be within the language of the fourteenth amendment.

For these reasons defendant has not made out a case which would warrant removal under section 641, and the motion to remand is granted.

MORGAN v. GARFIELD & PROCTOR COAL CO.

(District Court, D. Massachusetts. February 5, 1902.)

No. 1,181.

1. SHIPPING—DEMURRAGE.

Ordinarily demurrage is the agreed additional payment by the charterer for the allowed detention of the vessel beyond the period specified in the charter party.[1]

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[1] Definition and general principles of demurrage, see notes to Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.

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2. SAME—CHARTER PARTY—CANCELLATION—DEMURRAGE—LIABILITY OF CHARTERER.

A charter party stipulated that the vessel should have 10 days in which to load, with a specified demurrage thereafter; it being agreed that the charterer should not be liable for demurrage if he was prevented from loading by strikes, unless loading had begun, and that in case of a strike the owner might cancel the charter. The vessel remained 18 days without loading, when its captain informed the charterer that a strike was imminent, and that the vessel was lying at the charterer's expense, and asked what concessions the charterer would make. The next day the captain wired the charterer for instructions and propositions, and the latter canceled the charter. *Held*, that the cancellation of the charter relieved the charterer from all liability for demurrage.

In Admiralty.

Carver & Blodgett, for libelant.
Hutchins & Wheeler, for respondents.

LOWELL, District Judge. The respondents chartered the schooner Eagle Wing for a voyage from Baltimore to some Northern port. The material parts of the charter party are as follows:

"Ten days to load, Sundays and holidays excepted, on the terms following: Demurrage five cents per ton thereafter." "It is agreed that said vessel has her turn in loading with other sailing vessels, vessels to load for the government having priority; and parties of the second part are not to be held accountable for demurrage if they are prevented from loading either by strikes at the mines or on the railroad, or any cause beyond their control. In case of strike, party of the first part has privilege of canceling charter party, but, if vessel has commenced to load, then shippers are to be held for demurrage."

The schooner proceeded to Baltimore; arrived and reported March 22d. She lay there without loading until April 10th. On April 10th her captain wrote to the respondent as follows:

"The prevailing opinion at this time is that a strike is imminent by tomorrow, and, should same occur, you will be notified by the Consolidation Coal Co. that they will be unable to load our cargo of coal on your account. As you are aware, the condition of the charter party of Schr. Eagle Wing, that in event of strike the vessel would have privilege of canceling charter. The prevailing opinion of shippers here is that strike will not last long. Would your firm be willing to retain the Eagle Wing to wait for cargo, even though strike should be declared? What concessions, if any, have you to make relative to the matter in question? As you are aware, the Eagle Wing is now lying here at your expense, and will be until loaded or strike prevents loading. I assure you that I have no desire to cancel our charter with you, but merely use these means of notifying you of condition of affairs now prevailing at this port. Kindly advise at earliest moment of your intentions. Yours, truly."

On the following morning he sent the following telegram: "Wire your instructions for Eagle Wing. Waiting your proposition. Prompt answer required." To this telegram the respondents replied as follows: "Cancel charter on account of strike."

A strike began April 10th or 11th. The master sues for demurrage up to April 10th, and it is admitted that, after the 10 lay days had passed, 8 days more had elapsed prior to the cancellation of the charter as above stated. The libelant contends that the cancellation of the charter left the liability for this demurrage still subsisting. The respondent contends that the cancellation of the charter, either by the

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libelant under the right given to him by the charter, or by the consent of both parties, has put an end to all liability for demurrage under the charter. Nothing appears in the correspondence between the parties to interpret the clauses of the charter party above quoted, or to take the case out of the general rule.

The question concerns the nature of the liability for demurrage stipulated for in a charter party. Does the liability ordinarily arise only after performance of the contract by the vessel? In other words, when the lay days have expired without loading by the charterer, can the owner treat the contract as rescinded, or is the vessel bound to await longer the convenience of the charterer? Is stipulated demurrage ordinarily compensation for waiting while the vessel is bound to wait by the terms of the contract, or is it compensation for damage sustained by a breach of the contract by the charterer? Is it payment for carrying out the contract, or damages for its breach? Extreme and exceptional cases may be put, but these do not concern the case at bar. That under ordinary circumstances the first alternative correctly states the law, is plain. "The word 'demurrage,' no doubt, properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in, or to be collected from, the instrument." Lockhart v. Falk, 44 Law J. Exch. 105. See Cropton v. Pickernell, 16 Mees. & W. 829; Mathewson v. Ray, Id. 329; Gage v. Morse, 12 Allen, 410, 90 Am. Dec. 155; The J. E. Owen (D. C.) 54 Fed. 185, 186. A vessel chartered under a stipulated rate of demurrage, which should sail away after the lay days had run out, would thereby break its contract of charter party. If this be true, it follows that the contract is equally broken if the vessel sails away after one or two or three days' demurrage. No compensation for demurrage could be recovered in the case supposed. Extreme cases may be put, as has been said already, where the result would be otherwise, but the ordinary rule is as above stated. In order to collect demurrage, the contract must ordinarily be carried out, and the cargo must be taken on board. The difference between stipulated demurrage and damages awarded for detention beyond the terms of the contract appears from a consideration of cases like The J. E. Owen (D. C.) 54 Fed. 185, and Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623. Where no demurrage is stipulated, the contract is deemed a contract to load within a reasonable time under all the circumstances, and the burden is upon the owner, who seeks to recover for excessive detention, to show that the charterer was not diligent. No such burden rests upon the owner who seeks to recover stipulated demurrage. The charterer's diligence or negligence is immaterial. The general principle is further illustrated by Lilly v. Stevenson, 22 Sess. Cas. Scot. (4th Series) 278. There, after certain lay days, demurrage was to be paid at a certain rate, unless the detention arose from a strike. No limit of time was specified. The strike did not begin until the vessel was on demurrage. The vessel waited until the strike was over, then loaded, and sought to recover demurrage for all delay occurring after the expiration of the last lay day. This would have

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been the true principle of computation if the charterer had been bound to load within the fixed days, and if demurrage were treated as liquidated damages for breach of contract. Having broken the contract before the strike began, the charterer could not set up in mitigation of damages that a strike had happened subsequently. The lord ordinary (Lord Wellwood) appears to have agreed with the owner, but his decision was reversed by the court of session. In delivering the opinion of that court, Lord Trayner said:

"The pursuers argued that the exemption from liability to which I have referred did not apply when no use had been made of the lay days, and that, if the defenders had used their lay days, the cargo would have been loaded before the strike began. But I cannot accede to that view. Days stipulated for by the merchant on demurrage are just lay days, but lay days that have to be paid for. If a charter party provides that the charterer shall have ten days to load cargo, and ten days further on demurrage at a certain rate per day, the shipper has twenty days to load, although he pays something extra for the last ten. Loading within twenty days is fulfillment of the obligation to load. Here the lay days proper were limited to sixty hours, but any time beyond that which was occupied in loading the cargo was to be paid for at the rate of 12s. 6d. per hour. The pursuer said that this would amount to a lease of his vessel for any length of time the defenders were pleased, provided they paid the stipulated rate. Even if it had been so, I rather think it would have been a good enough bargain for the ship. But it is not so. Where the days on demurrage are not limited by contract, they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or emerge. But there is no such limitation of the application of the demurrage clause in the charter party before us as that which the pursuer maintains there is, nor can any such limitation be fairly implied. The defenders were entitled to keep the vessel on demurrage, but were to pay no demurrage if the detention was caused by a strike." Page 286, 22 Sess. Cas. Scot.

See Connor v. Smythe, 5 Taunt. 654; Francesco v. Massey, 42 Law J. Exch. 75, 78.

If this be true, the application of the principle to the case at bar is simple. At the time of the cancellation of the charter no liability had accrued, enforceable by the libelant. Nothing was due under the contract. True, the contract had been performed in part. It would have been performed in part had it been canceled before the lay days ran out, yet no recovery could then have been had. Neither in that case nor in this does any benefit accrue to the respondent for which he is liable on a quantum meruit. See O'Brien v. 1,614 Bags of Guano (D. C.) 48 Fed. 726. The whole charter is canceled, and the inchoate liabilities arising thereunder are released.

Libel dismissed, with costs.

GILBERT v. SOUTH CAROLINA INTERSTATE & WEST INDIAN EXPOSITION CO.

(Circuit Court, D. South Carolina. February 21, 1901.)

1. SUMMONS—SUFFICIENCY—DATE.

In an action on an account beginning August, 1901, and continuing until January, 1902, a summons bearing date "the 8th day of February, nineteen hundred and ——, and the one hundred and twenty-sixth year of the independence of the United States," is not insufficient as requir-

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ing defendant to answer on a day anterior to the cause of action stated, it being clear that a word has been omitted, and the year of independence showing that the year intended is 1902.

2. SAME—AMENDMENT.

Such summons, even if insufficient, having the complaint attached to it, would be amendable, within Rev. St. § 948, authorizing amendments in process returnable to circuit or district courts where no prejudice or injury will result.

Ficken, Hughes & Ficken, for the motion.
J. P. K. Bryan, opposed.

SIMONTON, Circuit Judge. This is a motion to set aside a summons. The summons is properly tested with the seal of the court, and is in the name of the chief justice. But it bears date "the 8th day of February, nineteen hundred and ———, and the one hundred and twenty-sixth year of the independence of the United States of America." The complaint attached to the summons is on an account beginning August, 1901, and continuing, with its items, until January, 1902. The defendant's motion is based on the proposition that the summons requires the defendant to appear and answer on a day anterior to the cause of action stated in the complaint.

The statutes of the United States are most liberal in allowing amendments of process returnable to the circuit and district courts (Rev. St. § 948); and, even in writs of error, Rev. St. § 1005, provided that the amendment does not injure or surprise the party against whom it is made; and this following the general maxim, "Ut res magis valeat quam pereat." If an amendment were necessary to validate this summons, it would be allowed; for we have the complaint attached to the writ, and the papers in the complaint, by which we could amend. Chamberlain v. Bittersohn (C. C.) 48 Fed. 42. But an amendment is not necessary. This is the 126th year of American independence, a statement as certain as A. D. 1902. The defendant could see from the summons that a word was omitted, for the words are "nineteen hundred and ———." The words "one hundred and twenty-sixth year of American independence" at once show without possibility of error what word is omitted; for this year of American independence is the year 1902.

The motion is refused.

UNITED STATES v. SLAZENGER et al.

(Circuit Court, S. D. New York. May 19, 1900.)

No. 3,027.

CUSTOMS DUTIES—TENNIS BALLS.

Tariff Act 1897, par. 391 (30 Stat. 187), providing that all manufactures of which wool is a component material shall be classified and assessed as manufactures of wool, does not apply to merchandise of which silk is not a component material; and tennis balls of wool and rubber (rubber being the component material of chief value) are not dutiable under the provision for "all manufactures of every description made wholly or in part of wool, not specially provided for" in paragraph 366 of that act, but as manufactures of India rubber, or of which India rubber is

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the component material of chief value, not specially provided for under paragraph 449 of said act.

Appeal by the United States from a decision of the board of United States general appraisers which sustained the protest of the importers as to the merchandise in question.

D. Frank Lloyd, Asst. U. S. Atty.
W. Wickham Smith, for appellees.

TOWNSEND, District Judge (orally). The articles in question are tennis balls, made of India rubber and covered with wool; the India rubber being the component material of chief value. They were assessed for duty under the provisions of paragraphs 366 and 391 of the act of 1897 (30 Stat. 184, 187), as manufactures of which wool is a component material, at 44 cents per pound, and 55 per cent. ad valorem. The question herein has been disposed of in the appeal of these importers (Slazenger v. U. S. [C. C.] 91 Fed. 517), except in so far as it may be affected by the following proviso in paragraph 391 (30 Stat. 187) of the silk schedule: "Provided, that all manufactures, of which wool is a component material, shall be classified and assessed for duty as manufactures of wool." Counsel for the United States contends that congress intended this proviso to apply to any manufacture of which wool is a component material. Counsel for the importers contends that this proviso is limited to the manufactures of silk, in said paragraph 391 of the silk schedule. It is clear that the construction contended for by the importers is correct. It appears by references to various other provisos in said act that, if congress had intended that this proviso should apply to paragraphs other than that in which it is inserted, they would have inserted language indicating such intention.

The decision of the board of general appraisers is affirmed.

HUNTER et al. v. THE TELLUS (two cases). CALIFORNIA & ORIENTAL S. S. CO. v. SAME. TELLUS S. S. CO. v. THE BELGIAN KING. R. DUNSMUIR SONS' CO. v. SAME.

(District Court, N. D. California. January 16, 1902.)

Nos. 12,161, 12,224, 12,228, 12,196, and 12,195.

COLLISION—STEAMSHIPS IN FOG—FAILURE TO STOP AND REVERSE.

Evidence considered in a cause for collision between the steamships Tellus and Belgian King in the Pacific Ocean, at night, in a dense fog, and the Belgian King *held* to have been solely in fault for failing to stop and reverse on becoming aware that she was in close proximity to another vessel, as the Tellus was shown to have done.

In Admiralty. Cross actions for collision.

Milton Andros, for G. B. Hunter and others, owners of the Belgian King.

Page, McCutchen, Harding & Knight, for Tellus S. S. Co.

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DE HAVEN, District Judge. The collision between the steamship Belgian King and the steamship Tellus, which is the subject of the litigation involved in these cases, took place in a dense fog, at about a quarter to 11 o'clock on the night of July 17, 1900, at a point on the Pacific Ocean between Point Reyes and Point Arena, on the coast of California. As is usual in this class of cases, each ship contends that the collision was caused solely by the fault of the other. It is not deemed necessary to enter into any lengthy discussion of the evidence. It will be sufficient to say that it has been fully considered, and my conclusion is that the collision must be attributed to the fault of the Belgian King in not stopping when she became aware that she was in close proximity to the steamer which proved to be the Tellus. If it should be conceded that the Tellus committed an error, just before the collision, in porting her helm, and, after this was done, giving the signal of one blast from her whistle, such error did not, in my opinion, contribute to the collision. The nature of the wound received by the Tellus shows conclusively that she was not under headway when the collision took place, and that she was run into by the Belgian King. If the latter had stopped her engines and reversed, as she ought to have done, when she became aware that the other vessel was near to her, and hidden in the fog, the collision would not have occurred. The Belgian King was doubtless moving at a very low rate of speed, but she did not discharge her whole duty in slowing down under the circumstances. She should have stopped when she became aware of the presence of the other vessel, until she ascertained its position, and then it would have been easy for her to have avoided the collision.

The libels of Hunter et al. v. Tellus (No. 12,161), Hunter et al. v. Tellus (No. 12,224), and California & Oriental S. S. Co. v. Tellus (No. 12,228), will be dismissed, and there will be a decree for the libelants in the cases of Tellus S. S. Co. v. Steamship Belgian King (No. 12,196), and R. Dunsmuir Sons' Co. v. Belgian King (No. 12,195), for damages and costs. The decree will further direct a reference to United States Commissioner Morse, to ascertain and report the amount of such damages.

INTERNATIONAL SILVER CO. v. WM. G. ROGERS CO. et al.

(Circuit Court, D. Massachusetts. February 17, 1902.)

No. 1,508.

TRADE-MARKS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Complainant, as the successor of the "Wm. Rogers Mfg. Co.," was engaged in manufacturing silver-plated ware, with a right to the use of the trade-mark "Wm. Rogers Mfg. Co." Defendants organized a corporation under the name of the "Wm. G. Rogers Company," using the trade-mark "Wm. G. Rogers." Wm. G. Rogers, its president, was a bank clerk, had never been engaged in manufacturing silver-plated goods, his only previous experience being limited to efforts to establish a business of selling ware stamped "Wm. G. Rogers," which had been crippled by various legal proceedings instituted by complainant. He had only 5 of the 100 shares of stock. Two other stockholders, holding between them

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85 shares, had at one time manufactured silver-plated ware for the genuine "Wm. Rogers Mfg. Co." and for other concerns, and organized the new corporation for the purpose of continuing such manufacture. *Held* to conclusively show want of good faith on defendants' part, and that plaintiff was entitled to a preliminary injunction restraining them from making or selling ware stamped with the mark "Wm. G. Rogers."

In Equity.

Mitchell, Bartlett & Brownell and Hiram R. Mills, for complainant.

Elder, Wait & Whitman, for defendants.

COLT, Circuit Judge. This is a motion to enjoin the defendants against the use of the corporate name "Wm. G. Rogers Company" in the manufacture and sale of silver-plated tableware, and from making, marking, or selling silver-plated tableware stamped with the mark "Wm. G. Rogers." The complainant is the successor of the Wm. Rogers Manufacturing Company, and it has acquired the title to the business of that company, and to the trade-mark and trade-name, "Wm. Rogers Mfg. Co." The defendant, Wm. G. Rogers Company, is a corporation organized under the laws of Massachusetts on January 24, 1901. Its location is Greenfield, in that state. The corporation was constituted for the purpose of "the manufacture and sale of silverware and other articles of a like character." The amount of its capital stock is $10,000, divided into 100 shares of $100 each. The corporation was organized by the election of William G. Rogers as president and Walter E. Nichols as treasurer. The original incorporators and the directors and shareholders of the company are the defendants William G. Rogers, Walter E. Nichols, J. Henry Nichols, and Heman M. Purdy. Their subscriptions to the capital stock were as follows: William G. Rogers, 5 shares; Walter E. Nichols, 43 shares; J. Henry Nichols, 42 shares; and Heman M. Purdy, 10 shares. The whole question in this case is one of fact, and turns on the good faith of these defendants in organizing a corporation under the name of "Wm. G. Rogers Company" for the purpose of manufacturing silver-plated ware, and in making and selling spoons, forks, and knives having stamped upon them the mark "Wm. G. Rogers."

In one of the many cases concerning the Rogers trade-marks, the circuit court of appeals for the Second circuit, speaking through Judge Shipman, said:

"The fair and honest use of a person's own name in his ordinary and legitimate business, although to the detriment of another, will not be interfered with. A tricky, dishonest, and fraudulent use of a man's own name for the purpose of deceiving the public and of decoying it to a purchase of goods under a mistake or misapprehension of facts, will be prevented. Every case under this branch of the law of trade-marks turns upon the question of false representation or fraud. In this case Rogers helped to establish a corporation which took his name for the purpose of inducing the public to think that they were buying the well-known Rogers goods, and for the purpose of surreptitiously obtaining the advantage of the good reputation which other manufacturers had given to articles stamped with that name. The use by the defendant corporation of this name is not merely an injury to the complainant, but it is an intentional fraud upon the public."

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In that case, Judge Wallace said:

"I place my concurrence in the judgment in this cause upon the broad ground that a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number, when it appears that such name has been intentionally selected in order to compete with an established concern of the same name, engaged in similar business, and divert the latter's trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. No person is permitted to use his own in such manner as to inflict an unnecessary injury upon another. The corporators chose the name unnecessarily, and, having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the complainant."

R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 17 C. C. A. 576–579, 70 Fed. 1017–1019.

Applying these principles to the case at bar, I think the following facts and circumstances conclusively show the want of good faith and honest purpose on the part of these defendants:

First. The use of the abbeviated form "Wm." instead of "William" in the name of the corporation, and in the mark placed upon the spoons, forks, and knives manufactured and sold.

Second. The relatively small subscription of five shares of the capital stock by William G. Rogers, and making him the president of the company.

Third. The history and calling of William G. Rogers. It appears that he resides in New York, and that he has been for years, and is now, a bank clerk in the Seamen's Bank for Savings of that city; that he has never been engaged in the manufacture of silver-plated goods, and is entirely wanting in knowledge, skill, or experience respecting such manufacture; that his only previous experience in this line was limited to his efforts in a small way to establish a business in New York of selling silver-plated ware stamped with his name, "Wm. G. Rogers"; that his New York business was seriously crippled by proceedings instituted by this complainant against the Bristol Brass & Clock Company, which stopped that company from manufacturing the silverware he was selling, and by notice of threatened proceedings to his principal customer, R. H. Macy & Co., which prevented further sales to that concern.

Fourth. The history of Nichols Bros., defendants, in relation to the manufacture of silver-plated ware. It appears that Nichols Bros. at one time had been engaged in the manufacture of silver-plated ware for the genuine "Wm. Rogers Mfg. Co." and for other concerns; that their desire to continue this manufacture induced them to organize the defendant corporation, and to name it "Wm. G. Rogers Company"; that the capital, plant, manufacturing facilities, knowledge, skill, and experience in the business were furnished by Nichols Bros.; that the management and conduct of the business is substantially in their hands, and that they own nearly nine-tenths of the company's stock.

Fifth. The corporate title of the defendant corporation, the "Wm. G. Rogers Company," closely resembles the "Wm. Rogers Mfg. Co."; the trade-mark "Wm. G. Rogers" closely resembles the

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trade-mark "Wm. Rogers Mfg. Co."; and the similarity is so great as to deceive the ordinary purchaser.

From this statement of facts and circumstances, the inference, to my mind, is irresistible that the defendants have adopted the corporate name "Wm. G. Rogers Company" and have placed the mark "Wm. G. Rogers" upon the plated silverware manufactured and sold by the defendant company for the purpose of deceiving the public, and in order to compete in an unfair and illegal manner with the Wm. Rogers Manufacturing Company, of which the complainant is the successor. Following the rule laid down by Judge Shipman in the recent case of International Silver Co. v. Simeon L. & George H. Rogers Co. (C. C.) 110 Fed. 955,—a very similar case, involving the same trade-mark,—I will not, on motion for preliminary injunction, enjoin the corporation from any use of its corporate name, but an injunction may issue restraining the defendants from making, marking, selling, or in any manner disposing of silver-plated ware stamped with the mark "Wm. G. Rogers," or any other mark of which the words "Wm. Rogers" are a characteristic part.

Motion for a preliminary injunction granted in accordance with this opinion.

THE BARGE NO. 127.

(District Court, D. Rhode Island. February 4, 1901.)

No. 1,084.

1. SALVAGE—ALLOWANCE.

A tug towed a barge lying at a pier out into the river to save her from danger from burning coal pockets. The barge's cargo was in no danger, and the impending damage would probably not have exceeded $5,000. There was evidence that the barge could have been saved harmless, without the tug's interference, though the tug's services were rendered promptly, and when good judgment warranted them. They involved no peril or suffering to the tug's crew, and, while it was stated that the tug's side was blistered, yet the location of the fire, the protection afforded the tug by the intervening barge, and a failure to prove pecuniary damage, made serious injury improbable. *Held*, that $300 salvage, apportioned $150 to the tug, $60 to her master, and the balance to the crew in proportion to their wages, was proper.[1]

2. SAME—COSTS—EXCESSIVE BOND—EFFECT.

On a libel for salvage the requirement of an excessive bond from claimant should not be permitted to relieve him from costs where the amount appeared to have been agreed on, and the claimant had had an opportunity to apply to the judge for a reduction.

In Admiralty.

Carpenter & Park and Comstock & Gardner, for libelants.
Carver & Blodgett, for claimant.

BROWN, District Judge. This libel is for salvage services rendered by the steam tug George S. Tice, her master and crew, to

[1] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

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the steel whaleback Barge 127, in removing her from proximity to burning coal pockets on the Wilkesbarre pier, in the Providence river, and anchoring her in the stream. Fire broke out in the coal pockets on the pier at about 5:40 a. m., December 18, 1900. Barge No. 127 was lying at the Wilkesbarre pier on the northerly side, heading eastward. Behind her was the barge Felix. The George S. Tice was bound up the river with a barge in tow, and was nearly abreast of the pier when the fire was discovered. The barge in tow was anchored, and the Tice went to the assistance of the barges at the pier. The Tice first towed the Felix, which was most exposed, into the stream, and then Barge 127. Upon all the evidence I am of the opinion that the peril to which the Barge 127 was exposed when the Tice made fast to her was merely to damage which would not have exceeded the sum of $5,000 had she remained at the pier. Her cargo was in no danger. Furthermore, there is evidence both from those on the barge and from the agent of the Wilkesbarre pier, to which I must give weight, that, without the assistance of the tug, the barge could have been moved, before the fire could have reached her, to the easterly end of the pier, and breasted out; so that it is highly probable that the actual damage would have been slight. I am not satisfied that the libelants have sustained the allegation of the libel that, without the services of the George S. Tice, the barge would have received serious damage. Nevertheless, the services were rendered promptly, and when it was apparently good judgment to remove the barge to the stream. I do not find that the services rendered the Barge 127 involved any peril or suffering to the crew of the Tice, nor do I think that the Tice was seriously exposed to injury. Her entire length was protected by the steel barge, some 36 feet in beam, which was between the tug and the fire. Furthermore, the fire was at some distance from the edge of the pier and at a considerable height above the pier. If the libelants desired to rely upon any actual damage to the tug, this should have been proved in a definite form. The failure to prove the pecuniary amount of the damage to the tug, together with the fact that the tug had previously been working upon the Felix, which was much more seriously exposed to the fire, renders it impossible to attach much significance to the general statement that the tug was blistered on her starboard side. It seems improbable that she could have been blistered seriously while under the side of the barge. I am of the opinion that a fair compensation for the services is the sum of $300,—$150 to the tug, $60 to the master, and the balance to be apportioned among the crew according to their wages.

It was suggested at the hearing that no costs should be allowed, for the reason that an excessive bond had been required; but, as the amount seems to have been agreed upon, and as the claimant was at liberty to apply to the judge, who was then present, for a reduction, I do not think that this should affect the costs of the case.

A further suggestion was made at the hearing that the claimant had offered in satisfaction a sum larger than that now found to

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be due by the court. This fact was not admitted by counsel for the libelants, and the claimant was not ready with proof thereon. Leave is given to the parties to present further evidence as to a tender, affecting the question of costs.

THOMPSON v. SNYDER et al.

(Circuit Court, S. D. New York. December 23, 1901.)

ACCOUNTING—BILL—SUFFICIENCY.

A bill which alleges the placing of a certain amount of money in the hands of defendants as a committee for the purchase of certain property, but does not allege what they have done with the money, nor that they have acquired anything with it but the title to the property which they were to acquire, nor that they have received anything from the property, is insufficient as a bill for an accounting, though it alleges that the defendants have refused to account for such money.

In Equity.

George M. Hough, for plaintiff.
Roger Foster, for defendants.

WHEELER, District Judge. The bill well enough alleges the placing of $3,919.32 at each of two different times into the hands of the defendants, as a committee of mortgage note holders, for the purchase of the property, and alleges no more as to what was done with it. Nothing is alleged but that they have done exactly what they were to do with the money; nor is there any allegation that they have acquired anything with the money but the title to the property which they were to acquire; nor that they have received anything from the property. The bill does allege that they have refused to render any account of the moneys, but this does not supply the want of showing that there is anything yet to be accounted for. The refusal was merely of information, for rendering which alone a bill of complaint does not lie. In this respect the bill lacks equity.

Demurrer sustained.

ROYAL TRUST CO. et al. v. WASHBURN, B. & I. R. RY. CO.

FROST v. McLEOD et al.

(Circuit Court, W. D. Wisconsin. January 16, 1902.)

1. EQUITY — AMENDMENT OF DECREE OF FORECLOSURE — MANNER OF SELLING PROPERTY.

A decree of foreclosure is not final, so far as relates to the provisions therein for its own enforcement, directing the manner in which the mortgaged property shall be sold, etc.; and in such respects it may be amended at any subsequent term.

2. RAILROADS—FORECLOSURE OF MORTGAGE—JURISDICTION OF COURT.

A supplemental decree entered by a court of equity in a suit to foreclose a mortgage on railroad property, finding that the road could not be sold as an entirety, as ordered in the former decree, owing to the

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fact that it was unprofitable and could not be operated so as even to pay expenses, and that the receiver had operated it at a loss, thereby creating an indebtedness, and directing him to suspend its operation, tear up the track, and sell the same, together with the equipment, for the best prices obtainable, is one which it was within the jurisdiction of the court to make, and, even if erroneous and unwarranted, is valid and binding until reversed by a court of competent jurisdiction.

3. FEDERAL AND STATE COURTS — CONFLICT OF JURISDICTION — INTERFERENCE BY STATE COURT WITH EXECUTION OF FEDERAL DECREE.

A state court has no power to interfere with the execution of a decree of a federal court ordering its receiver to suspend the operation of a railroad over which it has acquired jurisdiction in foreclosure proceedings, and to take up the track and sell the materials, by granting a writ of mandamus to compel the receiver of the federal court to operate the road, or by issuing an injunction restraining him from taking up the track.[1]

4. SAME—SUITS AGAINST FEDERAL RECEIVER.

Section 3 of Act Aug. 13, 1888 (25 Stat. 436), providing that "every receiver of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court," does not authorize a state court to entertain an action against a federal receiver to prevent him from carrying out the orders of the court of which he is an officer.[2]

5. CONTEMPT—INTERFERENCE WITH ENFORCEMENT OF DECREE — SUIT AGAINST RECEIVER.

A federal court, in a suit to foreclose a railroad mortgage, in which it acquired jurisdiction over the property, and operated the road for a considerable time by its receiver, after entry of a decree of foreclosure ordered the receiver to cease operating the road, and to take up the rails and sell the same, with the other equipment. A number of persons, under the advice of the district attorney of one of the counties of the state, and joined by such county, brought actions in a state court against the receiver to prevent him from executing such order. Writs were issued therein and served on the receiver, enjoining him from removing the rails, and commanding him to operate the road. After serving such writs, the sheriff of the county, without any further process, but under advice of the district attorney, forcibly interfered with the work of the receiver, and took his servants engaged in such work into custody. *Held*, that all such persons were guilty of contempt of the federal court, which, in the case of the district attorney, who advised the proceedings, and the sheriff, who was an officer charged with the enforcement of the law, was most flagrant and without mitigation.

6. SAME—PROCEEDINGS FOR PUNISHMENT—DEFENSES.

Advice of counsel is no defense to a proceeding for contempt of court, although where the person charged with the contempt is a layman, and not an officer charged with the enforcement of the law, it may be considered in mitigation.

In Equity. Suit for foreclosure of railroad mortgage. Proceeding on petition of the receiver against sundry persons for contempt.

Horace S. Oakley, for petitioner.

H. H. Hayden, for respondents R. D. Pike, John A. Jacobs, and L. H. Lien.

H. B. Walmsley, for respondents M. A. Sprague, W. H. Lemke, Carl Hirsch, D. M. Maxcy, and A. W. McLeod.

[1] Conflicting jurisdiction of federal and state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.

[2] Actions by and against receivers, see note to Plow Works v. Finks, 26 C. C. A. 49.

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Before JENKINS, Circuit Judge, and BUNN, District Judge.

JENKINS, Circuit Judge (orally). The facts in the matter presented to the court are not greatly involved, and are substantially uncontradicted. The Washburn, Bayfield & Iron River Railway Company was incorporated in 1895, under the general laws of the state of Wisconsin, to construct a railroad from Iron River to Washburn, in the county of Bayfield. This road ran through timber land, and manifestly, from the evidence here, it depended for its profitable operation upon the timber to be gotten out of that country. Spur lines or branches were constructed from the main line into the woods, and used for the purpose of hauling timber. On or before the 1st of January, 1898, the railroad company issued its trust deed to the complainant, to secure its bonds to the amount of $535,000, payable in 20 years, of which amount of bonds $237,000 were issued, put upon the market, and disposed of. The county of Bayfield also issued its bonds, and delivered them to the company, to aid in the construction and operation of the road. These bonds of the railway company were issued on the 1st of January, 1898, and default was made in the payment of the first installment of interest accruing thereon, July 1, 1898. In December, 1898, by reason of such default, and for the purpose of foreclosing the mortgage upon the road, the trustee in the trust deed filed its bill in this court for the foreclosure of the trust deed. A receiver was thereupon appointed, by the consent of all of the parties to the suit, to take possession for the court of this road, and to operate it in the interest of all parties concerned. The receiver and his successors in office have so operated that road from that date until nearly the present time,—a period of a little less than three years. During that period the court found it necessary, for the protection of the road and for the interest of the parties, to cause to be issued receiver's notes and receiver's certificates. It would seem that, aside from the debt which the road was under to the trustee and bondholders, it must have had quite a large floating debt at the time of this foreclosure, for receiver's certificates and notes were issued to the amount of over $220,000 for obligations incurred by the receiver in the management and operation of the road during the time mentioned, and for preferred claims against the road. It would also seem that the country between the termini of this road had been largely, if not wholly, denuded of its timber, and that the road was operated at great loss, and that it has resulted that the bondholders, interested to the amount of over a quarter of a million of dollars, have abandoned all hope of receiving anything upon their debt, and that the road, in possession of this court, must be disposed of by the court merely in the hope to recover, if possible, the whole or a part of the obligations which the court, through its receiver, had incurred in the maintenance and operation of the road. On July 23d a decree of foreclosure was passed; the total obligations of the road at that time, including receiver's certificates, being $546,857. The decree provided for the sale of the road at an upset price of $225,600, which was then the amount supposed to be due for the receiver's obliga-

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tions, as determined by the amended decree of July 23d, as I recall it. On October 12th, at a subsequent term of the court, an amendment to the decree was entered, which recites that the court expressly finds that it is impossible to sell the property of the railroad company as an entirety, as was adjudged by the original decree; that the road has been constantly insolvent, and a losing venture from its inception; that, although every possible effort had been made to operate the road economically and advantageously, it had been found impossible to operate the same for any length of time so as to even pay operating expenses, and that there was a deficit arising therefrom; that there is no prospect of any decrease in the losses incident to the operation of the road; that the timber along the main line of the road and its branches has been substantially cut off, depriving the road of any value, except in the value of its rails; that there are no funds available to continue the further operation of the road; that no one will loan money to the receiver for that purpose; that the rails, motive power, rolling stock, and equipment are constantly depreciating in value, and that the longer a sale is delayed, the less will be realized, and that there is no such public interest or business in the territory through which said road passes as will support the railroad, or justify any one in advancing any money to operate it, and that, if the railroad property is held intact, it will mean simply absolute loss of the capital therein invested; that it is impracticable and injudicious to attempt to sell the property at public sale, or for the court to decree any public sale; and that, in the opinion of the court, no such sale should be ordered. Therefore the court ordered that the special master, Mr. Frost, who is receiver, be directed to proceed to take up the rails and fastenings of the road, and get the same ready for immediate sale; and he was authorized and directed with all reasonable diligence to sell for cash all of the rails, motive power, rolling stock, equipments, machinery, tools, furniture, and fixtures, and all other personal property of every kind now in his hands, except the property theretofore ordered to be turned over to the Pike Lumber Company and the American Car & Foundry Company, and that it be sold in such quantities as the special master, according to his judgment, may determine, at public or private sale, for the best prices that can be obtained for the same, and return the money into court. Subsequently to that decree, and on the 13th of December, the respondents Pike, Sprague, Jacobs, Lemke, Hirsch, Maxcy, and also Bayfield county, acting through its district attorney, Mr. McLeod, filed in the circuit court of the county of Bayfield a petition for a writ of mandamus to compel the receiver to operate this road, and substantially to refrain from carrying out the decree of this court of October 12th. That suit was disregarded by the receiver, and subsequently a peremptory writ issued on the judgment of the circuit court for the county of Bayfield, which modified in some respects the alternative writ; reciting, however, as did the original petition and the alternative writ, all the proceedings had in this court with respect to the foreclosure of the mortgage or trust deed. This peremptory writ enjoined and

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required this receiver that he, without delay, continuously maintain the main line of the Washburn, Bayfield & Iron River Railway Company; that he maintain the track in a reasonable condition for use in the operation of it as a railroad; and, in substance, that he refrain from doing that which the decree of this court of October 12th required him to do. On the 23d of December a suit in equity was also commenced by the same parties in the same court against the receiver, and an order of injunction was obtained ex parte, enjoining the defendant in that suit,—the receiver in this suit,—in effect, from carrying out the orders of this court in respect to the manner of disposition of this railroad. In January of the present year the receiver proceeded to execute the decree of this court, and, by his servants, to take up the rails, with a view of marketing and selling them. It is estimated, I perceive, from proceedings here, that those rails at the present market price would bring in the market something like $140,000 or $150,000, and the avails can be used in part payment of the receiver's obligations. He was met in the attempt to execute the decree of this court by the forcible resistance of the defendant Lien, who is the sheriff of the county of Bayfield, and prevented by force from the execution of the decree as directed by the court. Thereupon this proceeding was instituted by the receiver, by his petition, seeking to punish all these parties for contempt,—as to the parties named, for the institution of the suits against the receiver; and as to Mr. Lien, the sheriff, for his forcible resistance to the attempted execution of the decree. The answers of the defendants, except the sheriff, say that their only act was the institution of the proceedings in the court, and that in so doing they acted on the advice of counsel, and believed they were right; counsel advising them that this decree of October 12th was absolutely void. The sheriff says that, in thus forcibly resisting the officer of this court in the execution of the decree of this court, he acted upon the advice of the district attorney, Mr. McLeod, who is one of the respondents here, and that he prevented the receiver from so acting under and by virtue—this is the justification for his conduct—of the said peremptory writ of mandamus, and the said injunction so in his hands for service, and by virtue of the further fact that they were committing in his presence a crime against the state of Wisconsin and its laws, and contrary to the provisions of section 4386 of the Revised Statutes of Wisconsin. It is further asserted by the parties that the decree of October 12th was absolutely void: First, because it was made and entered at a term subsequent to that at which the original decree was entered, and the court was without power; secondly, that the abandonment of the operation of the road operated to turn this property—the rails and ties and the rolling stock—over to the state of Wisconsin, the road being a public highway.

As to the first objection,—that this decree was entered at a subsequent term, and was without authority,—assuming that any one but the parties to the suit and their privies may raise the objection, the court is of opinion that the objection is not well founded. A decree of foreclosure is, in a sense, a final decree, adjudging the

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rights of the parties as between themselves, but a decree of foreclosure is something more than that. It is not only a decree adjudging those rights, but is also a sort of equitable execution, providing the manner in which the decree shall be enforced, and for the assertion of the rights declared; and the provisions of a foreclosure decree with respect to the manner and the terms of the sale are part of the terms of the execution of the decree, and not of the decree, so far as adjudging the rights of the parties. There is no vested right in the party to a suit to have execution of the decree for the enforcement of his right performed in any particular manner. It is within the province of a court of equity to determine how and in what manner its decree adjudging the rights shall be carried out so as to render restitution. It is always within the province of the court of equity at any term of the court to modify the terms of a decree so as justly and equitably to enforce its judgment, and render to the parties that to which they are entitled.

An interesting and important question is suggested by the proposition that, upon the abandonment of operation of a railroad, the property—the rails, the rolling stock, engines, and equipment—of the road passed to the state, upon the theory that it is a public highway. In support of that doctrine,—which at first blush seems startling and novel, because the state of Wisconsin has authorized railroad companies to mortgage their property and to issue their bonds, and for the foreclosure of all such mortgages, and for reorganization of the road by the owners of the bonds,—they insist that the doctrine is maintained by a decision of the supreme court of Pennsylvania, rendered by no less a distinguished jurist than Judge Black. Railroad Co. v. Casey, 26 Pa. 287. If that decision is fully applicable here, it certainly is entitled to great weight as the expression of a distinguished jurist, although it is proper to say that the decision was by a divided court, of three to two; one of the dissentients being a no less distinguished jurist than Judge Woodward. But there the road had, under the act, for one of its termini, the city of Erie, and it was sought in a way to pass by the city of Erie, and make the road a connecting link with a road to the West; and the legislature repealed its charter, and appointed an agent to take possession of the property and operate it as a public highway; and an injunction was sought, which injunction was denied; and finally an act of the legislature was passed restoring the railroad company to its former rights, under certain conditions; and the bill was still prosecuted, after the complainant had been put into possession under the act of the legislature, for the profits arising from the operation of the road by the agent of the state, and that right was denied by the court. There are some expressions by Mr. Justice Black in that opinion which are, as were most of his opinions, couched in strong and vigorous language, and which seem, in a measure, to support the contention of counsel. There are, however, other decisions, which have more or less bearing upon the proposition, to the effect that the courts would not undertake to compel a railroad company to operate a railroad at a loss

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(Com. v. Railroad Co., 12 Gray, 180, and Ohio & M. R. Co. v. People, 120 Ill. 200–208, 11 N. E. 347), and one from the supreme court of Kansas (Kansas v. Dodge City, M. & T. R. Co., 53 Kan. 329–336, 36 Pac. 755, 24 L. R. A. 564) which maintains the right, where a railway company was insolvent and had disposed of its road, the operation of which had been abandoned, of the purchasers to take up the rails. I do not find it necessary, nor is it possible for me within the time that has been permitted me in this discussion, to come to a fixed conclusion upon that important and interesting question. There is somewhat of a conflict between the authorities, and it is a question of importance. It is not needful to here determine the question. This road was in the possession and custody of this court. The res was here,—here with the court for its management and operation and sale. The jurisdiction of this court was complete over this road. It had jurisdiction to determine when it should be sold, and how it should be sold; and if it was improper for the court to order the rails to be taken up and sold; if its decree was improvident, and failed to recognize the supposed right of the state and the public in the road; if it was the duty of the court, under the circumstances, to keep those rails there, notwithstanding the road could not be sold, and that no one would purchase it for the purpose of operation,—still, as the late Chief Justice Ryan once observed, if it was an error, the court had jurisdiction to commit the error. That decree was valid and binding until it was reversed by a court of competent jurisdiction. So that, as the court views this case, it stands in the position of a decree of this court, valid, authorized, which should be respected and obeyed by all who are bound by it and by all who have knowledge of it.

It is to my mind—and I regret to be compelled to refer to the subject—a matter of astonishment that the distinguished jurist who presides over the circuit court for the county of Bayfield could by any possibility have issued such a judgment and writ and order of injunction as are here presented. I cannot but believe that he was either deceived in the issuance of the writ and order, or labored under gross misapprehension of his duty. If there is one principle of the law which should be known to all lawyers, which is absolutely essential to the preservation of order in society, and to the enforcement of the rights of parties, it is that the final decree of a court having jurisdiction shall not be interfered with by any other court. These parties saw fit to invoke the supposed aid of that court. With the exception of Mr. McLeod, they were all laymen. They claimed to be interested, as taxpayers of Bayfield county, and as merchants, in having that road maintained. I do not know if they supposed they had a right to have the railroad company or its bondholders or its receiver operate the road at a loss for their benefit; but, whatever their motive, the saw fit to invoke the supposed aid of that court, and to obstruct and hinder and resist the receiver in the execution of the decree of this court. It is said that they had a right to sue the receiver in that court, and they base their right upon section 3 of the act of congress of August 13, 1888 (25 Stat. 436), which is:

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"That every receiver of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed, so far as the same shall be necessary to the ends of justice."

As I remarked during the argument, the history of that provision is well known. Before that act the receiver of a railroad, standing in the shoes of the railroad corporation, operating the road, incurring indebtedness, incurring obligations with respect to the carriage of property and persons, and subject to liability for accidents upon the road, could not be sued, except by leave of the court, even in the court which appointed him. The consequence was that, with respect to a road running through a great extent of country, persons having lawful and just claims against the receiver, either for property sold him, or for wrongs suffered through the operation of the road, were obliged to go to a great distance, and to resort to the court having jurisdiction of the matter. That was found to be burdensome to litigants, and so it was provided that, with respect to such claims (for you will observe the language of the act, "may be sued in respect of any act or transaction of his in carrying on the business connected with such property"), he may be sued in any court of any jurisdiction which could properly assume jurisdiction under any circumstances, and have his right determined. The execution of that judgment was not according to the ordinary forms of execution of judgments rendered by such court, but that judgment must be brought into the court of original jurisdiction, and satisfied by that court out of the funds in the possession of that court; courts of original jurisdiction recognizing, by comity, the action of other courts in adjudging the claims. But the statute most certainly has no reference to a suit brought to direct the receiver or special master to disobey the decree of the court which specifically directed him to do certain things. It most certainly was not designed to permit a state court to render nugatory the decree of the federal court having jurisdiction, by enjoining the officer of the federal court from executing the decree of the court under whom he was acting; for that is simply to bring about anarchy, and to render the administration of justice a travesty. I cannot but think, therefore, that the action of these parties in instituting these proceedings was a resistance to the decree of the court. They knew of it. They set the entire proceedings forth in their petition for this writ. They say to this circuit court of Bayfield county:

"The circuit court of the United States for the Western district of Wisconsin has decreed thus and so. We insist the decree is void, and we ask you to prevent and enjoin the officers of the federal court from carrying out the instructions of the federal court, and the decree of that court."

But they say that they were advised that this decree was void,—advised by their counsel, one of whom verified this petition to that court. This is no justification, although it may be matter of mitigation. The advice of counsel to a party that he may commit a crime

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is no sort of defense. The advice of counsel that a party may set himself up in judgment against the decree of the court is no justification for resisting and violating the decree of that court. That could not be tolerated, because then no decree of court could be enforced.

The action of the other two respondents, the sheriff and Mr. McLeod, stands upon different footing. The sheriff made actual, forcible resistance to the execution of this decree. He seeks to justify his conduct, but he seems somewhat doubtful upon what ground to justify it, for he first pleads justification under the peremptory writ of mandamus; secondly, under an order of injunction that was in his hands for service; and, thirdly, under a statute of the state of Wisconsin which forbids a person from taking up a spike or rail or in any way injuring any railroad. As to his first excuse, he had no more to do with that peremptory writ of mandamus, as it was called, than a child, and it was a matter with which he was not concerned. He had no more to do with that order of injunction, except to serve it upon the parties, than a child. He had no right to set himself up as judge and executioner. He had no right to determine whether these parties were violating the orders of the circuit court of Bayfield county. He had no writ from any court commanding him to interfere with the execution of the decree of this court. This writ—this order of injunction—ran to this receiver. If he violated the lawful order of the circuit court of Bayfield county, he was responsible to that court, and the sheriff had no right of interference. Nor does the statute invoked have any reference to any such case as the present. It seeks to punish one who for a wicked purpose should interfere with the operation of a railway, and make possible the destruction of life or property, by maliciously taking up a spike or rail, seeking to destroy life or property. It had no reference to the act of an owner, or one lawfully taking up a rail. The conduct of the sheriff is without justification or mitigation, except that he says he acted upon the advice of Mr. McLeod; and that, as I have said with reference to the other respondents, is no justification. Whether in his case it may be considered even in mitigation is to my mind extremely doubtful. Here was an officer of the law, bound to respect and to execute the law,—bound to confine himself to the legitimate exercise of his powers,—undertaking, without writ and without warrant, to obstruct and resist the process of the law issued from this court; of his own motion, except as he acted under the advice of the district attorney, surrounding himself with a posse of deputy sheriffs to prevent the execution of the decree of this court. He knew—he was bound to know—that he ought not to follow such advice. He was bound to know that no advice to resist the law could shield him in the performance of the acts which he did. He arrested the servants of this receiver,—carried them 30 miles away,—as he asserts, for violation of the injunction, of which they had not been convicted, with which they had not been charged in court, and held them to bail. Who held them, and for what they were held, and under what sort of statute or law, the answer is silent, and the fact does not appear.

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With respect to the case of Mr. McLeod. He also was an officer of the court, a member of the legal profession, counsel learned in the law, representing one of the divisions of sovereignty of the state of Wisconsin. He knew the sanctity of judgments and decrees. He knew that which was due to a court; and he and the sheriff—officers of the law—set a bad example to the community when they undertook to set up their judgment against the decree of a court of record and to counsel, and advise forcible resistance to the execution of that decree. He seems to have advised all these proceedings. He joined in the petition for a peremptory writ; he verified the petition; he boldly sets up the decree of this court, and assures the circuit court of Bayfield county that, in his judgment, that decree is void; and therefore he advises the sheriff, as the sheriff states, to make forcible resistance to that decree, and the latter acts thereon. I have no sort of question, without reference to the other question, whether the decree of this court of October 12th was erroneous— I have no sort of question that here has been a flagrant resistance to the decree of this court, and one that cannot be passed over; for, if a decree of a court is not to be binding, is not to be respected, is not to be obeyed, and the court does not enforce obedience and respect, we might as well abolish all courts, adopt the theories of the anarchist, and allow every man to judge for himself, to decree for himself, and to execute his own decrees. If we are to have a government of law, a government of order, if society is to be protected, men must learn that the decree of a court is not mere waste paper; that it is to be enforced; that it is to be obeyed and is to be enforced, if necessary, by the strong arm of the government.

With respect to these men who, so far as the record shows, simply attempted to resist the decree of this court by undertaking to annul its decree by applying to another court, I have doubted somewhat as to the extent of the punishment which would be adequate. I have sought to look at their conduct leniently. I have considered they were laymen. I have considered that they were, in a sense, interested as taxpayers, and had, perhaps, a strong interest that this road should be maintained. I have sought to consider and to recognize the weakness of human nature, and that they have allowed their feelings to run away with their judgment. I have come to the conclusion, as to them, that a fine of not a large amount would be sufficient in the present case. And the judgment of the court as to them will be that each of them—there are six of them—be fined, for the contempt it is found they have committed, in the sum of $250, and that each of them be imprisoned in the county jail of the county of Dane until such fine be paid.

With respect to Mr. McLeod and the sheriff, Mr. Lien, the court cannot deal with them upon the same basis. There has been in their case flagrant and unwarranted resistance to the decree of this court, and that by parties who knew better, whose education taught them better, whose position demanded of them respect of the judgment of the court, not forcible resistance to it. It is a very sorry sight for a district attorney of a county, and a member

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of the legal profession, to advise any one to forcibly resist the decree of the court. It is a very bad example to the community when the sheriff of the county, the executive of the law, seeks to take the law into his own hands, and to give defiance and forcible resistance to a court established by the government of the United States. I cannot pass over that conduct with a fine. In their case—the case of McLeod and the case of Lien—the judgment of the court will be, for the contempt which they have committed, and of which they are respectively convicted, that each of them be imprisoned in the county jail of the county of Dane for the period of 60 days.

I trust that this will be the end of forcible resistance to this decree. I trust that those who recognize the situation will see to it that the time for forcible resistance to the law is passed,—will see to it that, whatever rights the state of Wisconsin may have, and whatever rights these parties may have, they are not to be obtained by defiance of a decree of the court. If any error has intervened in the proceedings of this court, there are methods in the courts of the land by which such error may be corrected, but it cannot be tolerated that there shall be forcible resistance to a decree of a court.

THE ZAMPA.

(District Court, N. D. California. January 16, 1902.)

No. 12,041.

1. COLLISION — SAILING VESSELS MEETING — APPEARANCES JUSTIFYING PRIVILEGED VESSEL IN CHANGING HER COURSE.

Under the navigation rules (26 Stat. 320), which require a vessel sailing closehauled on the starboard tack on meeting another closehauled on the port tack to keep her course, unless a departure from such rule is "necessary in order to avoid immediate danger" (article 27), and make it the duty of the other vessel to keep out of the way, the privileged vessel is justified in changing her course when in the opinion of the officer in command, in the exercise of good judgment and seamanship, a collision will otherwise be unavoidable because of the failure of the burdened vessel to take timely action to keep out of the way, and in such case she cannot be held in fault, although a collision in fact results.

2. SAME—INSUFFICIENT LOOKOUT.

The ship Reliance was sailing closehauled on the starboard tack at night in the Pacific, when she saw the red light of the schooner Zampa off her port bow at a distance of a mile and a half. The Zampa soon showed both lights, and thereafter her green light only. When the Zampa was quite close, and almost directly ahead, still showing her green light, the officer in command of the Reliance, believing a collision otherwise inevitable, changed his course to port. Immediately afterward the Zampa changed her course to starboard, and a collision resulted. *Held*, that the Reliance was justified, under the circumstances, in changing her course when she did, and that the fault for the collision must be placed on the Zampa for failing to sooner change her own course so as to avoid the appearance of danger, which apparently resulted from her not keeping a proper lookout, and failing to see the lights of the Reliance until immediately before the collision.

In Admiralty. Suit for collision.

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Andros & Frank, for libelant.
Page, McCutchen, Harding & Knight, for respondent.

DE HAVEN, District Judge. This is an action brought by the owner of the British ship Reliance to recover damages on account of a collision between that vessel and the schooner Zampa. The collision occurred on the Pacific Ocean, between the hours of 9 and 10 o'clock on the night of January 26, 1900, the Zampa striking the Reliance abaft the forerigging, on her starboard side. There was at the time a fresh breeze from the southeast, and the weather was a little hazy. The lookout on the Reliance sighted the red light of the Zampa about two points off the port bow, when the vessels were perhaps one mile and a half apart. At this time the Reliance was sailing closehauled on the starboard tack, heading N. E. by E. ½ E., at a speed of between 7 and 8 knots an hour. The Zampa was sailing closehauled on the port tack, making a course about S. by W., and proceeding at a speed of between 4 and 5 knots an hour.

The Zampa being closehauled on the port tack, it was her duty, under the provisions of article 17 of the act of August 19, 1890 (26 Stat. 320), to keep out of the way of the Reliance, and it was the duty of the latter to keep her course (article 21, Id.), unless there were special circumstances which made a departure from this rule "necessary in order to avoid immediate danger," as provided in article 27 of the same statute. It appears from the evidence that just prior to the collision the helm of the Zampa was put hard to port, and she had fallen off one-half point, and that of the Reliance was put hard to starboard, and she had swung around five points from the course on which she was sailing at the time the red light of the Zampa was first observed by her. It is claimed by the libelant that the Zampa did not keep out of the way, as required by article 17 of the act of August 19, 1890 (26 Stat. 320), but approached so near to the course of the Reliance that there was danger of an immediate collision, and that the Reliance in attempting to avoid such collision was justified in changing her course. The burden of establishing this alleged justification for the departure from her course is upon the Reliance. The Chesapeake, 5 Blatchf. 411, Fed. Cas. No. 2,643; The Corsica, 9 Wall. 633, 19 L. Ed. 804. "When a change of course is admitted or established on the part of a vessel which is under obligations to keep her course, as against another vessel which is bound to avoid the former vessel, a very close scrutiny of the conduct of the former is necessary." The General U. S. Grant, 6 Ben. 465, Fed. Cas. No. 5,320. But, while this is so, there can be no doubt that when the vessel bound to give way does not do so in time, and as a result there is immediate danger of collision, the other may change her course for the purpose of avoiding the apprehended collision. The Catharine and Martha, Fed. Cas. No. 2,512; The Richard R. Higgins, 1 Low. 290, Fed. Cas. No. 11,768; Waldorf v. The New York, 1 Flip. 49, Fed. Cas. No. 17,057. There is but little difficulty in ascertaining the controlling facts in this case. The testimony of Doyle, second officer of the Reliance, and who was officer of the deck at the time of the collision, is, in substance, that the red light

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of the Zampa was first observed two points off the port bow of the Reliance, when the vessels were, in his judgment, one mile and a half apart. This light was kept in view by him for a short time, when the Zampa showed both her red and green lights, and immediately thereafter her red light was shut out, and only her green light could be seen. The Reliance kept her course until the green light, steadily drawing nearer, was a quarter of a point on her port bow, when, in the judgment of the witness, a collision was imminent, and for the purpose of avoiding it he directed the helm of the Reliance to be put to starboard, which was done, and she had swung off five points when the collision occurred. The testimony of this witness was corroborated by others of the crew of the Reliance. It furnishes a reasonable explanation of the action of that vessel in changing her course, and must, in my opinion, be accepted as true. Indeed, as to the important fact that the Reliance changed her course just before the collision, it is supported by the evidence given upon the part of the Zampa to the effect that the red light of the Reliance was first observed about one point off the port bow of the Zampa; that immediately thereafter both her green and red lights came into view; that next her green light only was seen, and then the collision took place; and as to the time which intervened between first seeing the red light of the Reliance and the collision the mate of the Zampa testified that when that light was sighted he at once gave orders to keep the Zampa off, and between this time and the collision the Zampa only changed her course about one-half point. This evidence shows conclusively that the events described by it were crowded into a very short space of time before the collision, and makes it reasonably certain, not only that the Reliance changed her course at the last moment, but also shows that she was not observed by the Zampa until at or about the time she changed her course, because the history of the transaction, so far as the Zampa is concerned, is confined to the short space of time intervening between the order to keep her off and the collision, and it is apparent that it was during this time the Reliance changed her course. Upon the finding that the facts are as testified to by Doyle, the second officer of the Reliance, that vessel was not in fault in changing her course, provided that officer exercised a reasonable judgment as to the necessity for such maneuver, in view of the conditions as then presented to him. It is urged on behalf of the Zampa that if the Reliance had kept her course there would have been no collision, and from this it is argued that no blame can attach to the Zampa. Whether, if the Reliance had continued on her course, the collision would have been avoided by the subsequent action of the Zampa, need not be determined. The question here is whether, at the time the Reliance changed her course, the officer in command was justified in believing that the Zampa was about to fail in her duty to keep off, and that there was immediate danger of collision, unless her course was changed. She had a right to depart from her course if necessary in order to avoid immediate danger, and, having this right, it must follow that, if the officer in command exercised a reasonable judgment in view of all the conditions then present, the action taken by him in changing

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the course of the Reliance cannot be attributed to her as a fault. This general principle, stated in different language, has often been announced. Thus: "When the vessel that has the burden of avoiding the danger has come so near that, to a reasonable, firm, and skillful navigator, it appears that the collision is unavoidable, it shall be taken to have been so." The Richard R. Higgins, 1 Low. 290, Fed. Cas. No. 11,768. And the supreme court said in the case of The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126:

"But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty."

Again, in the case of The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, the same court said:

"The weight of English, and, perhaps, of American, authorities is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under rule 24, 'rendering a departure' from the rules 'necessary to avoid immediate danger.'"

The question, then, is this: Did the officer in charge of the Reliance have reason to believe that the Zampa would not keep off, and that in order to avoid a threatened collision it was necessary to change the course of his vessel? Or, stated in another form: Was the situation such that a competent master on board the Reliance, exercising reasonable care and judgment, would have concluded that the vessels were in such proximity that in order to avoid collision it was necessary to change her course at the time it was done? Upon this point, Doyle, the officer in charge of the Reliance, in referring to the time when he gave orders to change her course, said: "At this time I allowed I was just near enough to the schooner to avoid collision. If I had not done what I did, I would have run her down." And in this he was corroborated by the third mate and by a seaman who was on watch. There is no evidence in the case which would warrant the court in finding that the judgment thus formed by the officer in command of the Reliance was unreasonable, or that the same conclusion would not have been reached by any skillful navigator placed in the same situation. Putting aside, as not entitled to any great weight, the estimates of the various witnesses as to time, it is clear that, when the course of the Reliance was changed, the vessels were very near to each other,—much nearer than they ought to have been permitted to come when the weather was such that each should have been seen by the other for the distance of at least one mile and a half.

Upon this state of facts, the collision must be attributed to the fault of the Zampa in holding on to her course too long. It is probable that her action in this respect was due to the fact that the Reliance was not seen by her as soon as she should have been; but, whatever may have been the reason, it is perfectly clear there was no attempt to keep her off until immediately before the collision, and until after the helm of the Reliance had been put to starboard.

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This was too late. The real fault, therefore, and that which fixes the liability for the collision upon the Zampa, was her failure to keep off; thus bringing on the situation which justified the officer in charge of the Reliance in believing that there was immediate danger of collision unless the course of his ship was changed.

There will be a decree in favor of the libelant for the damages sustained by him and costs, and the case will be referred to United States Commissioner Morse to ascertain and report the amount of such damages.

In re CHAPPELL.

(District Court, E. D. Virginia. December 31, 1901.)

1. BANKRUPTCY—PAYMENTS WITHIN FOUR MONTHS—INSOLVENCY—PRESUMPTION—BURDEN OF PROOF.

Where the trustee of one who was adjudged bankrupt on his voluntary petition files a petition alleging that certain partial payments to creditors, made within four months of filing the bankrupt's petition, were made while he was insolvent, and praying that such creditors be required to return such preferential payments before being permitted to receive dividends on their claims, and the creditors answer that the bankrupt was not insolvent at the times such payments were made, no presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed, and hence it is incumbent on the trustee to prove the insolvency.

2. SAME—AMOUNT OF PROPERTY—SUFFICIENT TO PAY DEBTS—EVIDENCE.

A merchant, seven months before filing his petition in bankruptcy, sent a creditor a postdated check and a note for the balance of his debt, and afterwards renewed the note, paying it a little less than four months before the petition was filed. *Held*, that such acts, while showing that he was not in possession of ready money to meet this particular debt, were not evidence that he was insolvent, within the meaning of Bankr. Act, § 1, subd. 15, providing that a person shall be deemed insolvent whenever the aggregate of his property, exclusive of any which he may have fraudulently concealed or conveyed, shall not, at a fair valuation, be sufficient in amount to pay his debts.

3. SAME—SCHEDULES—ASSETS IN EXCESS OF DEBTS.

The schedules of a voluntary bankrupt prepared and filed with his petition as required by Bankr. Act, § 7, subd. 8, showed the value of his assets, as estimated by him, to be largely in excess of his debts. Subsequently additional claims were filed, which increased the indebtedness to nearly the estimated value of the assets, and sufficient was not realized out of the assets to pay the debts in full. During the four months prior to filing his petition, the amount and value of assets and amounts of his debts had remained relatively about the same. *Held*, that he was not insolvent at the times of making certain part payments to his creditors during such four months.

In Bankruptcy.

The following is the report of George S. Bernard, Referee:

The undersigned referee respectfully reports to your honor that after the supreme court of the United States rendered its decision in the case of Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, touching preferences, and there was no longer reason for deferring the consideration of the matter of controversy between R. D. Gilliam, the trustee representing the general creditors of the bankrupt, and the nineteen several creditors who were alleged in the petition filed by the trustee to have received from the bankrupt, in part payment of their respective claims, sundry sums of

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money as preferences, within the meaning of the bankruptcy act, and who said trustee prayed might be required to surrender said preferences before being permitted to receive their dividends from the bankrupt's estate, the referee, on the 26th day of June, 1901, made an order directing that said nineteen creditors appear before him at a time and place in the order mentioned, to show cause, if any they could, why the prayer of said petition should not be granted. A copy of this order, and of the extract from said petition served upon said nineteen creditors, marked "O," is filed with this report, from which it will be seen that these creditors had proved claims aggregating the sum of $3,938.42, and at different dates from July 13 to November 1, 1900, received sundry payments, aggregating the sum of $2,914.42. Upon inspection of the record in this cause, it will be seen that the dividends of these creditors, aggregating fifty-five and one-third (55⅓) per centum of their said claims so proved, are held to await the decision of the questions raised by said petition, except the parts of said dividends which in the cases of six creditors exceed the amounts so received. With a few exceptions, not necessary to be mentioned, all of these creditors filed answers to the trustee's petition, in each of which the respondent or respondents gave as a reason why the prayer of the petition should not be granted that the bankrupt was not insolvent at the time he made the alleged payment or payments. Other reasons were also given in said answers, not necessary to be stated, under the view taken of this case.

At the hearing of the issues joined between the parties, the creditors to whom said payments were made contended that on the trustee rested the burden of proving the insolvency of the bankrupt at the time he made them. The trustee, on the other hand, contended that, as the bankruptcy act fixes four months preceding the filing of a petition for or against a bankrupt as the period, all preferences given within which are voidable by the trustee, this raises the presumption of insolvency during that period, and that creditors receiving such preferences must accordingly show that the bankrupt was solvent at the time the preferences were given.

Under a well-settled rule of pleading, in legal proceedings of all kinds, a party making an allegation of a fact necessary to sustain his case must prove the truth of the allegation; and this rule, in the absence of any statutory provision affecting it, governs the allegations made in the trustee's petition. He must prove that the bankrupt was insolvent when he made the payments in the petition alleged. Is his contention that there is a presumption of insolvency within the four months preceding the filing of the petition by or against the bankrupt correct? Clearly, in the case under consideration,—that of an adjudication on a petition filed by, and not against, the bankrupt,—there is no such presumption. In an involuntary proceeding, wherein the allegation is that at a certain date the defendant, "while insolvent," did some one of the acts declared by subdivisions 2 and 3 of section 3 of the bankruptcy act to be acts of bankruptcy, the adjudication would, of course, show insolvency at such date,—insolvency being one of the issues; but as was held in the case of George M. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, an adjudication, when the alleged act of bankruptcy was one of the acts declared by subdivisions 4 and 5 of said section 3 to be acts of bankruptcy,—as, for instance, the making of a general assignment for the benefit of creditors,—does not establish insolvency, insolvency in such case not being an issue. This is apparent upon examination of the opinion of the court in the case referred to. Mr. Justice White, delivering the opinion, having quoted paragraph "a" of section 3 of the act, says: "It is patent on the face of this paragraph that it is divided into five different headings, which are designated numerically from 1 to 5. Now, the acts of bankruptcy embraced in divisions numbered 2 and 3 clearly contemplate not only the commission of the acts provided against, but also cause the insolvency of the debtor to be an essential concomitant. On the contrary, as to the acts embraced in enumerations 1, 4, and 5, there is no express requirement that the acts should have been committed while insolvent. Considering alone the text of paragraph 'a,' it results that the nonexistence of insolvency at the time of the filing of a petition for adjudication in involuntary bankruptcy, because of the acts enumerated in

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1, 4, or 5, which embrace the making of a deed of general assignment, does not constitute a defense to the petition, unless provision to that effect be elsewhere found in the statute. This last consideration we shall hereafter notice." Justice White, in a subsequent paragraph of this opinion, referring to paragraph "c" of section 3, which provides that "it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt." says: "We are concerned only with the meaning of the words as used in the law we are interpreting. Now, the context makes it plain that the words relied on were only intended to relate to the first numerical subdivision of paragraph 'a.'" From what was said by the court in this well-considered case, it appears that an adjudication in an involuntary proceeding is only evidence of insolvency in certain cases and at certain dates, and not of insolvency in all cases. Of what is evidence in a case of voluntary bankruptcy, Mr. Collier, in his work, Coll. on Bankr. (3d Ed.) p. 46, says: "Any person owing debts, as defined in section 1 (11), may file a voluntary petition. The present act does not in express terms require that the person shall be insolvent, or unable to pay all his debts in full, as did the act of 1867; and there seems to be no reason why, if a solvent person cares to have his property distributed among his creditors in bankruptcy, he should not be allowed to do so. It will not be necessary to allege insolvency in the petition, nor to prove it, to procure an adjudication." If this careful text writer is correct—and he appears to be—in his statement that a solvent person may be adjudged a voluntary bankrupt, the adjudication, so far from creating, as contended by the trustee, a presumption that the bankrupt was insolvent during a period of four months before the filing of his petition, does not even show that he was insolvent at the date of the filing of the petition. It is true that the bankrupt in his petition alleged that he owed debts which he was unable to pay in full; but, as Mr. Collier says, this was an allegation neither necessary to be made nor necessary to be proved. Let us, however, for argument's sake, assume that the adjudication established the fact of insolvency on the 8th of November,—the date of the filing of the bankrupt's petition and of the adjudication. This fact alone, whilst consistent with, did not show, insolvency at a previous date. In the case of In re Rome Planing Mill (D. C.) 96 Fed. 812,—a proceeding in involuntary bankruptcy, wherein the petition was filed on the 8th day of November, 1898, and the controversy was whether or not certain judgments against the bankrupt corporation obtained on the 17th day of October, 1898, were suffered or permitted by the debtor "while insolvent,"—District Judge Coxe, of the Northern district of New York, said: "As before stated, it is necessary for the petitioners to prove the judgments, the levy, the sale, and the insolvency on October 17, 1898, the date of the judgments. The referee finds all of these facts except the insolvency. The finding that the company was insolvent November 1st does not meet the requirements of the statute. The company might have been solvent on October 17th, and hopelessly insolvent two weeks later." The bankrupt, Jno. A. Chappell, might have been insolvent on the 8th of November, 1900, the day on which he filed his petition and was adjudged a bankrupt, and yet solvent during the period of time from July 13 to November 1, 1900, covering the several payments in the trustee's petition mentioned. The simple fact that he was adjudged a bankrupt proves nothing beyond insolvency at the date of the filing of the petition, if it proves this.

If, then, there is no presumption of insolvency at any date previous to the filing of the bankrupt's petition arising from the adjudication,—a proposition which seems clear,—was there any fact produced in evidence to show such insolvency? Let us now consider this question: From two letters of the bankrupt written to the creditors Jonas Bros., and filed with their answer to the trustee's petition, it appears that on the 4th of April, 1900, the bankrupt, being indebted to said creditors, sent to them a check for a

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part of his indebtedness, and a note for the residue, with the request that the check, which he dated April 20th, be held until that date. When the note fell due, on the 21st of June, he paid it, but drew on his said creditors for $100 with which to make the payment, at the same time sending them a note for that sum, payable 30 days after date, which note he paid at its maturity; this being the $100 alleged by the trustee to have been paid July 23, 1901, as a preference. This transaction, the trustee contends, is evidence tending to show the bankrupt's insolvency. It shows that the bankrupt was not in possession of sufficient ready money to meet this particular debt at the time when it first became due, and accordingly asked for an extension of credit upon it; but it is far from showing that at the time he paid his note for $100, that matured on or about July 23, 1900, he was insolvent, within the meaning of the bankruptcy act, subdivision 15 of section 1 of which provides that "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." In the case of Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666, Circuit Judge Gray, delivering the opinion of the circuit court of appeals, Third circuit, referring to and criticising a charge of the lower court, says: "We think the learned judge of the court below, in thus charging, gave the jury an erroneous impression as to how a fair valuation of the property of the debtor was to be arrived at. We think that the present market value of the property in question would be a fair valuation of the same, but there is nothing in this section of the act that market value should be ascertained by what a purchaser would give who desired to take advantage of the necessities and embarrassments of the owner, in order to procure the same at a price less than its real or market value. We think the words above quoted from the charge of the court below, which we have italicised, have no place in an explanation of what is the criterion of a fair valuation." Taking as a guide the statutory definition of "insolvency" as interpreted in this judicial decision, we find nothing in the record to show that Jno. A. Chappell was insolvent at any time during the period from July 13 to November 1, 1900, during which time he appears to have conducted in the ordinary way his business as a retail dry goods merchant, replenishing his stock from time to time, and keeping it in quantity and value about the same relatively to the aggregate amount of his debts as at the date of the filing of his petition. In the schedules filed with the petition on the 8th day of November, 1900, which he prepared and made oath to as required by subdivision 8 of section 7 of the bankruptcy act, providing that the schedules so prepared and sworn to must show "the amount and kind of his property, the location thereof, its money value, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amount due each of them, * * *" the bankrupt valued his total property at $14,200, of which he valued his stock of goods at $11,500, the debts due him on open account at $2,500, and his property claimed as exempt at $200. His total debts and liabilities he scheduled as aggregating the sum of $10,364.50. These statements, made under his oath and in conformity to law, show the bankrupt's opinion of the value of his assets, and his estimate of the aggregate amount of his debts. Whilst he stated in his petition that he owed debts which he was "unable to pay in full," the facts stated in the schedules—facts which the statute required him to state—show that he was not insolvent, within its meaning. It is true that the record shows that the aggregate debts proven amount to the sum of $12,887.70, whilst the total money realized from the bankrupt's estate amounts only to the sum of $8,625, with additional assets, according to the statement of the trustee, of the value of probably less than the sum of $200, yet to be administered; but it is also true that, in the inventory of the bankrupt's stock of goods and store fixtures made and returned by the receiver shortly after the adjudication, this portion of his property was valued at the sum of $14,391.32, —a sum exceeding by more than a thousand dollars the aggregate indebtedness so proven.

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With all these facts before him, the referee finds no difficulty in reaching the conclusion that the bankrupt was not insolvent when he made the several payments to the nineteen creditors in the trustee's petition mentioned, and that the dividends of these creditors should now be paid to them. He accordingly submits herewith, marked "Decree," a draft of a decree so providing, to be entered by the court if your honor concurs in this opinion.

All of which is very respectfully submitted.

Wm. B. McIlwaine, for trustee.

Wm. & Henry Flegenheimer, Wm. R. McKanney, Hamilton & Mann, Davis & Davis, Bartlett Roper, Jr., Williams T. Davis, George Mason, and Thos. G. Watkins, for opposing creditors.

WADDILL, District Judge. The foregoing report of the referee is approved and adopted as the opinion of the court, and a decree of distribution may be entered in accordance therewith.

WORRALL v. DAVIS COAL & COKE CO. et al.

(District Court, S. D. New York. January 21, 1902.)

1. EVIDENCE—DOCUMENTS—SHIP'S LOG BOOK.
   It is doubtful if the mere inspection of a ship's log book by the adverse party against whom it is produced and sought to be used renders it competent evidence for the party who made it.

2. SHIPPING—CONSTRUCTION OF CHARTER—DUTY OF VESSEL TO PROVIDE AGAINST DAMAGE FROM USUAL METHOD OF LOADING.
   The owner chartered a steamship, by a time charter, to be employed in carrying lawful merchandise, for which she was warranted in every way fitted. The owner agreed to maintain her in a thoroughly efficient condition during the service, and it was stipulated that the hire should cease during time lost by reason of her becoming unfit, if exceeding 24 hours. The charterer subchartered her, and she was again subchartered for two voyages to carry cargoes of iron ore from Cuba to an American port. In the loading of the first cargo she received some slight injury, particularly to her hatch coamings and their appurtenances, and in loading the second time more serious injury, which rendered her unseaworthy, and made it necessary to make repairs after her discharge, which occupied five days. The owner brought suit against the charterer to recover charter hire during such five days, and the cost of the repairs, and by petition of respondent the subcharterers were both brought in. It appeared that the ore was loaded in the usual manner, by means of chutes, and that the injuries received, beyond those which were to be expected from the character of the cargo, which was necessarily hard on ships, resulted from the fact that the ship was not constructed in the best manner to receive such cargo, and that the master failed to take such measures as he might have done, and as were customary, to protect the deck and hatchways. *Held*, that the subcharterers were protected from liability for injuries due to such causes by the subcharters, which warranted the ship to be in every way fitted for that particular service; that the original charterer was also protected, the service being a lawful one, in which he was authorized by the charter to engage the vessel, and the ordinary risks from which were assumed by the owner, and hence it was not liable either for the cost of the repairs, or for charter hire during the time they were being made.

In Admiralty. Suit to recover charter hire and for damages to vessel.

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Convers & Kirlin, for libelant.

Wing, Putnam & Burlingham, for Davis Coal & Coke Co.

Butler, Notman, Joline & Mynderse, for the United States Shipping Co. and the Spanish-American Iron Co.

ADAMS, District Judge. The libel was filed herein to recover against the Davis Coal & Coke Company a balance of hire of the steamer, amounting to $1,043.96, under a charter party dated at New York the 28th day of June, 1900, between the owners of the steamer and the Davis Coal & Coke Company, called hereinafter, for convenience, the "Davis Company," and for the cost of certain repairs to the steamer, amounting to $770.37, alleged to have been rendered necessary by the manner in which she was employed. The Davis Company brought in the other respondents by petition.

The material parts of the charter party are as follows:

"Witnesseth, that the said owners agree to let, and the said charterers agree to hire, the said steamship, from the time of delivery, for about (3) three calendar months. Steamer to be placed at the disposal of the charterers at Baltimore, Md., * * * and being, on her delivery, ready to receive cargo, and tight, staunch, strong, and in every way fitted for the service, * * * to be employed in carrying lawful merchandise, including petroleum or its products, in cases, within the following limits: Any safe port in United States, West Indies, Mexico, and/or Carribbean Sea, as the charterers or their agents shall direct,—on the following conditions: (1) That the owner shall * * * maintain her in a thoroughly efficient state in hull and machinery for and during the service. * * * (4) That the charterers shall pay for the use and hire of the said vessel (£1.260) twelve hundred and sixty pounds British sterling per calendar month, commencing on and from the day of her delivery as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the owners (unless lost) at a port in the United States north of Hatteras. * * * (7) That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide. * * * (9) That the captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. That the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or otherwise complying with the same. (10) That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments. * * * (12) That the master shall be furnished from time to time with all requisite instructions and sailing directions. * * * (16) That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the vessel for more than twenty-four consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service. * * * (23) That the owners are to provide ropes, falls, slings, and blocks necessary to handle ordinary cargo up to two tons (of 2,240 lbs. each) in weight; also lanterns for night work. Charterers to provide necessary dunnage and shipping boards, but owners to allow them the use of the dunnage and shipping boards already on board the steamer."

The material parts of the libel are as follows:

"Third. Under and pursuant to the terms of this charter party the said steamship Acanthus was delivered to and taken over by the charterer at

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Baltimore on the 9th day of July, 1900, and entered upon the performance of the said charter party; being at the time classed 100 A1 at British Lloyd's, and tight, staunch, and strong, and in every way fitted for the service. During the life of the said charter party, and pursuant to orders received from the said charterer, she proceeded to Daiquiri, Cuba, where she arrived on August 11, 1900, and there loaded a cargo of iron ore from the Spanish-American Iron Company, to whom as the libelant is informed and believes the said steamer had been subchartered by the respondent. Solely by reason of the careless, reckless, and negligent manner in which the said cargo was put aboard by the said Spanish-American Iron Company, notwithstanding the protests of the master, and without fault on the part of the steamship or her officers, the said steamship Acanthus sustained some damage, particularly to her hatch coamings and their appurtenances. Subsequently, and during the life of the said charter party, and upon the orders of the said charterer, the said steamship Acanthus proceeded a second time to Daiquiri, Cuba, arriving there on September 25, 1900, and received a cargo of iron ore from the Spanish-American Iron Company, to whom, as the libelant is informed and believes, the said steamer had again been subchartered by the respondent. Solely by reason of the careless, reckless, and negligent manner in which the said cargo was loaded by the said company, notwithstanding the protests of the master, and without fault on the part of the steamship or her officers, the said steamship Acanthus sustained considerable further damage to the decks, coamings, and other parts of her structure.

"Fourth. The said steamship Acanthus duly proceeded to the port of Baltimore, to which she had been ordered with the said cargo so loaded, and on the discharge of the said cargo a survey was held upon the said vessel; and the master was informed by Lloyd's surveyor that said steamship Acanthus was unseaworthy, because of the aforesaid damages, and would not be allowed to leave port unless repairs were made to the portions of the vessel damaged as above set forth. That accordingly the said repairs were immediately begun, on the 5th day of October, 1900, and were concluded on the 10th day of October, 1900. That the cost of such repairs had been the sum of $750, and the cost of such survey $20.37, making in all $770.37, no part of which has been paid by the respondent, although due demand therefor has been made.

"Fifth. The said steamship Acanthus was redelivered to the owners in New York on the 19th day of December, 1900, but the respondent has withheld and deducted from the charter hire the sum of £215.5.0., or, in money of the United States, $1,043.96, as and for the time occupied in repairing the damage above set forth, and has refused to pay the same, although due demand therefor has been made.

"Sixth. The cost of such repairs and the charter hire for the time so withheld are a charge upon the respondents, and not upon the owners of the vessel, according to the terms of the charter party hereinbefore set forth, providing that the hire of the said vessel was to continue until her delivery to the owners in the like good order and condition in which she had entered on the performance of the charter party."

The respondent the Davis Company excepted to the libel, and answered (the immaterial parts being omitted) as follows:

"(1) Because it states no cause of action against the respondent, inasmuch as, under the terms of the charter party exhibited in this case, no hire was due during the time that the steamship Acanthus was unseaworthy, and while not in an efficient state to resume her service; and, further, that the alleged damage sustained by said steamer that made her unseaworthy is set forth to have been by the careless, reckless, and negligent manner in which the cargo was put aboard by the Spanish-American Iron Company (article 3), for whose actions this respondent is in no wise responsible.

"(2) In that it does not appear that on the 19th day of December, 1900, when the steamship Acanthus was redelivered to the owners in New York

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(article 5), the steamship was not in the like good order and condition as when originally chartered to the respondent.

"(3) That under clause 16 of the charter party, providing for 'damage preventing the working of the vessel for more than 24 consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service,' the respondent was entitled to withhold and deduct from the charter hire the sum of £215. 5s. ($1,043.96) as and for the time thus agreed to be off hire, and that no claim therefor can be made on this respondent under the terms of said contract.

"Without waiving the foregoing exceptions, but insisting upon all and every thereof, this respondent makes answer unto said libel as follows:

* * *

"Third. This respondent also admits that, on or about the 9th of July last, the said steamship entered upon the performance of said charter party, and was accepted by the charterer, by whom she was subchartered to the United States Shipping Company, a corporation of New Jersey, by whom said vessel was again let unto the Spanish-American Iron Company,—the same corporation named in the third article of the libel. This respondent further admits that it has now just learned, by the perusal of the libel herein, that on or about the 11th of August, 1900, while the Acanthus was loading a cargo of iron ore from said Spanish-American Iron Company, she received some damage, either through the manner in which the said cargo was taken on board, or from the unfitness and weakness of her hatch coamings to receive iron ore, but that no intimation thereof was ever given to this respondent, except by the filing of the libel herein. Further answering, this respondent admits that it did receive notice that on the second trip to Daiquiri the master did claim that his vessel had received certain damage in and about the hatches in the loading of said cargo, but as to the facts thereof this respondent has no knowledge, having no representative at Daiquiri, and having had no control over the said vessel, or over the parties then engaged in loading cargo on board thereof.

"Fourth. This respondent admits that the steamship arrived at Baltimore, and that on the discharge of her cargo it was notified that Lloyd's surveyor had pronounced the Acanthus unseaworthy because of the state of her hatches, and the coamings thereof, and would not allow her to leave port until they could be made efficient so as to carry general cargo. This respondent also admits that repairs were being made from the 5th to the 10th of October, 1900. This respondent has no knowledge as to the cost of such repairs, and it alleges that the same have been formally demanded from it, although such claim was presented to the respondent to be passed over to the Spanish-American Iron Company.

"Fifth. This respondent admits that the said steamship was redelivered to the owners in New York on or about the 19th of December, 1900; that it has not paid the charter hire during the time that the vessel was repairing and was off hire under the charter party."

The respondent the Davis Company also filed a petition, the material parts of which are as follows:

"Second. On the afternoon of December 24, 1900, the New York agent of this petitioner was served with process of this honorable court, citing it to appear on January 1st next, and answer unto a libel against this respondent filed by the above-named John P. Worrall, as master of the steamship Acanthus, for $770.37, costs of repairs made to said vessel, together with £215. 5s. 0d., or, in United States money, $1,043.96, as hire for the time occupied in repairing such damage. The petitioner is sued as charterer of said vessel, under a time charter annexed to said libel, bearing date the 28th day of June, 1900.

"Third. In said libel it is alleged (article 3): 'During the life of the said charter party, and pursuant to orders received from the said charter, she proceeded to Daiquiri, Cuba, where she arrived on August 11, 1900, and there loaded a cargo of iron ore from the Spanish-American Iron Company, to whom as libelant is informed and believes the said steamer had been subchartered by the respondent. Solely by reason of the careless, reckless,

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and negligent manner in which the said cargo was put aboard by the said Spanish-American Iron Company, notwithstanding the protests of the master, and without fault on the part of the steamship or her officers, the said steamship Acanthus sustained some damage, particularly to her hatch coamings and their appurtenances. Subsequently, and during the life of the said charter party, and upon the orders of the said charterer, the said steamship Acanthus proceeded a second time to Daiquiri, Cuba,—arriving there on September 25, 1900,—and received a cargo of iron ore from the Spanish-American Iron Company, to whom, as the libelant is informed and believes, the said steamer had again been subchartered by the respondent. Solely by reason of the careless, reckless, and negligent manner in which the said cargo was loaded by the said company, notwithstanding the protests of the master, and without fault on the part of the steamship or her officers, said steamship Acanthus sustained considerable further damage to the decks, coamings, and other parts of her structure.'

"Fourth. It is also in said libel alleged that by reason of such damage the said steamship was pronounced unseaworthy, and the repairs to the same were made in Baltimore from the 5th of October, 1900, to and including the 10th of October, 1900, and that the cost of the same was the sum of $770.37. Under the terms of the charter party to this respondent, copy of which is annexed to the libel, it was provided (clause 16) 'that in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the vessel for more than twenty-four consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service,' and that accordingly the respondent did withhold and deduct from the charter hire of the vessel the sum of £215. 5s. 0d. during the time of such repairs, and until the said steamship had been made seaworthy and fit to resume her service.

"Fifth. This respondent had no direct privity or knowledge in regard to the loading of said steamship at Daiquiri upon the times mentioned in the libel, and is unable to admit or deny the same. On both of said times the respondent had subchartered the said steamship unto the United States Shipping Company, a corporation of New Jersey, by whom the Acanthus had been again subchartered to the Spanish-American Iron Company,—the same corporation named in said libel,—who had sole charge of the loading and dispatch of the steamer Acanthus at Daiquiri on both occasions mentioned in the libel.

"Sixth. Upon receiving notice from the libelant that he claimed the steamship Acanthus had sustained damage while loading at Daiquiri, which notice was first communicated to the respondent on or about October 4th last, the respondent passed the same over to its subcharterer, the United States Shipping Company, and requested information concerning the same, to which the United States Shipping Company replied in writing, denying liability, and alleging that, if any such damage was sustained, the Spanish-American Iron Company was alone responsible, as appears by a copy of said letter hereto annexed, marked 'A,' to be taken as part of this petition.

"Seventh. These claims now put forward against this petitioner, having arisen primarily between the vessel and the said Spanish-American Iron Company, require that the company be brought in to defend this suit; and as this petitioner has no direct contract with the Spanish-American Iron Company, save by its subcharter to the United States Shipping Company, the United States Shipping Company is also a necessary party defendant herein. Thereby this court will have all parties before it, so that its decree herein may be effectual to do final and complete justice and settle the ultimate liability of the party in fault, if anything should be found due the libelant for the causes of action stated in the libel.

"Eighth. The Spanish-American Iron Company is a corporation of West Virginia, but transacts business in New York, at No. 26 Broadway, where it has an office and general manager. The United States Shipping Company is a corporation of New Jersey, but has its general office in New York, in the Produce Exchange Annex Buildings, where are also its president and executive offices."

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The United States Shipping Company, hereinafter called the "Shipping Company," answered the libel, the material parts being as follows:

"First. Heretofore, to wit, on or about the 27th day of December, 1900, the Davis Coal & Coke Company theretofore proceeded against upon the libel of John P. Worrall, master of the British steamship Acanthus, filed its petition in this court, praying that this respondent, to wit, the United States Shipping Company, might be cited to appear and answer unto said libel and unto said petition, which said prayer was granted by this court, and a citation issued accordingly. * * *

"Third. This respondent, upon information and belief, admits that the steamship Acanthus loaded a cargo of iron ore from the Spanish-American Iron Company in Daiquiri, Cuba, on or about August 11, 1900, and a second cargo of iron ore on or about September 25, 1900, as alleged in article 3 of the libel. This respondent alleges that at said times said steamer had been furnished to said Spanish-American Iron Company by this respondent, and not by the Davis Coal & Coke Company, as alleged in said article of the libel.

"Fourth. Further answering the libel herein, the respondent alleges that the authority under which it furnished the steamer Acanthus to the Spanish-American Iron Company for the first cargo of iron ore as aforesaid was derived from a charter party entered into on the 1st day of August, 1900, between the Davis Coal & Coke Company, therein named, as chartered agents for the owners of said steamship, and this respondent, in and by which said charter party it was provided, among other things: '(1) That said steamship, being warranted tight, staunch, and strong, and in every way fitted for the voyage, shall, with all convenient dispatch, proceed in ballast, unless otherwise permitted by charterers, to Daiquiri, Cuba, and there load, as customary, always afloat, as directed, in the customary manner, from the charterers' agents or shippers, a full and complete cargo of ore, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, fuel, and furniture, say about 3,800 tons,—no ore to be carried in the bunkers,—and, being so loaded, shall therewith proceed to Baltimore direct, and deliver the same as customary, in good order, where and as directed by the consignees, always afloat.' And the respondent further alleges that the authority under which it furnished the steamer Acanthus to the Spanish-American Iron Company for the second cargo of iron as aforesaid was derived from a charter party entered into on the 21st day of August between the Davis Coal & Coke Company, therein named, as chartered agents for the owners of said steamship, and this respondent. The said charter party for the second cargo of iron ore aforesaid contained the same clause above quoted, in identical language.

"Fifth. This respondent further alleges, upon information and belief, that the charter parties aforesaid executed by the Davis Coal & Coke Company, as chartered agents for the owners, were duly ratified by the owners of said steamship, and that, if the steamship Acanthus sustained any damage at the times mentioned in the libel, such damage was due to the fact that the steamship Acanthus was not properly constructed, equipped, and provided for the transportation of cargoes of iron ore, and that the hatchways, hatch coamings, angle irons, holds, and shaft tunnel were not protected, by the use of planks and dunnage, against injury.

"Sixth. Further answering the libel herein, the respondent alleges, upon information and belief, that the steamship Acanthus, at the times mentioned in the libel, was loaded in a suitable, proper, and customary manner, and sustained no damage other than ordinary wear and tear."

The Shipping Company also answered the petition, the material parts being as follows:

"Second. This respondent admits that the averments of the libel set forth and referred to in articles 3 and 4 of said petition are therein correctly stated.

"Third. This respondent admits the matters alleged in article 5 of said petition.

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"Fourth. This respondent has no knowledge as to when the notice of the libelant's claim for damages sustained by the steamship Acanthus was received by the Davis Coal & Coke Company; but it admits that said notice was passed over to this respondent, to wit, on or about October 6, 1900, with a request for information concerning the same. This respondent admits the other matters alleged in article 6 of said petition.

"Fifth. This respondent has no knowledge as to the matters alleged in article 7 of said petition, but admits those alleged in article 8 thereof.

"Sixth. This respondent has no knowledge as to whether all the premises of said petition are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court.

"Seventh. Further answering the petition herein, this respondent alleges that the charter parties to this respondent referred to in article 5 of the petition herein were executed by the petitioner, the Davis Coal & Coke Company, on the 1st day of August, 1900, as to the first cargo of iron ore mentioned in the libel, and upon the 21st day of August, 1900, as to the second cargo of iron ore mentioned in the libel, and that each of said charter parties provided, among other things, as follows: '(1) That said steamship, being warranted tight, staunch, and strong, and in every way fitted for the voyage, shall, with all convenient dispatch, proceed in ballast, unless otherwise permitted by charterers, to Daiquiri, Cuba, and there load, as customary, always afloat, as directed, in the customary manner, from the charterers' agents or shippers, a full and complete cargo of ore, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, fuel, and furniture, say about 3,800 tons,—no ore to be carried in the bunkers,—and, being so loaded, shall therewith proceed to Baltimore direct, and deliver the same as customary, in good order, where and as directed by the consignees, always afloat.'

"Eighth. This respondent further alleges, upon information and belief, that the steamship Acanthus was not adapted to the carrying of cargoes of iron ore, in that said vessel was constructed with between-decks, and otherwise improperly constructed for said purpose, and in that said vessel was improperly equipped and provided for the transportation of cargoes of iron ore, and in that the hatchways, hatch coamings, angle irons, holds, and shaft tunnel of said vessel were not protected, by the use of planks and dunnage, against injury; and the respondent thereupon avers that if, during the loading of the cargoes referred to in the libel, said vessel sustained any damage, said damage was due to the defects aforesaid.

"Ninth. Further answering the petition, this respondent alleges, upon information and belief, that at the times mentioned in the libel and in the petition the steamship Acanthus was loaded in a suitable, proper, and customary manner, and sustained no damage other than ordinary wear and tear."

The Spanish-American Iron Company, hereinafter called the "Spanish Company," answered the libel, the material parts being as follows:

"First. Heretofore, to wit, on or about the 27th day of December, 1900, the Davis Coal & Coke Company, theretofore proceeded against upon the libel of John P. Worrall, master of the British steamship Acanthus, filed its petition in this court, praying that this respondent, to wit, the Spanish-American Iron Company, might be cited to appear and answer unto said libel and unto said petition, which said prayer was granted by this court, and a citation issued accordingly. * * *

"Fourth. This respondent has no knowledge as to the delivery of the steamship Acanthus to the charterer, the Davis Coal & Coke Company, on the 9th day of July, 1900, or as to the classification or condition of said vessel at said time. It admits that on the 11th day of August, 1900, the steamship Acanthus arrived at Daiquiri, Cuba, and there loaded a cargo of iron ore from this respondent, to which said steamer had been subchartered; but it alleges that said steamer was chartered to this respondent by the United States Shipping Company, and not by the Davis Coal & Coke

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Company, as alleged in the libel. This respondent alleges that said vessel was loaded in a suitable, proper, and customary manner, and it denies that said loading was careless, reckless, or negligent, and it denies that any protest whatsoever was made by the master of said vessel. This respondent has no knowledge, nor any information sufficient to form a belief, as to any damage whatever sustained by said vessel at said time; and it alleges that no notice or claim that such damage had occurred was brought to its attention or to that of its officers or employés, prior to the filing of the libel herein. This respondent denies that, in case said vessel sustained damage at said time, said damage was without fault on the part of the steamship or her officers. This respondent admits that the steamship Acanthus proceeded a second time to Daiquiri, Cuba, arriving there on September 25, 1900, and that said vessel again received a cargo of iron ore from this respondent, to which said vessel had been subchartered by the United States Shipping Company as aforesaid. This respondent alleges that said vessel was loaded in a suitable, proper, and customary manner, and it denies that said loading was careless, reckless, or negligent, and it denies that the damage sustained by the vessel at said time, if any such damage there was, occurred without fault on the part of the steamship or her officers. This respondent alleges that no protest or complaint as to the manner of loading, or as to any damage sustained by the vessel, was made until about 3 p. m., when the master of said steamship stopped the loading and complained that his vessel was being damaged. After a detention of about forty minutes said loading was resumed, and was completed on the morning of the following day. This respondent denies that said vessel sustained any damage after 3 p. m. of September 25, 1900, but it has no knowledge as to whether any damage occurred on said day earlier than said hour. It alleges that such damage, if any, was trifling. * * *

"Seventh. Further answering the libel herein, the respondent alleges that the steamship Acanthus, upon the voyage mentioned in the libel, was furnished to it under the terms and provisions and subject to the conditions of an agreement or charter party entered into on the 30th day of September, 1897, between the United States Shipping Company, therein referred to as the 'Shipping Company,' and this respondent, therein referred to as the 'Mining Company,' in and by which said agreement or charter party it was provided, among other things: '(1) Ships to be furnished at regular intervals specified by the Mining Company, the latter giving the Shipping Company reasonable notice; and the Shipping Company warrants that all steamships to be employed in this traffic shall be tight, staunch, and strong, and in every way fitted for the voyage. The Shipping Company also agrees to furnish steamships, the construction of which is suitable for this trade, and approved by the Mining Company. * * * (19) Any damage suffered by a vessel in loading or discharging shall be borne by the vessel, unless due to negligence or fault on the part of the Mining Company.'

"Eighth. This respondent further alleges, upon information and belief, that the steamship Acanthus was not adapted to the carrying of cargoes of iron ore, in that said vessel was constructed with between-decks, and otherwise improperly constructed for said purpose, and in that said vessel was improperly equipped and provided for the transportation of cargoes of iron ore, and in that the hatchways, hatch coamings, angle irons, holds, and shaft tunnel of said vessel were not protected, by the use of planks and dunnage, against injury; and the respondent thereupon avers that if, during the loading of the cargoes referred to in the libel, said vessel sustained any damage, said damage was due to the defects aforesaid."

The Spanish Company also answered the petition, the material parts being as follows:

"First. This respondent admits the matters alleged in articles 1, 2, 5 and 8 of said petition.

"Second. This respondent admits that the averments of the libel set forth and referred to in articles 3 and 4 of said petition are therein correctly stated.

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"Third. This respondent admits that it has no direct contract with the Davis Coal & Coke Company, but as to the other matters alleged in articles 6 and 7 of the petition it has no knowledge, and it neither admits nor denies the same.

"Fourth. This respondent has no knowledge as to whether all and singular the premises of said petition are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court."

The question for consideration is whether the vessel was damaged at Daiquiri in such a manner as to entitle the libelant to repair her at the expense of the respondents, or of any of them. If that is determined in the affirmative, the hire continued during the period necessary for such repairs, and the libelant is entitled to recover in both respects; otherwise the steamer was off hire during the period, and there cannot be a recovery in either respect.

At the trial the question as to the admissibility of the steamer's log book was raised. It was offered by the libelant, objected to by the respondents, and received subject to the objection. It appears that its production was asked for by the proctors for the Shipping Company and the Spanish Company at the time of the taking of the deposition of the master of the ship. It was not then produced, but it was produced during the examination, which immediately followed, of the first officer, who kept it, and it was marked in evidence as an exhibit for the libelant. The log book was then subject to the respondents' use, if they wished to examine it; and it appears by the admission of the proctors for the Shipping Company and Spanish Company that they did examine it, but too late for cross-examination of the witnesses in connection with it. It is well established that a log book is not ordinarily receivable in evidence in favor of the persons concerned in making it, except in a few cases relating to seamen, provided for by statute. 1 Greenl. Ev. § 495. It is not necessary to decide here the vexed question whether an inspection by the other party after a production at the time of the trial upon a subpœna duces tecum makes it evidence for the one producing it. Edison Electric Light Co. v. U. S. Electric Lighting Co. (C. C.) 45 Fed. 55, 59; Smith v. Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138. I doubt if a mere inspection of a log book by the party against whom it is sought to be used makes it evidence for the party who made it, but, under the circumstances of the case, I have examined this one. I do not see that it adds anything to the testimony of the officers, but regard it as corroborative of their statements.

The steamer was delivered to the Davis Company in Baltimore on July 29, 1900, at 9 o'clock a. m. She was classed 100 A1; having passed her second Lloyd's survey in November, 1899, at South Shields, at which time some $2,000 were spent upon her. At the time of her delivery she was in good order, and all the hatch coamings were in good condition. She was accepted by the Davis Company as being in accordance with the contract, and subchartered by it to the Shipping Company, which subchartered her to the Spanish Company. The subcharters were in substantial conformity with the allegations of the pleadings, and thereunder the steamer made two trips to Daiquiri, Cuba, where she was loaded with iron ore,

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which she delivered in Baltimore, Md. Upon the occasion of her first loading at Daiquiri, the libelant claimed that some damage was done thereby to the angle irons of the hatch coamings, but it was not of serious consequence, and the claim therefor in the libel was not pressed upon the trial. Upon the second loading, however, it was claimed that such serious damage was done that the vessel was rendered unseaworthy thereby, and that in consequence the repairs which are the subject of dispute were necessarily made in Baltimore. On the other hand, the respondents contend that the vessel was not damaged in the loading beyond the ordinary wear and tear incidental to the loading of iron ore, and that the steamer's owners were bound to repair the damage, under the terms of the charter party. That there was considerable damage admits of no dispute. A survey was called in Baltimore for the purpose of ascertaining the extent of the damage, and Lloyd's surveyor recommended certain repairs to the coamings, etc., which he testified were necessary to render the steamer seaworthy. I accept this testimony as controlling upon the condition of the steamer, and conclude that the damage exceeded ordinary wear and tear. The question remains whether the excess of damage could have been prevented by the use of proper precautions on the part of the steamer at the time of loading. The surveyor mentioned (libelant's witness) testified that, even with coal cargoes, it was usual for a steamer receiving them to take preventive measures in the way of coverings for the coamings and other parts liable to injury, and that, iron ore being a harder cargo to receive, greater precautions were necessary in such cases. The loading at Daiquiri was from an ore dock projecting about 500 feet out into the bay. There were 12 ore pockets located near the outer or northerly end of the dock, about 20 feet apart. Each pocket had an iron chute, semicircular in shape, about 25 or 30 feet long, and 2½ feet wide, attached to it at its lowest point. These chutes were fed through openings in the pockets immediately over them. The pockets were at two elevations; a part having their orifices about 32–35 feet above the water; the other being tapped at an elevation of about 22–25 feet above the water. The ore passed through these pockets into the chutes, and thence into the vessel. A part of the loading apparatus was a large square sheet of iron, called a "devil," which was suspended by the ship's tackle in the center of the hatchway, opposite the mouth of each chute, and served to break the force of the fall of the ore, and to distribute it in the hold of the vessel. Ordinarily it was necessary to use the upper chutes first in loading, because the vessels would be too high out of the water for the use of the lower chutes, which were brought into requisition when cargo enough was taken in by means of the upper chutes to bring the vessel down in her bearings to the necessary depth for the lower chutes. The rise and fall of the tide at Daiquiri is only about 18 inches, so that no substantial difference is made by its state. The testimony is to the effect that this method of loading iron ore is generally adopted in this country and Cuba, and is one to which vessels undertaking to carry iron ore are expected to have in view when chartering for such trade. Notwithstanding precautions taken by vessels to pro-

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tect themselves, some slight damage to the hatch openings, amounting to $50 or $75, usually occurs on each occasion, and is borne by the vessel. I am inclined to the opinion that the excess of damage in this case, over ordinary wear and tear, was caused by the absence of proper precautions on the part of the vessel, or at least there is no satisfactory proof to the contrary, and not by any negligent loading on the part of the shipper, which used the ordinary method. During the loading the captain of the vessel complained to the shipper that the vessel was being injured, and the loading was temporarily suspended. The shipper's agent, in reply to the complaint, wrote to the master that they were "loading the vessel in the usual manner. In case you find any damage to her, please write me a letter detailing the same, and I will forward the same to our New York office, where such claims are adjusted." The master sent such a letter to the agent, and the loading then went on again without further objection on the master's part, who appears to have relied upon his complaint and the letters to cover any damage the vessel might receive. It would have been better if the master, being advised of the probability of damage by his experience on the first loading and what was taking place at the second loading, had endeavored to protect his vessel by suitable devices, such as covering the coamings and other places where the ore would strike by old chains, boards, and planks, as was sometimes done on vessels which were being loaded at this dock. And apart from the practice, ordinary care on the part of the vessel would have required some attempt to prevent the damage, which was entirely neglected. The duty of prevention belonged to the ship. Olivari v. Merchant (D. C.) 18 Fed. 554. Moreover, this steamer was of a different type from those usually employed in the trade, in that she had between-decks, which received the principal part of the damage, and probably had some effect in producing damage to the upper coamings and other parts, through a difficulty of distributing the ore by the usual means. Such fact was necessarily influential in exonerating the Shipping Company and the Spanish Company, which were entitled by their subcharters from the Davis Company to a vessel suitable for their trade. I find that they are not liable.

As to the Davis Company, it was entitled to the use of the vessel in "carrying lawful merchandise" within the limits in which she was to be used, and in subchartering for the iron trade it was acting within its legal rights. Such trade is a hard one on vessels, but iron ore is not unlawful merchandise. If the steamer's owners had wished to exclude such use of their vessel, they should have procured a stipulation to that effect to be included in the contract. The fact that the vessel would be subjected, by reason of the character of the ore and the method of loading, to more than the ordinary wear and tear incident to other cargoes, was known to the master when he entered upon the performance of the second voyage. It is evident that, from what he ascertained upon the first voyage, he did not then consider the proposed use of the vessel as improper, and it was incumbent upon him to take adequate means to adapt her to the contingencies of the trade. If he had done so, and endeavored by some

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proper means to avert or minimize the danger of damage, and it nevertheless had occurred, he would now be in a better position to assert the claim of negligent loading. I also find that there is no liability on the part of the Davis Company.

Libel and petition dismissed, with costs to the Davis Company against the libelant, and with one bill of costs to the Shipping Company and the Spanish Company against the Davis Company.

FIDELITY TRUST & GUARANTY CO. v. FOWLER WATER CO. et al.

(Circuit Court, D. Indiana. January 21, 1902.)

No. 9,677.

1. MUNICIPAL CORPORATIONS—POWERS—GRANTING FRANCHISE TO WATER COMPANY.

Under the law of Indiana, as settled by decision, the fact that a town is financially unable to construct a system of waterworks does not disable it from granting a franchise to a water company for the construction by it of such system for the benefit of the town and its inhabitants.

2. SAME—INDEBTEDNESS—CONTRACT TO PAY WATER RENTALS.

A contract by a city or town to pay hydrant rentals to a water company at stated times in the future does not create an indebtedness for the aggregate amount of such rentals, within the meaning of the provision of the constitution of Indiana limiting the indebtedness of such corporations.

3. SAME—CONTRACTS—DISCRETION OF COUNCIL.

In a contract between a city or town and a water company for the rental of fire hydrants, the number of hydrants to be furnished, the rental to be paid therefor, and the times and amounts of the several payments, are all matters which it is competent for the parties to agree upon, and as to which the discretion of the municipal authorities cannot be controlled by the courts, in the absence of fraud or such a gross abuse of discretion as to evince bad faith.

4. SAME—POWERS—PURCHASE OF PROPERTY SUBJECT TO MORTGAGE.

A municipal corporation, having no power to incumber its property by mortgage, in the absence of express legislative authority, is without power to purchase and hold property which is subject to a mortgage. Such a purchase, moreover, would create an indebtedness on the part of the corporation to the extent of the mortgage debt, although it did not obligate itself to pay such debt.

5. SAME—VALIDITY OF ORDINANCE—CREATION OF ILLEGAL INDEBTEDNESS.

A town in Indiana, having voted to construct waterworks, but being unable to do so without incurring an indebtedness beyond the constitutional limit, passed an ordinance granting a franchise to a water company to construct the works in accordance with certain specifications. It authorized the company to issue a series of bonds, maturing in from 1 to 30 years, and secured by a mortgage on the plant. It further contained a contract by which the company was to furnish a number of fire hydrants, for which the town agreed to pay a stipulated rental semiannually; the same to be paid directly to the trustee for the bondholders; such rentals being sufficient in amount to keep up the interest on the bonds and to pay the same as they matured,—and such provisions were printed on the back of the bonds. *Held* that, in the absence of fraud which would render the agreement to pay hydrant rentals invalid, neither the ordinance, nor the bonds issued in accordance therewith, were rendered invalid, as against bona fide purchasers, by a further provision of the ordinance giving the town an option to

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purchase the waterworks, subject to the mortgage, within 30 days after their completion, although the town had no lawful power to make such purchase, since the option created no obligation on the part of the town to purchase or to create an illegal indebtedness.

6. SAME.

The bonds having been issued and sold to bona fide purchasers, such purchasers were charged only with knowledge of such facts as were disclosed by the ordinance and records; and the contract by the town to pay hydrant rentals, on the strength of which the bonds were sold, being in itself legal and within the corporate powers of the town, the latter could not invoke to defeat such contract as against the bondholders a secret agreement between its officers and the water company that the town should exercise its option to purchase the works, in violation of law, nor the actual exercise of such option after the bonds were sold, by taking a conveyance of the works subject to the mortgage, but the bondholders had the right to have such conveyance adjudged illegal in so far as it affected their rights.[1]

7. EQUITY JURISDICTION—ENFORCING LEGAL DEMANDS—DETERMINING ENTIRE CONTROVERSY.

A town, having taken a conveyance of waterworks from a company which had previously executed a mortgage thereon to secure its bondholders, and having gone into possession, was a necessary party to a suit against the company to foreclose the mortgage; and a court of equity, having thus obtained jurisdiction of the parties and of the subject-matter, has jurisdiction in such suit to enforce a contract between the town and company, made prior to the issuance of the bonds, by which the town agreed to pay hydrant rentals directly to the mortgage trustee for the benefit of the bondholders.

In Equity. On exceptions to report of special master.

This is a suit in equity to procure the foreclosure of a deed of trust executed by the water company to secure the payment of bonds issued by it amounting to $30,000 The deed of trust covers all the tangible property, franchises, and rights of the water company. On June 17, 1895, an election was duly had and held by the qualified voters of the town of Fowler to determine whether or not the town should construct a system of waterworks, at which election 283 voted for, and 9 against, such proposed construction. The board of trustees advertised for bids for the construction of the proposed works, and three bids were received, namely, one for $37,800, one for $35,300, and one for $34,985. These bids were rejected; the board of trustees being of opinion, and so resolving, that the town was not financially able to construct the works. The board, on further consideration, determined that there was urgent need for a system of waterworks, and thereupon determined to negotiate a franchise on the best terms obtainable with the Fowler Water Company. On August 9, 1895, the board unanimously adopted an ordinance for the supply of wholesome water to the town and its inhabitants, and authorizing the Fowler Water Company to construct, maintain, and operate a system of waterworks therein.

The first section grants authority and permission to the Fowler Water Company to construct, maintain, and operate a system of waterworks in the town according to certain prescribed plans and specifications, and for that purpose permission is granted to use the streets, alleys, bridges, sidewalks, and public grounds for laying, placing, taking up, repairing, and connecting water mains, hydrants, pipes, and valves for the service of water. The rights, privileges, and franchises were vested in the water company for 50 years from and after the adoption of the ordinance, subject to the right of the town to purchase as hereinafter provided.

The second section provides that the water shall be wholesome in quality, and shall be pumped from tubular wells; that the pumps, engines, boilers, standpipe, engine house, and other buildings and machinery

[1] Bona fide purchasers of municipal bonds, see note to Pickens Tp. v. Post, 41 C. C. A. 6.

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shall be erected on ground within the corporate limits; that the pumping station shall be constructed of brick, practically fireproof, and the pumps shall be set as shown on the plans, or as directed by the consulting engineer; that the pumps shall have an aggregate capacity of not less than 1,000,000 gallons in 24 hours; that all mains and piping shall be cast iron, and tested under a pressure of 300 pounds to the square inch, and of various sizes, quality, and finish, as required by the plans and specifications; that all mains shall be laid in accordance with the plans and specifications, and joined in the most skillful manner, and placed where indicated on the plans and specifications; that the fire hydrants shall not be less than 49, and shall be placed as required by the plans, and shall be of modern standard style; that the standpipe shall consist of a steel reservoir 100 feet high by 12 feet in diameter, on a stone and concrete foundation; that the engines, boilers, pumps, and all other machinery, and all kinds of materials for the erection and completion of the waterworks system, shall be of the pattern and quality described in the plans and specifications, and all work shall be done in strict accordance therewith, and subject to the approval of the consulting engineer or superintendent.

The third section provides that the waterworks shall be completed and ready to be finally tested on or before December 1, 1895; that the water company shall furnish a bond in the sum of $10,000 for the completion of the works according to the plans and specifications, and to hold the town harmless from all damages by reason of the construction of the same.

The fourth section provides that the streets, etc., shall not be unnecessarily obstructed in constructing the works; that the streets, etc., shall be restored to their former condition, and that the water company shall hold the town harmless on account of the negligence of itself or its agents; that danger lights and temporary barricades shall be erected at night.

The fifth section provides that as soon as the works are completed the engineer or superintendent shall report to the board of trustees, and a final test shall be made; that if, on such test, the works comply with the test prescribed in the specifications, and if the work shall in all respects conform to the plans and specifications, the board of trustees shall accept the same, and a certificate to that effect signed by the president of the board of trustees, and attested by the town clerk, shall be delivered to the water company.

Section 6: "For the purpose of enabling said water company to realize a portion of the money with which to erect and complete said waterworks, said corporation may mortgage said entire water works plant, including the engines, pump-house and stand-pipe and real estate connected therewith, all machinery, mains and piping, and all other property forming a part of said water works system, including the rights and franchises of this ordinance, to secure a loan of said corporation not exceeding at any time within one year from the date of the completion of said water works, the sum of $30,000. But said company shall not alienate said plant otherwise except to the town of Fowler within one year from the date of the completion of the said water works plant according to said plan and specifications. But nothing herein nor in this ordinance shall be so construed as to make the town of Fowler liable for the payment of any portion of said $30,000 of bonds and mortgage."

Section 7: "In consideration of the furnishing of water for the hydrants hereinafter enumerated, and in further consideration of the benefits to accrue to the town of Fowler by the erection of said system of water works, and of the mutual covenants and agreements in this ordinance contained, the said town of Fowler agrees to rent and hereby rents from said Fowler Water Company, its successors or assigns, forty nine fire hydrants such as are described in the plans and specifications herein mentioned, for the period of twenty years beginning December 1, 1895, which hydrant rentals the town of Fowler hereby agrees to pay to the said Fowler Water Company, its successors or assigns, semi-annually, at the following rates: [Here follows a detailed statement of the amount of each semiannual payment.] And in case the said water company causes an encumbrance by mortgage to be placed upon its property to secure an issue of bonds for

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an amount not exceeding the sum hereinbefore mentioned, then the town of Fowler agrees to pay each and all of the hydrant rentals herein named during the existence of such encumbrance or mortgage directly to the trustees named in said encumbrance or mortgage. And in the event that hydrants are constructed on such water works system in excess of forty nine in number, said town agrees to pay an annual rental of forty dollars for each such additional hydrant so placed on the system; such additional hydrant rental to be payable semi-annually on June first and December first in each year to the said Fowler Water Company, its successors or assigns."

The eighth section provides that the water company shall keep the hydrants supplied with water, and keep them in good repair; that the chief of the fire department of the town shall have supervision of them, and shall cause them to be inspected and tested at any time, and, if he finds any defective, he shall give notice at once to the person in charge of the waterworks, and the water company shall at once put the same in repair.

The ninth section provides for the rates which may be charged to private consumers of water.

Section 10: "Said town shall annually, during said term hereinafter mentioned, levy and collect a tax sufficient to pay said hydrant rentals accruing said years; the said tax when collected shall be kept and known as the 'Hydrant Fund,' and shall be held inviolate and is hereby irrevocably pledged and appropriated for the payment of such hydrant rental in the manner herein provided. Provision to meet the requirements of this section shall be made in the annual appropriation bill."

Section 11: "The town of Fowler shall have the right, for the period of thirty days as hereinafter specified, to purchase said water works from the said water company; and in case the said town shall exercise the option hereby granted, said water company shall convey to said town said water works plant, together with all real estate, buildings, machinery, fixtures and piping connected therewith, and all the rights and franchises appertaining thereto, upon the terms and conditions following, to-wit: If said town shall exercise the said option within thirty days after said water works shall have been completed, tested, approved and accepted by said town as hereinbefore provided, said water company shall convey to said town by good and sufficient deed said water works plant, with all the real estate, buildings, machinery, tools, fixtures and piping connected therewith, and all the rights and privileges appertaining thereto, for the sum of four thousand dollars, such payment to be made at such time and in such manner as may be agreed upon between said town and said water company, but to be made on or before said town shall take possession of said water works. Said sale to be made subject to the encumbrance of any bonded indebtedness theretofore placed upon said plant by said water company as aforesaid, but free and clear from all liens, claims and charges other than said mortgage indebtedness and accrued interest thereon; said town shall covenant in said conveyance to it to keep said plant in good repair and operating condition. Said deed of conveyance shall recite that said conveyance is made expressly subject to said encumbrance and all its terms and conditions, but that said town does not assume the payment thereof."

The twelfth section provides for the acceptance by the water company of the ordinance within ten days from the date of its adoption.

The acceptance of the water company was duly executed and filed on August 14, 1895, together with the required bond, which was accepted and approved by the board of trustees of the town of Fowler on said date. The town became a stockholder in said water company, by subscribing for and taking $1,450 of its capital stock.

On September 2, 1895, the water company executed its deed of trust to the complainant to secure 60 negotiable bonds, in the sum of $500 each. These bonds were duly issued, and have passed into the hands of innocent holders for value, who were such owners and holders prior to November 9, 1895. The waterworks were completed on and before November 9, 1895, and on that date the same were duly tested and accepted by the town of Fowler; and a certificate showing their completion in all particulars

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as required by the plans and specifications, and their test and acceptance by the town, was duly issued and furnished to the water company. On November 9, 1895, the town exercised its option to purchase said waterworks, and on November 11th the water company executed to the town a deed of conveyance on the terms and conditions required by section 11 of the ordinance. The town has paid the first four of said installments of hydrant rentals in full to the complainant. These rentals were applied to the payment of the first four of said bonds and the interest coupons falling due prior to June 1, 1898. The town has made default in paying the hydrant rentals falling due June 1, 1898, and from thence hitherto. The town having defaulted in paying the rentals, the water company has been unable to pay any part of the principal and interest falling due on said bonds and coupons on and after June 1, 1898, and has wholly failed to do so. Thereupon the Fidelity Trust & Guaranty Company, on the request of the bondholders, filed its bill against the town of Fowler and the Fowler Water Company for the foreclosure of said trust deed. The bill alleges the execution of the deed of trust to the complainant, its acceptance of the trust, and the due recording of the deed of trust; that it secured the payment of 60 negotiable bonds, of $500 each, payable to bearer, at semiannual intervals from June 1, 1896, to June 1, 1915; that the bonds were negotiated, and are in the hands of innocent purchasers for value; that default has been made in the payment of the principal and interest which has fallen due on and since June 1, 1898; that the whole debt has been matured as provided for in the deed of trust; that the water company on November 9, 1895, without the knowledge or consent of the complainant or of the holders of any of the bonds, conveyed the waterworks to the town of Fowler, and the town immediately took, and still retains, possession of the same.

The answer need not be referred to, except as to those parts which assail the validity of the ordinance of August 9, 1895. It alleges that, as matter of fact, the ordinance was enacted and the contract entered into between the town of Fowler and the Fowler Water Company, and the bonds and mortgage were issued by the latter company, "in pursuance of a scheme, plan, and purpose entered into between said Fowler Water Company, its officers and agents, and the said town of Fowler, its board of trustees and agents, to procure, in violation of law and in defiance of the thirteenth article of the constitution of Indiana, the construction of a system of waterworks to be ultimately owned by said town of Fowler, and at the same time to evade the provisions of said article of the constitution forbidding the creation of a debt in excess of two per cent. of the taxable property of the town." It further alleges "that the said Fowler Water Company and the trustees and officers of the said town of Fowler formed, concocted, and contrived a scheme to enable the said town of Fowler to buy said waterworks plant and system, and ostensibly to pay therefor the sum of four thousand dollars, as recited in the deed of said Fowler Water Company to said town of Fowler, and to carry into effect the said scheme so contrived, formed, concocted, and carried into effect, in order to enable the said town of Fowler to evade and avoid the provisions of article 13 of the constitution of the state of Indiana, imposing a limit upon the power of a municipal corporation to incur any debt in excess of two per centum of the taxable property of such municipal corporation."

There was a general replication. The case was referred to a special master, who has made his report, to which the complainant has filed exceptions, assailing both findings of fact and conclusions of law. The language employed by the special master in his third conclusion of law raises a doubt as to whether he meant to hold that the ordinance of August 9, 1895, was void on its face, or whether he meant to hold that some plan or scheme outside of the ordinance renders it void. Other facts in the case, so far as material, will appear in the opinion of the court.

W. H. Latta, Rogers, Locke & Milburn, and Wood & Oakley, for complainant.

Miller, Elam & Fesler, Elliott, Elliott & Littleton, and Rollo R. Oglesbee, for defendants.

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BAKER, District Judge (after stating the facts). Whether or not any of the exceptions ought to be sustained must be resolved by the consideration and determination of three principal questions: First. Is the ordinance rendered invalid, as to the holders of the bonds, by what appears on its face, taken in connection with the recitals in the record of the board of trustees of the town of Fowler at and before the adoption of the ordinance, and its acceptance by the water company? Second. Is the ordinance rendered invalid by the subsequent purchase of the waterworks by the town of Fowler pursuant to the option reserved therein, or by any other subsequent act or acts of the board of trustees of said town? Third. If the ordinance, as between the holders of the bonds and the town of Fowler, is valid, may the court determine the amount now owing by the town of Fowler for hydrant rentals, and decree that said town pay the same to the complainant?

1. On June 17, 1895, pursuant to the petition of 171 freeholders therefor, the board of trustees of the town of Fowler caused an election to be held by the qualified voters of the town to determine whether or not the town should construct, own, and operate a system of waterworks. At the election there were cast 283 votes for, and 9 votes against, the construction of the proposed works to be erected and owned by the town. The board of trustees advertised for bids for said waterworks, and three bids were received for their construction, as follows: One for $37,800, one for $35,300, and one for $34,985. On consideration, all the bids were rejected; the board of trustees deciding that the town was not financially able to construct the waterworks. The board, on further consideration, determined and resolved that there was urgent need for a system of waterworks, and thereupon resolved to negotiate a franchise for their construction on the best terms obtainable. These are the only facts shown by the record of the board of trustees prior to the adoption of the ordinance. The water company on September 2, 1895, pursuant to the ordinance, issued 60 negotiable bonds, of $500 each, bearing interest coupons; the bonds and coupons payable to bearer at different times, as specified in said bonds and coupons, beginning June 1, 1896, and ending June 1, 1915. On the back of each bond was printed the list of payments of hydrant rentals to be made as provided in the ordinance, with the statement "that the town of Fowler, by an ordinance passed by its board of trustees, and approved August 9, 1895, agreed and bound itself to pay semiannually, on June first and December first of each year, rentals for forty-nine hydrants on the waterworks plant of the Fowler Water Company, in said town," in the sums specified in the ordinance. On the back of each bond was also indorsed the following statement:

"Such hydrant rentals to be paid by said town directly to the Fidelity Trust and Guaranty Company of Buffalo, New York, trustee, to be applied to the payment of the principal and interest of the series of first mortgage bonds of the Fowler Water Company, aggregating $30,000, of which series the within bond is one."

This last recited statement was attested on each bond by the signatures thereunder of the president and clerk of the board of

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trustees of the town of Fowler. The complainant and the holders of the bonds are chargeable with notice and knowledge of the foregoing facts.

But the fact that the town was financially unable to construct a system of waterworks did not disable it from granting a franchise to a water company for the construction by it of such system. This doctrine is too firmly settled in this state to be longer open to debate. City of Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; City of South Bend v. Reynolds, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795, and cases therein cited. No inference of fraud or wrongdoing can be drawn from the fact that the town, being financially unable to construct a system of waterworks, granted a franchise to the Fowler Water Company, authorizing it to erect such system for the benefit of the town and its inhabitants. It had, incontestably, the right to adopt an ordinance granting a franchise to the Fowler Water Company for that purpose, if it chose to do so, in the absence of fraud. Having, then, the right to adopt the ordinance, does the ordinance contain anything within its four corners showing a violation of the constitution or laws of this state? We will first examine the ordinance, omitting for the present the consideration of section 11. By a long line of decisions, beginning with City of Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416, and continuing unquestioned to City of South Bend v. Reynolds, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795, it has been uniformly held that an agreement by a city or town to pay, for water, light, or other thing pertaining to its ordinary and necessary expenses, a certain sum, annually or semiannually, out of its revenues to be raised by an annual tax levy, does not create a debt, within the true construction of article 13 of the constitution of this state. It is said in City of South Bend v. Reynolds, supra:

"It is settled in this state that if a city contracts for water, light, or other thing which pertains to its ordinary and necessary expenses, and agrees to pay for the same annually or monthly as furnished, such contract does not create an indebtedness for the aggregate sum of all the annual or monthly payments, because the debt for each year or month does not come into existence until it is earned."

The hydrant rentals agreed to be paid would not become an indebtedness until they had been earned. The evidence shows that the annual revenues of the town, if the tax levy had been made as it was agreed that it should be, would have been in excess of the amount of the semiannual hydrant rentals agreed to be paid. If the hydrants put in were no more than the needs of the town required, and if the rentals agreed to be paid therefor were reasonable, no reason is perceived why the town and the water company might not arrange the time and amount of such payments as would best subserve the interests of either party. It is said that the amount to be paid differs in different years, and that some of the semiannual payments are larger than others. That was a matter within the discretion of the board of trustees of the town, provided the rentals agreed to be paid did not exceed the revenues which might lawfully be ap-

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plied to their payment. Within these limits, the discretion of the board of trustees is uncontrollable by the court, in the absence of fraud or an abuse of discretion so gross as to evince bad faith. The power given to municipal corporations to contract for water is purely a business power, and the method of its exercise is discretionary. City of Valparaiso v. Gardner, supra. The law is firmly settled that discretionary powers vested by law in municipal corporations are not subject to judicial control, except in cases where fraud is shown to exist, or the discretion is being grossly abused, to the oppression of the citizen. Seward v. Town of Liberty, 142 Ind. 551, 42 N. E. 39. The making of a contract for the supply of water was a matter delegated to the board of trustees of the town of Fowler, to be exercised according to its discretion; and in the absence of fraud, or of an abuse of discretion so gross as to evince bad faith, its action, while within the authority delegated to it, is not subject to review by the courts. City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 126, 127, 31 N. E. 573, 16 L. R. A. 485.

The special master has found that more hydrants were rented than the needs of the town required, so as to create a fund sufficient to pay the mortgage indebtedness, and that this was a mere device to evade the constitutional prohibition against creating a debt in excess of 2 per cent. of the value of the taxable property of the town. The court has read the evidence, and is of opinion that it does not warrant the special master's conclusion. The question of how many hydrants were needed by the exigencies of the town was one to be determined by the board of trustees according to its judgment, in the absence of fraud. There is no evidence of fraud, nor does the evidence show any gross abuse of discretion. The most that can be gathered from the evidence is that there was a difference of opinion on this question. The same observation is true as to the amount agreed to be paid for hydrant rentals. In the case of Seward v. Town of Liberty, supra, it was shown that the board of trustees of the town had entered into a contract agreeing to take and pay for gas three times the amount for which the same company furnished gas to its private consumers, and it was held that this neither showed fraud, nor such gross abuse of discretion as would justify judicial interference. No such case of abuse of discretion is shown here. Indeed, as appears from an examination of the answer, no charge of fraud is made against the board of trustees; nor is there shown to have been any abuse of discretion, having regard to the present and future needs of the town. The amount agreed to be paid for hydrant rentals is shown to be about the same as was paid in other towns at the time the ordinance was adopted. In the opinion of the court, nothing is found in the ordinance to invalidate it, unless it be found in section 11, and in what was done under and pursuant to that section.

And, first, did the section, prior to the exercise of the option, render the ordinance invalid and unenforceable? At the time the ordinance was adopted, as well as at the time when the option was exercised, the town of Fowler had no authority or power to purchase the waterworks subject to the incumbrance of $30,000. If the town had

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owned the waterworks free of incumbrance, it could not have executed a valid mortgage upon them. No municipal corporation has any power or authority to incumber its property by mortgage, in the absence of legislative authority so to do. If a municipal corporation should accept a conveyance of property subject to a mortgage, it must pay off the mortgage debt, or lose the property. The purchase of the waterworks by the town of Fowler, subject to the incumbrance created by the deed of trust, would create an indebtedness to the full extent of such incumbrance. Mayor, etc., v. Gill, 31 Md. 375; Waterworks Co. v. Trebilcock (Mich.) 58 N. W. 371; Earles v. Wells, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 886; Brown v. City of Boston (Mass.) 60 N. E. 934. It is apparent that the town of Fowler on August 9, 1895, as well as on November 9, 1895, was constitutionally disabled to purchase the waterworks from the Fowler Water Company. Did such disability render the other provisions of the ordinance invalid and unenforceable, prior to the exercise of such option? This is a question of municipal power, to be determined by the constitution and laws of this state.

It is settled by the decision of the supreme court in City of South Bend v. Reynolds, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795, and authorities there cited, that an option to purchase, contained in an ordinance granted by a city indebted at the time to an amount which disabled it to purchase, does not impair the validity of the ordinance in other respects. In this case the city of South Bend, by an ordinance duly accepted, entered into a contract with James Oliver which provided that he should erect a suitable building for a city hall, at a cost not exceeding $75,000, upon a lot owned by the city. The building, when completed, was to be leased to the city for 12 years, with a right of renewal, at an annual rental of $7,200, which the city agreed to pay annually. Oliver gave and the city reserved an option to purchase the building at the termination of the lease, or at any time during the term. Reynolds, a taxpayer, brought suit against Oliver and the city to enjoin them from carrying the ordinance into effect. It was held that the contract for the payment of rent was valid. The court said:

"The only contract of the city is to pay an annual rent of $7,200, which is admitted to be only a fair rental value for said building. * * * Under said contract the city is under no obligation whatever to pay anything for the erection of said building, or to purchase the same when erected. If it should attempt to exercise its option to purchase said building, but cannot do so without violating the constitutional limitation as to becoming indebted, it may be enjoined from exercising such option. No facts are alleged in the complaint showing that the current revenues of the city will not be sufficient to pay the indebtedness for rent under said contract each year when the same comes into existence, including all other expenses for which the city is liable. The allegations of the complaint do not show, therefore, that said contract creates any indebtedness in violation of the constitution."

The same doctrine is maintained by other courts of high authority. In Stedman v. City of Berlin (Wis.) 73 N. W. 57, the ordinance contained an option authorizing the city to purchase the system of waterworks within six months after its completion, and provided that the amount to be paid should be the amount of the bonded indebtedness

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of the water company, and, in addition thereto, the amount which the enlargement of the plant should cost in excess of such bonded indebtedness. In a suit brought by a taxpayer of the city to enjoin the carrying out of the contract, and to set aside the ordinance on the ground that it was beyond the power of the city to enact the same, because thereby a debt was created in excess of the constitutional limit, it was held that the contract to pay rent for the hydrants was valid and enforceable, notwithstanding the option reserved. After deciding that the contract for the payment of annual hydrant rentals did not create a debt, but was only a current expense to be paid as the water was furnished, the court held that the option clause in the ordinance created no liability and imposed no obligation. The court said:

"It is clear that the city has not exceeded its constitutional limit to contract indebtedness. The city is under no obligation to buy the waterworks constructed under the franchise in question. It has simply stipulated for an option to buy the same on the terms stated, as it may find it prudent or advantageous for it to do so or not. It may decline to purchase, whenever the proper time for that purpose arrives, and this will put an end to the entire matter."

To the same effect is the case of Water Co. v. Woodward, 49 Iowa, 58. There, as here, it was insisted that the stockholders of the water company were not required to pay anything; that the waterworks were in fact constructed with bonds, or the proceeds thereof; and that the water company did not contribute anything for the purpose of construction. It was further urged there, as here, that the ordinance attempted to do by indirection what could not be done directly, and thus to evade the constitutional limitation on the power of the town to create an indebtedness. We say, as was said by the supreme court of Iowa:

"If this be conceded, and yet by the means adopted no debt is incurred or obligation assumed by the city which is illegal, it is difficult to see why the means adopted are unconstitutional."

It follows, therefore, that the reservation by the town of an option to buy the waterworks within 30 days after their completion and acceptance did not render the ordinance invalid or unenforceable.

Nor is there anything disclosed on the face of the bonds, or in the indorsement on their back, which would impart notice of the invalidity of the ordinance or of the trust deed or of the bonds. Such negotiable bonds, in a certain sense, are the representatives of money, and freely pass by delivery in the markets of all commercial countries. To accomplish this purpose, the holder of a perfected bond must be deemed to be the true owner, and be able to invest an innocent purchaser for value and before maturity with an unimpeachable title. The title of a bona fide holder of such bond ought to stand on as secure a foundation as that of a person who receives a bank note in the ordinary course of business. Any other doctrine would undermine the very structure of commercial law, and shake the foundations of such paper credits.

The certificate of the president and clerk of the town of Fowler indorsed upon the bonds constituted a representation of the validity

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of the contract to pay rent, and that such rent would be applied to the payment of the principal and interest of the bonds. The town ought not now, after money has been paid to the waterworks company on such bonds on the faith of such representations, to be permitted to repudiate them. Goodman v. Simonds, 23 How. 343, 15 L. Ed. 934.

2. Is the ordinance rendered invalid, in so far as the town of Fowler has contracted to pay semiannual hydrant rentals, by the subsequent purchase of the waterworks pursuant to the option reserved, or by other subsequent acts of its board of trustees? The only act set up in the answer subsequent to the adoption and acceptance of the ordinance, material to be considered, in addition to the purchase of the waterworks, is the passage of an ordinance by the board of trustees of the town on August 27, 1897. This ordinance provided for the issue of $9,000 of funding bonds for the purpose of raising money with which to discharge the outstanding indebtedness of the town incurred in the payment of the cost of constructing, acquiring, extending, and equipping the waterworks. The bonds were executed and delivered to Farson, Leach & Co. at their office in Chicago, where the same were executed by the board of trustees of the town of Fowler, who were there present for that purpose; and said bonds were then and there sold to Farson, Leach & Co. for their par value, and the purchase price was received by said town. So far as the rights of the bondholders of the water company are concerned, this transaction is wholly immaterial. Nothing could be done by the board of trustees after the bonds had been issued and had gone into the hands of innocent holders for value which could affect or impair their validity. The purchasers of the bonds were not bound to look beyond the ordinance and the records of the town leading up to its adoption. The town is estopped to set up any secret contract or understanding between it and the water company dehors the ordinance and the records of the town relating to its adoption. The purchasers of the bonds had the right to act on the faith that the ordinance spoke the truth, and that no undisclosed fraudulent plan or scheme lurked in ambush to entrap the unwary investor. No evidence was admissible to show that there existed between the board of trustees and the water company some secret and corrupt plan or scheme outside of the ordinance. To permit such evidence against innocent purchasers of negotiable bonds would be to offer a premium on fraud, and open wide the door to successful swindling.

Nor does the exercise of the option by the town to buy the waterworks, when the constitution forbade it, invalidate the contract or the grant contained in the ordinance. In Hynds v. Hays, 25 Ind. 31, 36, 37, it is said:

"It is, we believe, well settled that when a party has contracted to perform anything, and an illegal act is included therein, that he shall nevertheless be held to perform so much of his contract as it is lawful to perform, if it can be separated from that part which is illegal. In other words, so far as the contract is lawful it will be supported, but beyond that the parties will be left without aid. But if the contract be of such a nature that no separation can be made between the legal and illegal

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stipulations, then the whole will be held void, and no action can be maintained upon it."

In the present case the contract to pay the hydrant rentals is perfectly valid and legal, and is in no wise dependent upon or connected with the exercise of the option to buy the waterworks. It is entirely practicable to separate the contract to pay rentals, which was lawful, from the option to buy, which was vicious. It is difficult to see how a contract valid and enforceable before the exercise of the option to buy can be rendered invalid by the unlawful act of the town in attempting to purchase. The bondholders had the right to assume that the town would exercise the option to buy in good faith, and would not attempt to do so when it knew the constitution prohibited it from making a lawful purchase. It may be that, as between the town and the water company, the conveyance would not be set aside by a court of equity, at the suit of the water company, on the ground that each party was in pari delicto. The complainant and the bondholders, however, are in no wise implicated in the unlawful act, and they have a right to have the conveyance of the waterworks adjudged illegal. The town of Fowler can claim no advantage or benefit, as against the complainant and the bondholders, by reason of its receiving a conveyance of the waterworks pursuant to the option reserved in the ordinance.

3. May the court in this suit ascertain and determine the amount of the hydrant rentals due and owing by the town of Fowler to the complainant, and decree the payment of the same? It is contended that the right to the rentals grows out of contract, and that their recovery must be sought in an action at law. As a general proposition, this contention is well founded, but is it applicable here? The title of the waterworks stands of record in the town of Fowler. The town is in the actual possession of the tangible property covered by the deed of trust. It is therefore not only a necessary, but an indispensable, party to a suit for the foreclosure of the trust deed. A decree of foreclosure against the water company alone would not enable the purchaser at the foreclosure sale to obtain possession of the waterworks without further litigation against the town. The complainant was therefore under a necessity to make the town of Fowler a party defendant to the bill to procure an effective decree of foreclosure; and in such case it is according to the established course of procedure, in order to avoid multiplicity of suits and to prevent expense and delay to the parties, to proceed and give such final relief as the circumstances of the case may demand. It is not to be overlooked that the town covenanted to pay the hydrant rentals directly to the complainant. In Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187, an agreement to insure had been entered into between the parties, but the policy had not been issued by the company. Upon the happening of a loss the assured filed a bill praying that the company be decreed to pay the loss, or for such other relief as the complainant might be entitled to. The court maintained jurisdiction, saying:

"No doubt, a count could have been framed upon the agreement to insure so as to have maintained an action at law. But the proceedings would

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have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy either before or after the happening of the loss; and, being properly in that court after the loss had happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand."

In the case of Ober v. Gallagher, 93 U. S. 199, 206, 23 L. Ed. 829, 831, it is said:

"Having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief."

See, also, Sunflower Oil Co. v. Wilson, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025.

This court having acquired rightful jurisdiction of the town of Fowler and of the subject-matter, it will make that jurisdiction effectual by granting complete relief, and will not remit the complainant to an action at law.

The exceptions of the complainant to the findings and conclusions of the special master are sustained. A decree may be prepared in conformity with this opinion.

JOHN HANCOCK MUT. LIFE INS. CO. v. HOUPT.

(Circuit Court, W. D. Pennsylvania. August 14, 1901.)

1. REFERENCE—FINDINGS OF MASTER—REVIEW.
   Findings of a master on matters of fact are not to be disturbed unless clearly in conflict with the weight of evidence.
2. LIFE POLICY—CANCELLATION—MATERIAL MISREPRESENTATIONS.
   Where a life policy provides that it shall be void if any of the statements in the application are untrue, and the applicant expressly warrants that all his statements are true, but the application contains material misrepresentations as to his health and as to the pendency of applications for insurance with other companies, etc., which misled the company, and induced the issuance of the policy, and which are apparently intended for that purpose, the company is entitled to have the policy canceled on bringing suit within the proper time, especially where, even if the misrepresentations are not intentional, the policy, when delivered, plainly discloses the untruthfulness of the representations.
3. SAME—KNOWLEDGE OF MEDICAL EXAMINER—EFFECT.
   The fact that the physician who makes the medical examination has knowledge of the untruthfulness of the representations will not affect the company's right to the cancellation of the policy, he not having any power to enter into a contract of insurance or to make a waiver.
4. SAME—INCONTESTABLE CLAUSE—EFFECT.
   A provision in a life policy that it is incontestable after two years cannot affect a suit by the company to obtain its cancellation, brought within three months from its date, the company's rights depending on the facts as existing at the filing of the bill.

In Equity.

E. N. Willard, for plaintiff.

J. B. Woodward, for defendant.

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ACHESON, Circuit Judge. This suit was commenced on October 21, 1898. The bill is for the cancellation of a policy of insurance for $10,000, dated July 29, 1898, and on that day issued by the plaintiff to the defendant upon the life of the latter, on a written application dated July 15, 1898, made and signed by the defendant. The policy recites that the insurance is made "in consideration of the representations and statements made in the application for this policy, which are referred to and made a part hereof," and stipulates that, "if any of the statements in the application for this policy are in any respect untrue, this policy shall become void, except as hereinafter agreed," and that the "policy shall be incontestable after two years from its date, except for nonpayment of premium, or military or naval service in time of war." Accompanying the application were questions propounded by the medical examiner to the applicant, the latter's answers to the same, and the following stipulation thereunder, subscribed by the applicant:

"I hereby warrant that all the statements and answers made by me above are complete and true. I agree that there shall be no contract of insurance until a policy shall have been issued and delivered, and the first premium thereon paid, while I am in good health; and, if said policy be issued, this application, with answers made to the medical examiner, shall be a part thereof."

A true copy of the questions by the medical examiner and the applicant's answers thereto were plainly printed and written on the reverse side of the policy as issued and delivered. The ground for the cancellation of the policy alleged in the bill is that certain specified representations and statements made by the defendant in his said application and answers to the medical examiner, material to the risk, and upon the faith of which the policy was issued, were untrue, and were known by the applicant to be false when made.

After the cause was at issue, and at the instance of both parties, and in pursuance of a written stipulation signed by their counsel, the court referred the case to a master named by them. The order appointing the master did not expressly define his powers, but throughout the proceedings before him both parties acted upon the theory that he was authorized to hear and decide all questions of fact and law, and each party requested the master to make findings of fact and law in accordance with propositions submitted by them respectively. In the main, the findings of the master were in favor of the plaintiff, and he has recommended a decree in accordance with the prayers of the bill, canceling the policy in question. The master found and has reported, among other things, that "the defendant was not fairly insurable, and this fact was known both to him and to the examining physician"; that "the application and medical examiner's report signed by the applicant contained misstatements calculated and intended to, and which did in fact, deceive and mislead the company's officers"; that, "had the questions of the application been truthfully or fairly answered, the policy would not have been issued"; and that on "October 11, 1898, promptly on discovery of the misrepresentations, and within three months from the date of the original application, plaintiff tendered the defendant the return

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of the premium paid." Specifically answering certain of the plaintiff's requests, the master found thus:

"In his application the defendant stated as follows:

" 'The only insurance on my life is as follows: New England, $15,000; Northwestern, $10,000; Mutual Life, New York, $10,000; State Mutual, $20,000; Ætna, $10,000.' He further stated in his application as follows: 'I have never made an application to insure my life to any company nor agent upon which a policy has not been issued, nor is there one now pending, unless so stated above.' He further stated as follows, 'Have applied to State Mutual for $10,000 additional,' in his declaration to the medical examiner. Answer. I so find and report."

"That said answer [statement] was untrue, and at the time it was made, on July 15, 1898, the defendant had an application pending, which he made to the Phœnix Mutual Life Insurance Company of Hartford, Conn., for insurance on his life in the sum of $10,000 on June 29, 1898, which was received at the office of the Phœnix Mutual Life Insurance Company, in Hartford, Conn., on July 6, 1898, and rejected August 8, 1898. Answer. I so find and report. The date of rejection, however, was August 6th."

"That question 11a, put by the medical examiner in his question, was as follows: '(11a) Have you been obliged to consult a doctor at any time during the last ten years? If so, when, and for what?' To which the defendant answered, 'Pneumonia, 1½ years ago.' Answer. I so find and report."

"That said answer was false and misleading, and the defendant had consulted Dr. F. H. Bosworth, of New York, a specialist in throat diseases, in the month of April, 1897, and from that time to October 1, 1898, for a disease of the throat which the doctor pronounced 'perichondritis of the cricoid cartilage of the larynx.' That he consulted Ernest U. Buckman and Dr. L. H. Taylor, both specialists in throat diseases, of the city of Wilkesbarre, Pa., for the same disease, from April, 1897, to November, 1898. That he was treated for throat disease by these physicians in the month of April, 1897, and every month thereafter until November, 1898, from two to ten times a month, and they treated him by sprays, applications to the throat, and by applying electricity to the throat externally. Answer. I so find and report."

"That the defendant was also asked by the medical examiner this question: '(11b) When, and for what, did you last consult a doctor?' To which the defendant answered: 'As above' (which above answer was 'pneumonia, 1½ years ago'). That said answer was false and misleading, as the uncontradicted evidence is that he consulted and was treated for disease of the throat by Drs. Bosworth, Taylor, and Buckman, from April, 1897, to November, 1898. Answer. I so find and report."

"That the defendant was also asked by the medical examiner this question: 'Are you now under a doctor's care? If so, for what?' To which the defendant answered, 'No,' which answer was false and misleading, according to the testimony of Drs. Bosworth, Taylor, and Buckman. Answer. I so find and report."

"That the thirteenth question put by the medical examiner to the defendant was as follows: 'Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued, or is any now pending? If so, give full particulars.' To which the defendant answered, 'Have applied to State Mutual for $10,000 additional,' which answer was false, and there was an application by the defendant for a policy of $10,000 upon his life pending in the Phœnix Mutual Life Insurance Company of Hartford, Conn., dated June 29, 1898, received by the Phœnix Mutual on July 6, 1898, and rejected on August 8, 1898. Answer. I so find and report, except that the date of rejection was August 6th."

"Question 18 put by the medical examiner to the defendant was as follows: 'Have you ever had or been predisposed to any of the following diseases or infirmities? If so, state the full particulars, giving dates, severity, duration, nature, and number of attacks.' Among the diseases then inquired about was this: 'Have you ever had or been predisposed to

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disease of the throat?' To which the defendant answered, 'No, except pneumonia, above.' That said answer was false. Answer. I so find and report."

"That the plaintiff was induced to issue its policy, No. 56,098, insuring the defendant's life, by false declarations and representations made to it by the defendant as to the state of his health and medical attendance. Answer. I so find and report."

"That, had the defendant stated the truth in his application and in his answers to the questions put to him by the medical examiner as to his previous health and medical attendance, the policy would not have been issued. Answer. I so find and report."

"At the time M. B. Houpt made his application to the plaintiff he knew he had disease of the throat; he knew that he had consulted and been attended by Drs. Bosworth, Taylor, and Buckman, specialists in throat diseases, for diseases of the throat; and he knew that he had had illness and disease other than as stated by him in his application and in his answers to the questions put to him by the medical examiner. Answer. I so find and report."

"From April, 1897, to and including July 15, 1898, the defendant had perichondritis of the cricoid cartilage of the larynx. Answer. I so find and report."

"Perichondritis of the cricoid cartilage of the larynx is a disease of the throat, and tends to shorten life and increase the risk of loss in the matter of life insurance. Answer. I so find and report."

"The concealment of the fact by the defendant that he had consulted and been attended by Drs. Bosworth, Taylor, and Buckman for throat disease was the concealment of a fact material to the risk. Answer. I so find and report."

"The concealment of the fact by the defendant, on July 15, 1898, that he had an application pending in the Phœnix Mutual Life Insurance Company of Hartford, Conn., for a policy of $10,000, on his own life, was the concealment of a material fact. Answer. I so find and report."

"That under all the evidence in this case the answers of the defendant to the questions put to him by the medical examiner, Nos. 11 a, b, and c, 13, 18, and 19, were made with actual intent to deceive the plaintiff. Answer. From a careful consideration of the evidence, I believe this to be so. I so find and report."

"The policy, which the defendant read upon its delivery, contained this clause: 'No person except the president or secretary is authorized to make, alter, or discharge contracts, or waive forfeiture.' Answer. I so find and report."

To the report and findings of the master the defendant filed exceptions, and, accordingly, the cause came on for final hearing. The case, however, has been considered by the court as well on the pleadings and proofs as on the report of the master and the exceptions to his findings. Now, it is settled that the findings of a master upon matters of fact are not to be disturbed unless clearly in conflict with the weight of the evidence. Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289. No such clear conflict is apparent here. Certainly there was evidence to sustain all the findings of fact here excepted to, and I am not convinced that the determinations of the master were against the weight of the evidence in any essential particular whatever.

In the brief of the defendant's counsel it is said:

"It is not denied that the application contained misrepresentations, and that the misrepresentations were material to the risk. It is strenuously denied, however, that they were made by the defendant with intent to deceive the plaintiff."

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But, under the circumstances, and having regard to all the evidence, it is hard to acquit the defendant of positive bad faith. I cannot say that the master went too far in holding, as he has done, that the defendant actually intended to deceive the plaintiff.

It does not help the defendant's case that the medical examiner, who acted in this one instance, was informed or had knowledge of what the facts were. The medical examiner was not authorized to enter into a contract of insurance, or to make any waiver. The defendant well knew that his application and accompanying answers to the questions of the medical examiner were addressed to the insurance company, and were to be submitted to its officers as the basis of the proposed contract of insurance. He subscribed his application and the said answers, and must be taken to have known the contents thereof. He is not to be heard to assert the contrary under the circumstances of this case. Moreover, he expressly warranted the truth of his statements and answers as subscribed by him. Furthermore, aside from the warranty, his misrepresentations were most material, and, in fact, misled the plaintiff, and induced it to issue the policy. Still further, even if it could be believed that the defendant did not originally know what his answers stated, the policy, when delivered to him, plainly disclosed his untruthful answers, and he could not, in good faith to the plaintiff, hold the policy. Insurance Co. v. Fletcher, 117 U. S. 519, 534, 6 Sup. Ct. 837, 29 L. Ed. 934. Under the findings of fact by the master and the proofs, the defendant is without any solid ground upon which to place a defense to this bill.

A word as to the suggestion made by the defendant's counsel touching the effect of the clause providing that the policy shall be incontestable after two years from its date. That clause, and the authorities cited under this head, plainly have no application to this case. This suit is for cancellation of the policy, and was brought within two years—indeed, within three months—after its date. The suit proceeded upon the ground that there never was a valid contract of insurance, and that the policy was fraudulently obtained. Of course, the case is to be determined upon the facts as they existed at the date of the filing of the bill.

The exceptions to the master's report must be overruled, and his findings of fact confirmed. Let a decree be drawn in favor of the plaintiff in accordance with the recommendation of the master.

AMERICAN SCHOOL FURNITURE CO. v. J. M. SAUDER CO. et al.

(Circuit Court, E. D. Pennsylvania. January 22, 1902.)

No. 24, Oct., 1900.

PATENTS—INFRINGEMENT—COMBINATION.

A claim for a combination is not infringed by another combination in which one of the described or specified elements of the patented combination is omitted without substitution of any equivalent thereto.

On Final Hearing.

For former opinion, see 106 Fed. 731.

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J. B. McPHERSON, District Judge. This case presents an unusual situation. Although it is a suit charging the infringement of a patent, the defendants admit that the patent was for a useful invention, and that it had not been anticipated. The only issue is infringement, and even upon this point the defendants have taken no testimony, relying wholly upon the alleged weakness of the complainant's case. Unusual as the facts may be, however, an examination of the evidence has satisfied me that the defendants' course was justified, and that the charge of infringement has not been made out. The patent in suit is in no sense a primary patent. It is for improvements in adjustable school desks and seats, and consists essentially in a combination of old elements, as will be seen by an examination of the sixth and seventh claims of the patent, which are the only two claims involved in this controversy:

"(6) In an adjustable desk, the combination with the legs or standards, each provided with a slot, of a rack-bar on one side of said slot, the desk proper having depending arms adapted to bear against the legs or standards, a rod connecting said arms and provided with screw-threaded ends, a hollow clamping-nut on each of said ends, a hollow shaft on the rod, and a pinion on each end of the hollow shaft and engaging the rack-bars of the slots, and adapted to bear against the legs or standards, when the clamping-nuts are tightened; all said parts substantially as and for the purposes described.

"(7) In an adjustable desk, the combination with the legs or standards, each provided with a slot, of a rack-bar on one side of said slot, the desk proper having depending arms adapted to bear against the legs or standards, a rod connecting said arms and provided with screw-threaded ends, a hollow shaft on said rod, a blind nut on one end of said rod and secured to said hollow shaft, a pinion on each end of said hollow shaft and engaging the rack-bars of the slot and adapted to bear against the legs or standards, and a hollow clamping-nut on each end of the rod and bearing against the outer faces of the depending arms; all said parts substantially as and for the purposes described."

It will be observed that the connecting rod is an essential part of this combination. Without it the desk would not be operative; for, to use the phrase of the complainant's counsel, unless there were an "interposed medium" against which the clamping-nuts could abut, the device would not work. Now, what the defendants have done is to rearrange the same elements that have been combined in the complainant's patent, so as to omit the connecting rod altogether, and to make the body of the desk proper serve as the "interposed medium" against which the clamping-nuts abut. By this simpler combination, the desk, as a whole, performs the same function as does the desk of the complainant. This, as it seems to me, is clearly permissible, and does not constitute infringement. A very recent decision of the circuit court of appeals of this circuit (Pittsburg Meter Co. v. Pittsburg Supply Co., 48 C. C. A. 580, 109 Fed. 644) relieves me of the necessity of discussing the subject further. The principle applied in that case was thus stated:

"Nothing in the law of patents is better settled than the rule that a claim for a combination is not infringed if any one of the described or specified elements is omitted, without the substitution of anything equivalent thereto."

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This, as I understand it, is precisely what was done in the present case. The complainant's connecting rod was omitted, and nothing has been substituted equivalent thereto, the function performed by the rod in the complainant's device being now performed by the remaining elements in the combination. A better arrangement has produced a less complex result, and in combination patents such a product of the inventive faculty is to be encouraged.

A decree may be entered dismissing complainant's bill, with costs.

THE SEVERN.

(District Court, E. D. Virginia. January 21, 1902.)

1. ADMIRALTY—EVIDENCE IN SUIT FOR COLLISION—ADMISSIONS OF MASTER.
Statements made by the master of a vessel, after a collision, as to the manner of its occurrence, are receivable as admissions against the owners in an action against them for the collision.

2. COLLISION—DEFENSES—INEVITABLE ACCIDENT.
The defense of inevitable accident in a suit for collision will not avail a vessel unless she is shown to have been free from fault.

3. SAME—ANCHORED VESSELS—DRAGGING ANCHOR IN STORM.
Evidence that the dragging of a vessel's anchor, which resulted in her collision with another anchored vessel, was due to a sudden and severe squall, does not make out a defense of inevitable accident, where it is further shown that she had out only one of her two anchors, that the squall lasted only about five minutes, and that only one other of a number of vessels at the anchorage grounds dragged anchor, but such evidence, taken together, tends to show that the collision was due to the fault of such vessel in failing to be properly anchored.

4. SAME—PRESUMPTION OF CARE.
In case of collision between two anchored vessels, one of which dragged its anchor while the other did not, the latter is presumed to have been free from fault.

5. SAME—FAULT OF PILOT—IMPROPER PLACE OF ANCHORAGE.
The fault of a licensed pilot in anchoring a foreign vessel without cargo in the place allotted to loaded vessels by the harbor regulations is not attributable to the vessel.

In Admiralty. Suit in rem to recover damages for collision.

This is a libel filed by Lewis Luckenbach, owner of the barge Frank Pendleton, against the steam bark Severn, and a cross-libel filed by the owners of the Severn against the Frank Pendleton, to recover damages arising from a collision which occurred on the night of the 16th of August, 1900, between 8:15 and 8:30 p. m., near the mouth of James river, about abreast of Newport News; said barge and bark being, respectively, at anchor in the anchorage grounds prescribed by the harbor master of Newport News for loaded vessels. The barge Frank Pendleton was an ocean-going barge of a burden of about 1,300 tons gross, and the steam bark Severn was a British steam bark of a burden of about 2,000 tons. While so lying at anchor, a collision occurred in a storm by reason of the bark dragging its anchor and colliding with the barge.

Bickford & Stuart, for the Pendleton.

George Whitelock, E. I. Koontz, and Hughes & Little, for the Severn.

WADDILL, District Judge (after stating the facts). The faults assigned by the Pendleton are that the Severn was wrongfully anch-

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ored within the space allotted for loaded shipping, it being at the time light; that it had out only one anchor,—its port anchor,—when both should have been out, and that at least its starboard anchor should have been kept in position to be immediately released in case of emergency or storm arising; that the Severn's yards should have been trimmed fore and aft, instead of athwart-ship, as they were; and that the bark was not supplied with a sufficient crew. The defense of the Severn is that the collision was inevitable, arising from a sudden and violent hurricane, that could not reasonably have been foreseen, and that the velocity of the wind was such that it was impossible to have avoided what occurred, and that the Pendleton was negligently anchored in too close proximity to it.

Considerable evidence was taken by the parties, respectively, including that of the master and crew of the Pendleton, though only the first mate of the Severn was examined; the bark, with its entire officers and crew, on the next voyage after the collision, having been lost at sea, with the exception of the mate, who had left the ship by reason of sickness. One of the questions much discussed was whether or not certain statements made by the master of the Severn the day after the collision, as to how the same occurred, was admissible in evidence against the ship. Objection was made to the admissibility of this evidence upon the examination of witnesses orally before the court, and the same was received subject to exception. The same admissions, however, had been previously received during the taking of depositions without exception. The objection should have been then made and insisted upon; but, in any event, it seems quite clear that such admissions from the master of the ship are received against the owner in proceedings in admiralty. The Enterprise, 2 Curt. 320, Fed. Cas. No. 4,497; The Potomac, 8 Wall. 590, 594, 19 L. Ed. 511; Packet Co. v. Clough, 20 Wall. 528, 541, 22 L. Ed. 406.

The defense of inevitable accident, assuming that the evidence in this case established the respondent's contention in reference thereto, will not avail the Severn, unless it is shown itself to be free from fault, which it has utterly failed to do. Union S. S. Co. v. New York & V. S. S. Co., 24 How. 307, 313, 16 L. Ed. 699; The Morning Light, 2 Wall. 550, 556, 557, 17 L. Ed. 862; The Mabey, 14 Wall. 204, 215, 20 L. Ed. 881; The Clara Clarita, 23 Wall. 1, 12, 23 L. Ed. 146; The Colorado, 91 U. S. 692, 703, 23 L. Ed. 379. Moreover, the evidence fails to make out a case of inevitable accident; that is to say, that the storm was of such a character as that the collision could not have been avoided by the exercise of ordinary precaution and good seamanship on the part of those in charge of the Severn. The storm, it is true, was a violent one, but it only lasted at most five minutes, and at great height for only a minute. While it did appear to have been a thunder squall, rather than a cyclonic storm, still the threatening character of the weather was sufficiently manifest to have caused the Severn to have anticipated the coming trouble, at least to the extent that it could instantly have lowered its anchor, and have avoided the very trouble that ensued; and, although the storm was extremely violent for a short while, the fact that only the

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Severn and one other vessel lying at anchor in the harbor actually dragged anchor clearly indicates that the collision was attributable rather to the failure to have the necessary anchorage than to inevitable accident as the result of the suddenness and violence of the storm. My conclusion upon the whole evidence is that the collision was the result of the failure on the part of the Severn to have out its starboard anchor, and this, I think, sufficiently appears from the Severn's own evidence, independent of the admissions of its master, viz., that of the mate, Drake, and the other witnesses examined by the barge. It is conceded that the starboard anchor was not out, and it is plain from the evidence of the mate that it was, if in proper position to be let out, at least not put out in time to avert a collision, and, indeed, until the same was well nigh inevitable. The witness Drake and each of the expert witnesses examined by the Severn admit on cross-examination that it was not good seamanship to have been at anchor, under the circumstances, with only the port anchor out, and the starboard anchor not in position to be immediately let out. Had the two anchors been out, no collision would have ensued. The barge Frank Pendleton, having been collided with while at anchor, is presumed to have been free from fault, although in collision with another vessel which dragged its anchor. The Mary Fraser (D. C.) 26 Fed. 872; The Anerly (D. C.) 58 Fed. 794; The Carl Konow (D. C.) 64 Fed. 815. No fault should be imputed to the Pendleton because of its proximity to the Severn, as the preponderance of evidence establishes that it was anchored at an entirely safe distance from the Severn.

It is unnecessary, from the view taken by the court, to determine whether any fault should be attributed to the Severn for having been anchored in the space allotted to loaded instead of light vessels. The bark was put where it was by a licensed pilot, who himself, it seems, did not know as to the particular harbor regulation, and it would seem that fault should not be attributed to it on that account. The E. A. Packer, 10 Ben. 521, Fed. Cas. No. 4,241; The City of Reading (D. C.) 103 Fed. 696.

It follows from what has been said that the collision occurred solely from the fault of the Severn, and a decree may be entered so declaring.

BOYER v. KELLER et al.

(Circuit Court, E. D. Pennsylvania. January 30, 1902.)

No. 50.

EQUITY PLEADING—FAILURE TO ANSWER INTERROGATORIES—STATEMENT OF REASONS IN ANSWER.

Statements in an answer in excuse of the failure of defendant to answer interrogatories contained in the bill, framed under equity rule 44, should be as specific in setting out the grounds for such refusal as would be required in a demurrer for the same purpose.

In Equity. On exceptions to answer.

Edward Rector and Frank P. Prichard, for complainant.

E. Hayward Fairbanks, for respondents.

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J. B. McPHERSON, District Judge. The first four exceptions to the answer do not need discussion. They seem to me to be clearly well founded, and they are accordingly sustained. The fifth exception complains of the defendants' failure to answer the interrogatories contained in the bill, and may, perhaps, call for a few words concerning the excuse offered for such failure. The excuse, which is evidently framed under rule 44, is as follows:

"As to the several interrogatories, Nos. 1 to 14, both inclusive, as these defendants may not have answered, they are advised and humbly submit that they are not bound to answer the same, and they therefore decline to answer said interrogatories; and these defendants claim the same benefit of the objection as if they had demurred to the same, or to the discovery sought thereby."

I do not think it to be my duty to go carefully over the bill and answer 14 times, in order to discover whether the interrogatories have been substantially answered; nor do I feel obliged to consider what the undisclosed reasons may be that relieve the defendants altogether from answering such of the interrogatories as they may not have replied to in substance. If the defendants have in effect already answered the interrogatories, it will do no harm to answer them again specifically and in regular order. If they have not answered some of them at all, the reasons for refusing so to do should be distinctly stated, so that the court may be able to judge whether the refusal stands upon a sufficient ground. If the defendants had attempted to protect themselves by demurrer, they would have been obliged to specify the reasons for asking protection; and the same obligation exists where the same result is sought by a different form of pleading.

It is therefore ordered that each interrogatory be separately answered, unless the defendants set forth distinctly the reason why they believe an answer may not lawfully be required; these amendments and additions to be filed within 15 days.

SEVERY PROCESS CO. et al. v. HARPER & BROS.

(Circuit Court, S. D. New York. January 30, 1902.)

1. PATENTS—CONSTRUCTION OF CLAIMS—SUCCESS OF DEVICE.
When the question of infringement depends upon the construction of the claims, the court, in the endeavor to find out what it is that the inventor has given to the world, is justified in considering the invention as measured by the success achieved, and where the alleged infringer has taken the "last step," and has attained the first commercially successful solution of the problem, care should be taken to protect him to the extent of his actual invention.

2. SAME—IMPROVER OR INDEPENDENT INVENTOR.
Claims of a patent should not be so broadened by construction as to include devices which, though accomplishing the same function, do so by new combinations, operating upon principles so different as to entitle their originator to be considered as an independent inventor.

3. SAME—INFRINGEMENT—PLATEN FOR PRINTING PRESS.
The Severy patent, No. 549,691, for a bed or surface for platens for printing presses, composed of a number of fixed, independently yielding bristles or wires, cannot be so broadly construed as to cover the device

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of the Allen patents, Nos. 613,217–613,221, in which the bed or blanket consists of fine wire coils, interlocked and held in place between two sheets of rubber, which are not "independently yielding," and especially in view of the fact that the Severy device has never been commercially successful, owing to its cost, while the Allen device was immediately successful.

In Equity. Suit for infringement of patent. On final hearing.

William Houston Kenyon, for complainants.

Frederick P. Fish and Charles Neave, for defendants.

COXE, District Judge. This is an equity action for the infringement of letters patent, No. 549,691, granted November 12, 1895, to Melvin L. Severy for an improvement in platens for printing presses. The object of the invention is to produce a uniform impression without the previous preparation of the platen, impression-cylinder, or type, known in the art as the "make-ready." This is accomplished by providing under the covering of the platen, or its equivalent, a surface "formed by the ends of a number of fixed, independently yielding, and elastic wires or bristles, or their equivalents, arranged in close proximity to one another and smoothed off evenly, whereby a yielding surface is formed which accommodates itself to irregularities in the printing surface and to varying thicknesses in different parts of the material upon which the impression is to be made." The inventor describes the "make-ready" of the prior art as a tedious, expensive and unsatisfactory process, requiring skilled labor and wearing out the type. The substitution of the patented bed or surface for the "make-ready" removes all these disadvantages. The inventor likens the surface which he uses to the independently yielding bristles of an ordinary hairbrush, but he does not limit himself to this particular means of producing it. He illustrates different methods of reaching the same result by bending, in various ways, elastic wires placed in close proximity to one another, and having their free ends ground off to form a perfectly flat surface. He says:

"The finer the wires and the closer their proximity to one another the better will be the result attained. Fine 'card clothing,' so called, illustrates the desired proximity of the wires and the evenness of the surface."

The claims are as follows:

"1. A bed or surface for platens for printing presses and the like composed of a number of fixed, independently yielding, elastic bristles or wires, substantially as set forth.

"2. A bed or surface for platens for printing presses and the like composed of a number of fixed, independently yielding, elastic bent wires or bristles, substantially as set forth."

The defense of noninfringement is the only one argued.

The defendant's device is described in and protected by five letters patent, granted to Arthur S. Allen, all being dated October 25, 1898. It consists of a series of fine wire coils, interlocked, and held in place between two thin sheets of rubber. The upper and lower portions of the coils are imbedded in the rubber, the crests standing out for an infinitesimal distance from the rubber. To the underside of the coils is attached a sheet of woven fabric which

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adheres to the rubber and rests on the platen. When in use a stiff paper board, known as "fibrelyn," is laid on top of the device, sheets of manila paper are laid on the top of the "fibrelyn" and between the sheets forms of paper, corresponding to the old "make-ready" are frequently placed, then comes the paper upon which the impression is to be made.

Considered from a practical and commercial point of view two propositions are incontestably established by the proof. First. That the complainants' blanket is a lamentable failure. Second. That the defendant's blanket is a pre-eminent success. The Severy patent has been in existence for over six years and as late as October, 1900, the complainants had not succeeded in producing a successful commercial blanket. At that time they had, apparently, abandoned the device as shown in the specification and drawings and were experimenting with a blanket consisting of a thin sheet of brass perforated with parallel cuts about three-quarters of an inch long, uniformly distributed over the brass sheet which is to be backed by a blanket of rubber. This device was lauded by the complainants' representatives as being incomparably superior to the "old bent wire arrangement" and is asserted by them to be within the Severy patent, although, upon a casual examination of the exhibit in evidence, the assertion seems a most extravagant one. In short, with unlimited capital, with "no lack of brains or money," with ample time and every facility for making a favorable impression, the promoters of the Severy blanket have made a complete failure in their efforts to have it adopted by the printing trade. Printers have examined it, tried it, experimented with it and rejected it. The fact of the complete commercial failure of the patented device is not denied, but the excuse is made that it was impossible to procure the necessary wire or a machine that would weave it into the desired fabric. At least $50,000 has been, it is said, expended in endeavoring to develop a practical commercial blanket, but without success. The blanket is too thick to be used on cylinder presses and too expensive for practical purposes. As complainants' counsel says in the brief:

"The blankets which were made were very expensive, and had to be treated as precious things, as they certainly were."

It is not denied that it is possible to construct the Severy blanket; that numbers of them have been constructed; that cylinder presses can be cut down to fit them, and that they are capable of doing excellent work, but the expense and difficulty of making them seems prohibitive. Theoretically they are a success; practically they are a failure. The old "make-ready" also did excellent work; the only difficulty with it was the expense. It is apparent, therefore, that no substitute for "make-ready" can be popular and successful which offers no advantages in the way of cost. The defendant's blanket, though it was not put on the market until the autumn of 1898, was successful from the start. Large numbers of the devices are in actual use in various printing establishments and are paying royalty to the manufacturer, the Tympalyn Company. The defendant alone

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is paying annually $12.50 per square foot on over a hundred square feet of the material.

Of course, it is not asserted that the failure and success of these devices, respectively, should be considered by the court if the patentee is clearly entitled to a broad claim covering the use of wire in every form as applied to a platen bed. It frequently happens that improvements are made in patented structures and methods by subsequent patentees, but this does not give these patentees the right to use the broad invention, neither has the broad inventor the right to use the subsequent improvements. When, however, the question of infringement depends upon the construction of the claims, the court, in the endeavor to find out what it is that the inventor has given to the world, is justified in considering the invention as measured by the success achieved. "In the law of patents it is the last step that wins." The last step in this art has certainly been taken by Mr. Allen and it is the step that has won. In such circumstances care should be taken not to reward the one who is still wandering in the realms of theory at the expense of the man who has actually solved the problem.

To quote again from the Barbed Wire Patent, 143 U. S. 275, 283, 12 Sup. Ct. 443, 446, 36 L. Ed. 154, 158:

"It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond shaped prong, but evidently it did not, and to the man to whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp."

Claims should not be so broadened by construction as to include devices which, though accomplishing the same function, do so by new combinations operating upon principles so different as to entitle their originator to be considered as an independent inventor.

The case of Westinghouse v. Power-Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, is instructive upon this subject. A pioneer patent was held not to be infringed by the defendant's device, because the latter, though within the letter of the claims, departed from the principle of the patent and solved at once and in the most simple manner the problem in question. At page 568, 170 U. S., page 722, 18 Sup. Ct., page 1147, 42 L. Ed., the court says:

"The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted when he has done nothing in conflict with its spirit and intent. 'An infringement,' says Mr. Justice Grier in Burr v. Duryee, 1 Wall. 531, 572, 17 L. Ed. 650, 658, 'involves substantial identity whether the identity be described by the terms, "same principle," same "modus operandi," or any other. * * *' The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term equivalent."

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And, again, at page 573, 170 U. S., page 724, 18 Sup. Ct., page 1149, 42 L. Ed.:

"Although Mr. Boyden may have intended to accomplish the same results, the Westinghouse patent, if he had had it before him, would scarcely have suggested the method he adopted to accomplish these results. Under such circumstances, the law entitles him to the rights of an independent inventor."

In Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co. (C. C.) 86 Fed. 315, the court, at page 320, says:

"It is contended by the complainant that Kidder is entitled, under his patent, to claim, broadly, a printing machine having either vertical or horizontal type beds. Assuming that his combinations were patentable, which to me admits of some doubt, in view of the state of the art, and the facts that his machine is scarcely an improvement in the art, and certainly not a commercial success, that its capacity did not exceed that of presses then in use, and it failed to meet the demands of the trade for expedition and cheapness, while the defendant's machine has met with a large sale and prints more than three times as rapidly as Kidder's, while but one of the latter has been put in use since the issue of the patent in 1884, a radical difference in operation and mechanism between the Kidder machine and that of the defendant is strongly, if not conclusively, suggested." See, also, Jensen v. Norton, 12 C. C. A. 324, 64 Fed. 599, 603; Howell Torpedo Co. v. E. W. Bliss Co. (C. C.) 111 Fed. 907, 916.

There is nothing in the patent to indicate that Severy ever contemplated any other surface than that produced by the ends of bristles, the ends of wires, the ends of teeth sawed from sheet steel or the ends of other similar material. In every instance the free ends of the elastic bristles, wires, or teeth, when smoothed off evenly, form the surface. These wires, etc., may be straight or bent in various ways, but always it is the ends which receive the printing pressure, each end being an independently yielding unit. It is this novel characteristic which distinguishes the Severy blanket from the prior art, which shows rubber surfaces having independently yielding rubber springs and areas. In short, it is the brush-like formation which is described in the specification and is distinctly pointed out in the claims. The first claim is for a bed or surface composed of a number of bristles or wires which must have the following characteristics: First. They must be fixed vertically. Second. Their lower ends must be fixed in a backing. Third. Their upper ends must be free. Fourth. They must yield independently of each other. Fifth. Their free ends must form the printing surface. The second claim is similar, except that it specifically covers bent wires or bristles. Even allowing for a wide range of equivalents it is thought that the claims cannot be expanded to cover structures which operate upon a different principle and do not possess any one of the above-mentioned characteristics. Where it is manifest that a claim is limited to certain features it is not material whether such limitation was or was not necessary. See cases cited in Safety Oiler Co. v. Scovill Mfg. Co. (C. C.) 110 Fed. 203.

As before stated, the defendant's bed consists of a series of fine, interlaced wire coils laid horizontally between two sheets of rubber the summits of the coils being imbedded in the rubber. There are no bristles and nothing approximating thereto. There are no wires

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having a fixed lower end and a free upper end. There are no vertical wires or bristles with their free ends for the printing surface. There are no independently yielding wires, in the sense that the Severy wires are independent. The resiliency or elasticity of the patented structure is of a very different character from that produced by a fabric made of fine wire coils laid on their sides and backed and faced by rubber. In the one case the pressure falls upon a surface made of the ends of independent wires, there being from 600 to 1,300 points to the square inch; in the other it falls upon a composite surface, the coils of wire being continuous, interacting and reacting. It requires little expert knowledge to perceive that the yield and recovery of a straight or slightly bent wire from pressure applied to one end must be quite different from the action of a coiled spring lying upon its side, the pressure being applied to the crest of one of the turns, and that the difference must be more marked as the coils and wires are, respectively, increased. To adopt the language of Mr. Livermore:

"The separate turns of a coil in defendant's tympalyn have no individual existence, but are essentially a co-operative part of the continuous coil, and the turns are not independently yielding in the sense that any turn may yield without affecting, and without being affected by, the condition of the adjoining turns. * * * Neither are the turns of wire, structurally or functionally, equivalent to the bristles or wires of the Severy blanket, nor is the tympalyn blanket as a whole, composed of the intermeshing wire coils, an equivalent for the Severy blanket as a whole composed of a brush or comb-like structure."

When in addition to the structural differences referred to it is remembered that pressure reaches the coils through a thick, stiff paper board, which cannot be depressed in small areas, the impossibility of independent, individual action of the crests will be readily perceived.

Mr. Severy, in describing his experiments, says: "No one bristle had any possible means of knowing what another one was doing," but when pressure is applied to any given point of "fibrelyn" not only is the crest directly beneath the point of pressure informed, but so are all the crests in the immediate vicinity. Each knows immediately what the others are doing and assumes its share of the load.

It is unnecessary to pursue the discussion further.

The court has devoted considerable time to the study of the record and finds it impossible to escape the conviction that it will not only be an injustice to the defendant and its licensors, but to the public as well, to compel them, and future improvers also, to pay tribute to the Severy patent. The patent cannot fairly be given the wide scope insisted on. It may be that means will yet be discovered to make the patented blanket a commercial success. When this time arrives it is highly probable that its characteristic features will make it popular for high class printing, but there is no reason why it should monopolize the entire field. Each of the devices in controversy has advantages peculiarly its own. There is room enough in the art for both.

The bill is dismissed.

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CENTRAL TRUST CO. OF NEW YORK v. UNITED STATES FLOUR MILLING CO. et al.

(Circuit Court, S. D. New York. Sept. 2, 1901.)

MORTGAGE FORECLOSURE—RIGHT OF COMPLAINANT TO DISCONTINUE AFTER DECREE.

Where a federal court has entered a decree of foreclosure and sale in a suit to foreclose a corporation mortgage, and such decree remains unreversed, another judge of the same court will not entertain a motion by complainant trustee to discontinue the suit, against the objection of bondholders who are interested in such decree.

In Equity. Suit for foreclosure of mortgage. On motion for order of discontinuance.

See 112 Fed. 371.

Butler, Notman, Joline & Mynderse, for the motion.

Charles Thaddeus Terry, opposed.

LACOMBE, Circuit Judge. While the decree for foreclosure and sale signed by Judge THOMAS remains on the record, it should be accepted by this court as a decision upon the merits, to which future action should be conformed. If, as is asserted, that decree was made without notice to any of the parties, or was contrary to a prior adjudication, or was improvident, it may be corrected by application to modify or by appeal. Until this is done, however, it must be assumed that such decree has secured some benefit to nonassenting bondholders, which they would not otherwise have obtained. Therefore it would be an abuse of discretion for another judge of the same court to nullify the advantages thus secured to third parties, even though not parties strictly of record, by ordering a discontinuance against their objection.

Motion denied. The order denying the motion may also contain a clause forbidding the receivers or any of the parties from removing out of the jurisdiction of this court any property affected by the decree, and now within such jurisdiction.

MIDDLETOWN NAT. BANK v. TOLEDO, A. A. & N. M. RY. CO.

(Circuit Court, S. D. New York. October 9, 1901.)

PARTIES—ACTION AGAINST STOCKHOLDERS—OHIO STATUTE.

An action cannot be maintained to enforce the statutory liability of stockholders under Rev. St. Ohio, § 3260, as amended in 1894, which expressly provides for an action jointly against all the stockholders, including those who are out of the jurisdiction, or for other cause cannot be served, where the complaint shows that there are stockholders who are not made parties.

On Demurrer to Complaint.

See 105 Fed. 547.

Lucius H. Beers, for demurrer.

Schuyler C. Carlton and Charles N. Judson, opposed.

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LACOMBE, Circuit Judge. It is thought that the question raised by this demurrer should be decided upon the assumption that the action is the one provided for by section 3260, Rev. St. Ohio, as it stood after the amendment of 1894. Inasmuch as that section expressly provides for an action jointly against all the stockholders, including such as are out of the jurisdiction or for other cause cannot be served, and the complaint avers that there are stockholders who have not been made parties, there is a lack of parties defendant, and the demurrer is sustained. If, moreover, the amendments of the statute passed in 1900 are to be considered, the position of the demurrants is even stronger. Manifestly this action is not the one thereby provided for.

Demurrer sustained and complaint dismissed.

In re GAYDE.

(Circuit Court, S. D. New York. December 23, 1901.)

ALIENS—EXCLUSION OF IMMIGRANTS—CONCLUSIVENESS OF DECISION.

Permission given an immigrant to go on shore temporarily while awaiting the action of the board of special inquiry, does not release such immigrant from the obligation of satisfying the board of the right to land; and its adverse determination, where the immigrant is conceded to be an alien, is not reviewable by the courts under act March 3, 1891.

Petition by Paulina Schmidt Gayde for Writ of Habeas Corpus.

Joel M. Marx, for the writ.

Lorenzo Ullo, opposed.

LACOMBE, Circuit Judge. Upon her own statement it is manifest that petitioner is not a citizen. The question whether or not she is an immigrant is one no longer open for determination by the courts as it was when the cases of In re Martorelli (C. C.) 63 Fed. 437, and In re Maiola (C. C.) 67 Fed. 114, were decided, where it is conceded that the person is an alien. All decisions of the inspecting officers touching the right to land, when adverse to such right, are made final, except by appeal to the superintendent and secretary of the treasury. Act March 3, 1891. The return does not specifically set forth the facts as to her alleged landing, but, assuming them to be as alleged in the petition,—that an inspector allowed her to go ashore, where she remained a few hours, taking a meal, and then returned to the office, before action by the board of special inquiry,—I do not think she was thereby released from the obligation of satisfying the board that she was not likely to become a public charge.

The writ is dismissed.

CIMIOTTI UNHAIRING CO. et al. v. NEARSEAL UNHAIRING CO.

(Circuit Court, S. D. New York. July 17, 1901.)

PATENTS—INFRINGEMENT—UNHAIRING MACHINES.

The Sutton patent, No. 383,258, for a machine for removing the hairs from fur skins, claim 8, *held* infringed on a motion for a preliminary injunction, on the ground that the mechanism of defendant's machine, while operating in a somewhat different manner, was the substantial

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equivalent of that described in the claim, performing the same functions in substantially the same manner, and producing no better or different results.

In Equity. Suit for infringement of patent. On motion for preliminary injunction.

Louis C. Raegener and T. B. Reed, for complainants.
Redding, Kiddle & Greeley, for defendant.

THOMAS, District Judge. The bill is filed to enjoin the infringement of claim 8 of letters patent No. 383,258, issued May 22, 1888, to John W. Sutton. The complainants have succeeded to the rights under the patent, and the present motion is for an injunction pending final hearing. Claim 8 is as follows:

"8. The combination of a fixed stretcher bar, means for intermittently feeding the skin over the same, a stationary card above the stretcher bar, a rotary separating brush below the same, and mechanism, substantially as described, whereby the rotary brush is moved upward and forward into a position in front of the stretcher bar, substantially as set forth."

The patent has been considered and sustained by Judge Townsend, in Cimiotti Unhairing Co. v. Bowsky (C. C.) 95 Fed. 474; Same v. American Unhairing Mach. Co. (C. C.) 108 Fed. 82; and by Judge Wheeler, in Same v. Mischke (C. C.) 98 Fed. 297. The defendant denies infringement, and seeks to differentiate its device in several particulars, only two of which require discussion—First, that a stationary card above the stretcher bar is not used, but that on the upper side of the stretcher bar, and very close to the edge thereof, are arranged two rollers, hereinafter described; and, second, that a rotary separating brush is not used below the stretcher bar, but rather a segmental rotary brush, which is not a separating brush, and which is in a fixed location, and has no movement with relation to the fixed stretcher bar other than its rotary movement. The defendant's evidence furnishes the following description of its device and the manner of its operation:

"The pelt, marked 'P' on said drawings, is fastened to an apron, and is intermittently fed by mechanism, not shown, over the edge of a flat stretcher bar, marked 'B,' which has a rounded edge. On the upper side of the stretcher bar, and very close to the edge thereof, are arranged two rollers, marked 'E' and 'E',' the roller being covered with emery cloth, and being fastened so as to bear firmly against the pelt, and thereby produce a tension upon the pelt, and also causes both the hair and the fur to lie down closely thereon, and holds them in that position, so that they cannot escape until the pelt is fed forward. Arranged 9¼ inches from the edge of the stretcher bar is a rotating shaft, marked 'D',' having arms, d, thereon, to which is fastened a carding brush marked 'D².' This carding brush is segmental, and is provided with seven narrow brushes, each comprising four rows of stiff bristles very close together at their outer edges. A pair of plucking jaws, K and K', reciprocating in fixed guides, X, passes the edge of the stretcher bar. The lower jaw is hinged at H to the rear of the upper jaw, and is automatically opened by a cam device, not shown in the drawings, and is closed by the action of a strong spring, S, which causes the lower jaw to swing on its pivot in the arc of a circle of three and a half inch radius, and close against the upper jaw, with great force. The biting edge of the upper jaw is flat, and the biting edge of the lower jaw is beveled, and is narrower than the upper jaw, so that the outer edge of the lower jaw is about one thirty-second of an inch within the outer

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edge of the upper jaw. When the jaws are closed, the jaws are reciprocated by a rod, R, actuated by an eccentric, not shown in the drawings, which causes the biting edge of the upper jaw to pass about one-eighth of an inch below the stretcher bar. The guides, X, X, in which the jaws reciprocate, are arranged at an off angle, w, to the stretcher bar, as illustrated by the dotted lines, a, b, so that the jaws not only descend below the stretcher bar but approach a vertical plane, passing through the edge of the stretcher bar as they reach their lowermost and operative position. The operation of this machine is as follows: The pelt having been fixed to the apron which passes over a stretcher bar, the rollers E and E' are put in place, and the pelt is fed forward by the automatic feeding mechanism. The rotation of the carding brush causes the same to engage with the hair and fur, which has been released from the roller, E, by the feeding forward of the pelt, and card or straighten out the hair and fur simultaneously, as clearly shown in defendant's machine Exhibit No. 1. The brush then passes out of contact with both the hair and fur, which have been carded, and thereupon permits the hairs to spring out from the fur by reason of the great resiliency of the hair, and by the further reason that the skin is held under tension by the roller, E, it being a well-known fact that the water hairs are much stiffer and more resilient than the fur, and are deeper rooted in the pelt than the fur, so that the hairs tend to spring out more rapidly, more quickly, than the fur. Meanwhile, as the hairs are springing out from the fur by reason of their greater resiliency, the jaws are descending, and, by reason of the angle at which the guides are placed, are approaching closer to the pelt. When the jaws have reached the position shown in defendant's machine Exhibit 3, the lower jaw is automatically released, and because of the curvilinear motion of the lower jaw in closing it gathers up the projecting water hairs and carries them against the upper jaw, which is below the plane of the stretcher bar, and thereby snaps them in two. The jaws are then carried away from and above the stretcher bar, and the pelt is thereupon automatically fed forward one sixty-fourth of an inch by the feeding mechanism, and releases more hair and fur from the rollers, E. and E'. This released hair and fur is thereupon engaged and carded out by the carding brush, D^2, as heretofore described, and the cutting operation is repeated, and so on until the pelt is unhaired. * * * Exhibit No. 1, defendant's machine, shows the position of the hair and fur at the time the brush is operating thereon with absolute accuracy. No hair or fur whatever at any time stands out until after the last of the small brushes comprising the carding brush has passed out of operative contact with the pelt, and has passed a considerable distance beyond the same. The distance between the rows of bristles in defendant's brush is so slight that its action is, so far as the hair and fur are concerned, precisely as it would be were the brush solid,—that is to say, the bristles continuous. The only object in making this carding brush of independent small brushes with intervals is to enable same to be kept free from the hair and fur more readily than would be possible if the brush were made solid."

It is urged by the defendant that the rollers above the stretcher bar and the brush below the stretcher bar press down the fur and long hairs alike, and that under the complainants' patent the card, E, and the brush, F, compress the fur alone, allowing the long hair to spring up or remain standing, while the card or brush is in contact with the skin, and also that the under brush, F, remains longer in contact with the fur, holding it down during the operation of cutting. The roller otherwise performs the same office as does the card, E, acting not only to maintain the tension of the skin, but also for the purpose of pressing down the fur. Upon the argument the court, in answer to its inquiries, did not discover that any different result was obtained from the failure of the complainants' device to press the long hairs down with the fur, or that the

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defendant added anything to the utility of its machine by pressing down the fur and the long hair alike. The use of the roller, therefore, is a simple equivalent for the card used by the complainants, and obviously the segmental brush in this regard performs the same office as does the rotary brush, F, used by the complainants. But it is contended that the complainants' brush remains longer in contact with the fur, holding it down, while the longer hairs have sprung forward and have been removed by the cutting knife. Nothing in claim 8 indicates such action, nor does a reference to the specifications bear out the defendant's contention in this regard. The specifications show that an oscillating guard may be used "that follows the brush and carries the fur still further back and holds it in position." But this guard is no part of claim 8. In any case, even though the defendant's brush comes simply in contact with the edge of the stretcher bar, while the complainants' brush comes not only in contact with the edge, but continues for some distance on the underside, this is but a difference in the degree of action, the defendant's brush performing by its contact, however abbreviated, the same office performed by that of the complainants, namely, for an interval of time sufficient to allow the knife to act separating the fur from the long hairs. The fur in the operation of the defendant's machine may come back to its normal position earlier than in the complainants' device, but a separation of the fur and water hairs is maintained sufficiently long to allow the biting jaws, peculiar to the defendant's device, to cut the long hairs, and this parting of the fur from the long hairs is effected by pressing down the fur. The single duty done by the card and brush in one case, and the roller and brush in the other, is to compress the fur for such space of time that the knife used, whatever its shape, action, or relation to the stretcher bar may be, may eliminate the long hairs, which by their greater resiliency spring back more quickly into place, or, it may be, by greater stiffness remain in place. The length of time that the fur remains compressed is not important, provided there be time sufficient to do the work. The desideratum is to move the fur from the action of the cutting device. This each machine does. The defendant's cutting arrangement may permit the restoration of the fur at the instant of cutting. Nevertheless, the fur is held aside, and away from the biting jaws, so long as is necessary to permit its removal of the long hairs, and this is effected by parts that are practical equivalents of the complainants' machine. The fact that the long hairs are not kept pressed down in the complainants' machine, if such be the case, is not shown to be important. Whether they remain in place awaiting the knife, or spring into place to meet the knife, is nonessential; but that the fur shall be pressed down sufficiently long to allow the knife to meet the long hairs and escape the fur is all essential, and this is effected by the brush. A cutting device like that of the defendant may be so fashioned, nicely adjusted, and operated as to permit the fur to return to its position at such instant of time relative to that when the long hairs come in contact with the cutting apparatus that it may be said that the result of the compres-

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sion has passed when the long hairs are removed. Another form of cutting knife may require that the restoration of the fur shall be longer delayed. In each case the fur is pressed down by a method covered by claim 8. Mere peculiarity of mechanism for cutting is not involved in claim 8. Therefore, unless it shall appear that the defendant's machine, by pressing down the long hairs, performs some useful function that is absent in the complainants' device, it is impossible to differentiate the defendant's mechanism from that described in the claim. As has been stated, it does not appear that it is of consequence whether the long hairs are compressed and then escape to meet the knife, or whether they escape altogether the card and brush.

The defendant's machine appears clearly to fall within claim 8, as construed by Judge Townsend, and the motion for the injunction must prevail.

HENDEY MACH. CO. et al. v. PRENTISS TOOL & SUPPLY CO.

(Circuit Court, S. D. New York. October 14, 1901.)

PATENTS—INFRINGEMENT—FEED MECHANISM FOR SCREW-CUTTING LATHES.

The Norton patent, No. 470,591, for an improved feed for screw-cutting engine lathes, construed, and *held* limited to the particular combination shown in the claims, and, as so limited, not infringed.

In Equity. This is a suit brought for the alleged infringement of United States letters patent No. 470,591, granted to Wendell P. Norton March 8, 1892.

Worth Osgood, for plaintiffs.
Wood & Boyd, for defendant.

LACOMBE, Circuit Judge. The object of the invention, as stated in the specification, is to "provide a new and improved feed especially designed for use on screw-cutting engine lathes, to conveniently and rapidly change the speed of the feed screw according to the requirements of the screw to be cut. The invention consists of certain parts and details, and combinations of the same, as will be fully described hereinafter, and then pointed out in the claims." There are two sets of devices availed of in the patent to effect changes of speed. The one consists of a series of 3 interchangeable gear wheels, of varying diameters, arranged at one end of the machine; speed variation being secured by changing their relations to each other, which can only be done when the machine is at rest, since nuts have to be unscrewed, the wheels removed, and replaced on different spindles. By such changes 3 different speeds may be imparted to the feed screw. The other set of devices consists of a series of gear wheels, of varying diameters, arranged step-like. As shown in the patent, there are 12 of these. By means of a hand lever and connecting mechanism, one or other of these may be brought into engagement while the machine is in motion, and thus 12 varying speeds be imparted to the screw feed. A combination of both sets

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of devices secures 3 times 12 changes,—36 in all. The claims declared on are as follows:

"(1) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and to slide on the said shaft; a driving gear wheel in mesh with the said pinion; and a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel,—substantially as described and shown.

"(2) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and to slide on the said shaft; a driving gear wheel in mesh with the said pinion; a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel; and a lever carrying the driving gear wheel, and arranged for shifting the said pinion on the said shaft, and moving the driving gear wheel in and out of mesh with the feed-shaft gear wheels,—substantially as shown and described.

"(3) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and slide on the said shaft; a driving gear wheel in mesh with the said pinion; a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel; a lever carrying the driving gear wheel, and arranged for shifting the said pinion on the said shaft, and moving the driving gear wheel in and out of mesh with the feed-shaft gear wheels; and a locking mechanism for the said lever,—substantially as shown and described.

"(4) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and to slide on the said shaft; a driving gear wheel in mesh with the said pinion; a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel; a lever carrying the driving gear wheel, and arranged for shifting the said pinion on the said shaft, and moving the driving gear wheel in and out of mesh with the feed-shaft gear wheels; and a plate having a curved slot forming a guide for the said lever,—substantially as shown and described.

"(5) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and to slide on the said shaft; a driving gear wheel in mesh with the said pinion; a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel; a lever carrying the driving gear wheel, and arranged for shifting the said pinion on the said shaft, and moving the driving gear wheel in and out of mesh with the feed-shaft gear wheels; a plate having a curved slot forming a guide for the said lever; and a mechanism for locking the said lever to the said plate,—substantially as shown and described."

"(7) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to slide on and to turn with the said shaft; a lever fulcrumed loosely on the said shaft, and adapted to carry along the said pinion a driving gear wheel in mesh with the said pinion, and mounted to turn on the said lever; a series of gear wheels, of varying diameters, and arranged in step form, on the feed shaft, each of the said series of gear wheels being adapted to be engaged by the driving gear wheel; a hand lever pivoted on the said lever, and formed with a pin and a plate formed with a slot, and a series of openings adapted to be engaged by the said pin,—substantially as shown and described.

"(8) In a device of the class described, the combination, with a series of

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gear wheels arranged in step form on the feed shaft, of a driving gear wheel adapted to engage each of the said gear wheels in the series of gear wheels; a lever carrying the said driving gear wheel; a plate formed with a curved slot, through which passes the said lever for guiding the same,—substantially as shown and described.

"(9) In a device of the class described, the combination, with a series of gear wheels arranged in step form on the feed shaft, of a driving gear wheel adapted to engage each of the said gear wheels in the series of gear wheels; a lever carrying the said driving gear wheel; a plate formed with a curved slot, through which passes the said lever, for guiding the same; and a locking mechanism for locking the said lever on the said plate,—substantially as shown and described."

An examination of the prior state of the art, as disclosed in the proofs, shows that the patentee was not a pioneer. Indeed, it is not contended that he was. He has used old devices in a new combination (for there is no actual anticipation shown) to accomplish a particular result (rapidity of speed change), and a like result may be obtained by other combinations. The case is one, therefore, where the particular combination of parts and details which the patent secures to him is to be conformed to the self-imposed limitations which the patentee has inserted in the claims, and "nothing can be an infringement which does not fall within the terms the patentee has chosen to express his invention." McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Groth v. Supply Co., 9 C. C. A. 507, 61 Fed. 284. It will be noted that in every one of the claims above recited the series of gear wheels, of varying diameters, arranged step-like or in cone shape, is explicitly described as being located "on the feed shaft." In the combination of defendant's lathe a similar step-like or cone-shape series of gears is found, but it is not located on the feed shaft; but upon a counter shaft arranged adjacent to, and parallel with, the feed shaft. The result of this change of location is that defendant is able to introduce a second set of interchangeable or relatively shifting gear wheels between these step-like gears and the feed shaft. Defendant contends that this is an important improvement,—a contention which complainant disputes, and which need not be decided. It would seem to be sufficient, under the authorities cited supra, that the step-like gears are not located where in eight separate claims the patentee distinctly asserted that they should be, to embody his invention.

The bill is dismissed.

WESTINGHOUSE AIR BRAKE CO. v. CHRISTENSEN ENGINEERING CO.

(Circuit Court, S. D. New York. September 25, 1901.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
Where a patent which was invoked as a defense in a suit for infringement of another patent was considered by the supreme court, and its validity clearly and unequivocally sustained, such decision affords sufficient ground for the granting of a preliminary injunction against its infringement.

2. SAME—INFRINGEMENT—AIR BRAKE VALVE.
The Boyden patent, No. 481,134, for a valve for air brakes, claim 2, held infringed on a motion for a preliminary injunction.

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In Equity. Motion for preliminary injunction on claims 2, 4, and 11 of United States patent 481,134 to G. A. Boyden, August 16, 1892, for valve for air brakes.

Frederic H. Betts and J. Snowden Bell, for the motion.
William A. Jenner, opposed.

LACOMBE, Circuit Judge. This patent does not stand here with such presumption of validity only as arises from its issue by the patent office. It was before the United States supreme court in Westinghouse v. Power-Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136,—a litigation most hotly contested, and which involved a most careful examination of the state of the art. It is true that in that case the patent now in suit was not the one sued upon, but was the shield availed of by defendant therein to protect itself. Nevertheless, the decision of the supreme court, expressed with no uncertain sound, must be accepted here as establishing the proposition that Boyden was an independent and meritorious inventor, who solved with great ingenuity and in the simplest manner the problem of quick action. Nothing in the affidavits or prior patents shown here calls for any qualification of this proposition. The second claim reads:

"(2) In valve mechanism for automatic air brakes, the combination of a communication with the brake cylinder from both the auxiliary reservoir and train pipe, a single valve controlling said communication, and means to retard or restrict the flow thereto of the auxiliary-reservoir air when applying the brakes in comparison with the flow thereto of train-pipe air, whereby train-pipe air at lower pressure than said auxiliary-reservoir air will pass said valve when making an emergency application of the brakes."

It seems quite plain that the three elements of this claim—the "communication," "the single valve," and the "means to retard or restrict"—are all present in defendant's valve. In view of the statement of variety of form of structure which is found near the close of the specification, and of the history of application in the patent office, it would seem that additional elements are not to be read into this claim, restricting it to the precise form shown in the drawings, but that the patentee should be entitled to a fair application of the doctrine of equivalents. As defendant's experts demonstrated when it was sought to enjoin this same valve under United States patent 360,070, it is modeled upon and belongs to the group of which the valve now in suit is the exemplar. Doubtless it contains improvements, but it operates by reason of its possession of the three elements above referred to. It does not present the differences in form and principle which will distinguish it from the Boyden valve, as that was distinguished from 360,070.

There are some questions as to claims 4 and 11 which may better be reserved for final hearing, but complainants may take preliminary injunction as to claim 2.

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CITIZENS' TRUST & SURETY CO. v. ZANE et al.

(Circuit Court, E. D. Pennsylvania. February 5, 1902.)

No. 27.

1. CONTRACTOR'S BOND—NOTICE TO PERFORM.
The surety on the bond of a contractor is bound for necessary expenditures by the obligee in completing the work; opportunity having been given it to do the work, which it refused.

2. NOTICE TO AGENT.
The agency of one having the same general control of the business as a general manager is such that notice to him is notice to the principal.

3. BOND—RIGHT OF RECOVERY—ASSIGNS—SUBSTITUTION.
The defendants gave bond to the plaintiffs (but not to their assigns) for the completion of a building contract by one Z.; the plaintiffs being surety in turn on another bond of like character. The contractor having defaulted, the plaintiffs, after notice, undertook the completion of the work, but during the course of it, by an arrangement with a third company, transferred the bond, with their other assets, to that company, which went on and finished the operation. *Held*, that if the plaintiffs dropped the work, and had nothing further to do with it, and the company to whom they had transferred it finished it on their own account, there could be no recovery; but, the jury having found that the latter acted, not independently, but as representing the plaintiffs, whose place they took, a verdict for the plaintiffs was proper.

Sur Rule for New Trial on Verdict for Plaintiff.

Action on bond given by Frank S. Zane to the Citizens' Trust & Surety Company, in the sum of $6,400, on which the National Surety Company of New York was surety, conditioned that the said Zane should fully complete, free and clear of mechanics' liens, a certain building operation, wherein he had undertaken to build 64 houses on land conveyed to him by one John Meighan. Meighan sold the land to Zane for $31,300, and agreed to advance $56,000 to put up the buildings, taking a mortgage on the premises for $87,300. To secure himself, Meighan took a bond from the Citizens' Trust & Surety Company, and they in turn obtained the bond in suit from Zane, with the National Surety Company as surety; the interest of Meighan and the obligation of the Citizens' Surety & Trust Company to him being fully set forth therein. The jury found a verdict for the plaintiff for the full amount of the bond, with interest.

David J. Myers, for plaintiff.

S. Davis Page, for defendant National Surety Co.

ARCHBALD, District Judge.[1] That there was a breach of the bond in suit is beyond question, and with that established there was little left for controversy. The undertaking of the defendant company substantially was that Zane, the party for whom it became surety, should complete, free and clear of mechanics' liens, the 64 buildings which he was to build on the property conveyed to him by Meighan, according to the building operation which had been arranged between them. When the work was far from done, in March, 1899, he failed financially, and made an assignment for the benefit of creditors; and not only had the buildings to be completed for him, but mechanics' liens to the amount of $7,700 entered

[1] Specially assigned.

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against them for work and materials, which he had not taken care of, had to be paid off in order to protect the property. The Citizens' Trust Company were interested, because they had agreed to indemnify Meighan, who had sold the land to Zane for $31,300, and had advanced $56,000 more to carry on the operation, taking a mortgage of $87,300 to secure him. All this was set out in the bond which the surety executed, and entered into the question of its liability. When Zane failed, his assignee promptly gave notice to the Citizens' Trust Company to complete the job, and they fell back upon the National Surety Company. That this company was notified of the failure, and called upon by the Citizens' Trust Company to take up the work and go on with it, cannot be successfully controverted. Not only is this established by letters which passed between the two companies, but Mr. Smith, who had general control in Philadelphia of the affairs of the National Surety Company, a New York corporation, admits that in March, 1899, about the time of Zane's default, he was called up by telephone by Mr. Cushing, who had charge for the Citizens' Trust Company, and notified that the National Surety Company would be expected to complete the work, to which he replied that they would not do it; and upon being informed that if they did not the Citizens' Trust Company would go ahead and charge it to them, he said that his company was indifferent This was clearly sufficient to hold the National Surety Company for the expenditures made necessary by reason of Zane's default. All they could ask was an opportunity to act in the matter for themselves, if they so desired; and, this having been distinctly given them, they were bound by whatever the Citizens' Trust Company was called upon to do to protect themselves on their undertaking to indemnify Meighan. Trust Co. v. Campbell, 184 Pa. 541, 39 Atl. 291. It may be that Mr. Smith was not authorized to say what the company which he represented would do or would not do in the premises, but his agency was such that in the matter of notice he certainly stood for the company. It is undisputed that he had succeeded Mr. Taylor, the general manager of the business in Philadelphia; and, while he may not have taken the same official title, he admittedly had the same general control, and that is all that was necessary. Anderson v. Surety Co., 196 Pa. 288, 46 Atl. 306. So far the steps necessary to make out a complete case for the plaintiffs were established, and the court was warranted in instructing the jury to that effect, as it did.

As to the defenses sought to be set up to the case so made out, there is but one that needs to be seriously considered. The bond in suit was to the Citizens' Trust Company, and not to their assignees; and it was only as they themselves were damaged, and became thereby entitled to indemnity, that they could have recourse to the defendants. It is contended that, after the agreement between the Citizens' Trust Company and the Union Surety Company for the transfer of its affairs by the former to the latter, the Citizens' Trust Company completely dropped out, and was supplanted by the Union Surety Company, which did everything that was subsequently done on its own account solely, and not for the

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Citizens' Trust Company, which had no further interest to subserve. This, if true, was a valid defense, but it depended upon the facts produced to sustain it. The defendants largely relied on the resolutions set forth in the minutes of the two companies, but I do not find anything in them inconsistent with the idea that the one company, in taking the place of the other, intended to do more than step into its shoes. It did not break away from existing contracts. It assumed them, in terms. The contracts turned over were to be carried out. This required the Union Surety Company to take up and complete such an uncompleted operation as that of Zane's, and to do so it had not only nominally, but actually, to act for and under the company for whom it stood substituted. The two companies were by no means merged, nor was the Citizens' Trust Company obliterated. However intimate its subsequent relations with the Union Surety Company, it continued to preserve its separate corporate existence, as, indeed, it was bound to do, on account of the outstanding nonassenting minority stockholders. That these were concluded by the action of the majority in due meeting assembled may be conceded, but that is not the point. So long as they stood out, the corporate affairs had to be kept intact; and, until it is shown otherwise by competent evidence, we have the right to assume that they were.

Aside from the resolutions to which we have referred, the defendants relied argumentatively on the way the business relating to this operation was carried on after the transfer, but I fail to see anything that is not capable of the oral explanation given it. The failure of Zane was on March 2, 1899, and the transfer from the Citizens' Trust Company to the Union Surety Company was not till April 11th following. In the meantime the defendants had been notified, and declined, or at least neglected, to complete the work from where Zane had left it. The breach of the bond, and the obligation of the defendants to meet it, had, therefore, accrued before the Union Surety Company came in. At that time the special fund of $56,000 was nearly exhausted; the amount to the credit of the operation on April 17, 1899, being but $3,449.75. As the Union Surety Company from then on actually did the work, it was naturally and properly conducted and vouched for in its name; and that the accounts appear in that shape is of little moment, and is, at least, capable of explanation. By the time of the sheriff's sale, in June, some $1,500 or $1,600 additional had been expended; and this, according to the undisputed evidence, was advanced by the Union Surety Company for the Citizens' Trust Company; the latter having absolutely no money whatever of their own. The same is true with regard to the $7,700 paid into the court to satisfy the mechanics' liens which had priority over the Meighan mortgage. These liens had to be taken care of, and the Citizens' Trust Company was compelled to rely on the Union Surety Company to make the necessary advances, as it did. The officers of the former company testify that an arrangement to that effect was made, and no one contradicts them. It was for the jury, then, to pass upon this evidence, and deduce from it the true construction to be given to

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the whole transaction. They were distinctly instructed that if the Citizens' Trust Company actually dropped it, and had nothing further to do with the case, and the Union Surety Company took their place and finished the operation on its own account, there could be no recovery. They have found for the plaintiffs, and that shows they did not take that view. As I have endeavored to point out, there was sufficient evidence to warrant them in such a conclusion, and the defendants must therefore abide by the result. The verdict establishes that the Union Surety Company acted not independently of, but as representing, the Citizens' Trust Company, whose place it took, and this made out a complete case on which the plaintiffs were entitled to recover.

Several minor matters were urged at the argument, but I see no occasion to specially consider them. The real question is the one which I have discussed, and, finding nothing that calls upon me to disturb the verdict, the rule for a new trial is discharged.

HENRY HUBER CO. v. J. L. MOTT IRON WORKS.

(Circuit Court, S. D. New York. February 5, 1902.)

1. PATENTS—INFRINGEMENT—CONSTRUCTION OF CLAIMS.
A construction of the claims of a patent is not permissible which holds as an infringement a device which omits one of the elements of the combination, even if the remaining members accomplish a somewhat similar result.

2. SAME—BATH WATER HEATERS.
The Beaumont patent, No. 555,033, for an improvement in hot water bath fixtures, is not entitled to a broad construction of its claims or to a wide range of equivalents, in view of the prior art, and cannot be so construed as to cover every device having such an arrangement of valves that steam cannot be turned on without also turning on a stream of water to be heated. Claims 1, 2, and 6 construed, and *held* not infringed.

In Equity. Suit for infringement of patent. On final hearing.

Donald McLean and Walter S. Logan, for complainant.
W. P. Preble, Jr., for defendant.

COXE, District Judge. This is an equity suit, based upon letters patent No. 555,033, granted February 18, 1896, to the complainant as assignee of Thomas C. Beaumont, for improvements in hot water bath fixtures. The application was filed March 10, 1894.

The specification says:

"This invention relates to means for heating water for baths, showers, and other purposes where water is occasionally required to be heated, the invention being especially designed for those occasions where it is desirable to draw at will either hot or cold water through the same pipe. The water, in flowing to the faucet, shower or other outlet, passes through a water heating passage or pipe where it is exposed to the heat of steam contained in small pipes extended through said water pipes and constituting a steam passage, the steam being condensed by giving up its heat to the water in its flow through said passage. Hence if the steam is turned on along with the water the water issues hot, but if the steam is not turned on the water

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flows cold. In such heating device it is important to provide means for preventing turning on steam without also turning on water, as by so doing steam would blow into the waste pipes and might scald the occupants of the building and have other disastrous results. The object of the present invention is to provide means for controlling the admission of water and steam, to the end that the steam cannot be turned on without also turning on water, while the flow of steam may be regulated independently of the flow of water to a greater or less extent and in order also that water may be turned on to draw cold water when desired."

In other words, the patentee has endeavored to prevent accidents to the bather by providing mechanism which permits the cold water to be turned on independently of hot water or steam, and prevents the steam from being turned on except in conjunction with the cold water. Neither live steam nor scalding water can, in ordinary circumstances, escape from the outlets.

The specification says, further:

"To these ends the improved apparatus has a compound valve for controlling the admission of water or steam to the water-heating and steam passages, consisting of a shell having steam and water passages through it, a pair of compression valves connected together and adapted to close the steam and water passages, respectively, and an independent compression valve adapted to close the steam passage only, so that steam can flow only when both valves are open, and cannot be turned on without thereby opening the water valve."

The claims which are said to be infringed are the first, second and sixth. They are as follows:

"(1) The combination with a water-outlet passage, of a compound valve for controlling the admission of water and steam thereto, consisting of a shell having two distinct inlet passages for water and steam, a pair of valves connected for simultaneous operation and adapted to close respectively the steam and water passages, and an independent valve adapted to close the steam passage, whereby steam can flow only when both valves are open, and cannot be turned on without also turning on a stream of water to be heated.

"(2) The combination with a water-outlet passage of a compound valve for controlling the admission of water and steam, consisting of a shell having two distinct steam and water inlet chambers and outlet seats therefrom, a valve stem and two valves carried thereby, the one closing the steam-outlet seat and the other the water-outlet seat, and an independent stem carrying a valve closing the steam-outlet seat, whereby the former stem controls the flow of water, and both control the flow of steam, so that the steam cannot be turned on without also turning on a stream of water to be heated."

"(6) The combination of a valve shell B formed with steam and water inlet chambers c and d, and outlet seats h and o therefrom, valves i and p closing against said seats respectively, a valve stem J carrying both said valves, and formed in two sections screwed together, with a valve p between them, and a valve i swiveled on the section q' by means of a coupling nut t' engaging the head t of this stem section."

The defenses are lack of utility and patentability and noninfringement.

The first claim is for a combination having the following elements: First. A water outlet passage. Second. A compound valve for controlling the admission of water and steam to the outlet. Third. The shell for the compound valve having two distinct inlet passages for water and steam. Fourth. The shell having also a pair of valves

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connected for simultaneous operation and adapted to close the steam and water passages, respectively. Fifth. An independent valve adapted to close the steam passage.

The second claim is for substantially the same combination.

The sixth claim is restricted by the introduction of reference letters and is for a combination having the following elements: First. A valve shell B having steam and water inlet chambers c and d and outlet seats h and o therefrom, valves i and p closing against said seats, respectively. Second. A valve stem J carrying both said valves, and formed in two sections screwed together with a valve p between them. Third. A valve i swiveled on the section q' by means of a coupling-nut t' engaging the head t of this steam section.

It is doubtful if the sixth claim which omits the independent steam valve describes an operative combination for practical use. Without this valve there would be no adequate method of regulating the temperature. The outlet would always run hot or warm water. It would be impossible for the bather to take a cold bath as he could not turn on the cold water without turning on the steam at the same time.

But aside from this consideration it is obvious that the first two claims were intended to cover the invention as broadly as possible, the remaining claims being for subsidiary combinations and the precise mechanism described and shown. It would be an anomaly in patent law to construe the limited sixth claim as covering structures not embraced within the broad first claim.

The language of all of these claims is involved and obscure; they are difficult to comprehend and no effort has been made by the experts on either side to analyze or explain them. It is thought, however that the foregoing analysis is substantially correct and that in order to infringe the respective claims the defendant's apparatus must contain the elements as stated or clearly defined equivalents therefor.

The theory of the complainant, apparently, is that the claims are infringed by any apparatus "whereby," to use the language of the claims, "steam can flow only when both valves are open, and cannot be turned on without also turning on a stream of water to be heated."

A sketch of the defendant's device is found at the end of complainant's proofs and a description of the apparatus is given by the patentee and by the defendant's expert, generally, in his direct, but more specifically in his cross-examination. The device contains two valves only, one a compression valve and the other a spring valve. The water is turned on before the steam is admitted. There is a prolongation of the stem of the water valve, which is about a quarter of an inch from a projection on the steam valve when the valves are closed. The water valve is, therefore, opened a quarter of an inch before the spring seated steam valve commences to open. When the closing action takes place the handle of the lever is turned and the steam valve is closed by the spring. By turning the handle still further the water can be shut off or it can be left to run after the steam has been shut off. The device is operated by a single

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lever which controls the valves and induces them to open and close, but not synchronously. The valve spindle is made to swivel in two parts and passes through the partition in the valve shell separating the steam and water chambers. After opening the water valve the protruding stem pushes against the part connected with the steam valve and opens that.

As in the preferred form of the patented device the steam never comes in actual contact with the water. The steam is confined in small tubes inside a water column and thus communicates its heat to the water. There is no method by which the steam valve can be opened or closed independently of the water valve and as the latter is opened before the former the water flows through the system in advance of the steam. In a similar manner, when the lever is turned for closing, the steam ceases while the water continues to flow.

The defendant's apparatus has no independent valve adapted to close the steam passage, when it is desired to draw cold water only or vary the temperature of the water. This is admitted. Neither does it have the minutely described features of the sixth claim. There is no valve stem J made in two sections with the valve p between them, and several other parts therein described and claimed are also absent.

One of the defendant's witnesses testifies as follows:

"I do not know of the Beaumont apparatus ever having been used, made, offered for sale or illustrated; and I am conversant with the requirements of the trade and would be in a position to know if an article of this kind had been put on the market."

The complainant's expert testifies that the Beaumont apparatus is, in his judgment, "a practically successful machine," but the court has been unable to discover any testimony contradicting the above statement of defendant's witness, or tending to show that the patented structure was ever in practical use or achieved any commercial success. Assuming the presence of the inventive faculty, infringement must depend upon the scope given to the claims. "The range of equivalents depends upon the extent and nature of the invention." Miller v. Manufacturing Co., 151 U. S. 207, 14 Sup. Ct. 318, 38 L. Ed. 131.

The complainant insists that Beaumont is entitled to an exceedingly broad construction which will enable him to hold as infringers all who use devices which keep the cold water and steam separate and prevent the turning on of the latter without at the same time turning on the former to cool it. "Inventors," says the brief, "for decades had been leading up to this point. Many men had reached out towards it. Some, perhaps, had caught glimpses of the promised land, but it was left to Beaumont to be the first to enter it and to give to the world what it had been so long waiting for."

In order to ascertain how far this claim is justified it will be necessary to examine very briefly the prior art. Although many prior patents have been introduced in evidence by the defendant it will be necessary to examine two only, as it is conceded on all hands that they approach nearer to the Beaumont device than any of the

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others. These are the patents to Tobey and Schaffstadt, dated respectively November 23, 1886, and April 15, 1890.

The Tobey patent is for a water heater, but it can be and actually has been used for bathing purposes. Indeed, the specification, after describing the defects of the prior structure, says:

"Thus, as often occurs, all the water in the cold-water tank may become heated and accidents happen by scalding, hot water being discharged from a supposed cold-water faucet. * * * The object of my invention is to overcome these objections. * * * My improved heater has the least possible amount of surface from which heat can radiate, and may be made to discharge either warm or hot water always at uniform temperature, and when the valve is properly set by lock nuts the receiver can never fill with steam."

The cold water is heated by contact with pipes filled with steam, the water and steam do not mingle and the steam cannot in ordinary conditions be turned on unless there is cold water in the chamber to be heated. The apparatus is so arranged that no matter how hot the steam may be the water as it comes from the faucet cannot exceed the desired temperature. It is true that Tobey accomplishes the desired result by different mechanism from that shown in the patent in suit. The steam and water valves are not connected together so as to be operated by the same handle, and there are, of course, many other differences of construction, but, on the other hand, the Tobey device has actually stood the test of use and seems to be a practical machine for heating water by steam pipes and conveying it to the bath at the desired temperature without danger to the bather, provided the machine is used with ordinary prudence.

The Schaffstadt patent is for an improved bath fixture "whereby the water is heated to any desired temperature by steam traveling through the pipes in an opposite direction to that in which the water is flowing without coming in contact with the water." The arrangement of the steam pipes is very similar to the arrangement in the Beaumont structure, the material differences being confined to the valve mechanism, the Schaffstadt apparatus having two independent valves for steam and water and Beaumont having the three valves heretofore described. In short, the Schaffstadt structure has all the features of the patented structure, except one, viz., the impossibility of the steam coming on before the water. If the drawing shows interfering handles there can be no doubt that means to prevent the primary flow of steam is mechanically provided, but whether this be so or not such handles were well known in the art and could easily be applied to the Schaffstadt valves. Certainly the natural way to operate these valves would be to turn on the water first. It would be a difficult task to turn on the steam first as the handles are so arranged that if the lever of the steam valve be first manipulated the action will almost inevitably push open the water lever also and the water lever will act in a similar manner if, in closing, it be first turned to the right. Other patents and exhibits show an endless variety of heaters, valves, faucets and cocks all designed to accomplish the same general object.

Ever since the bath tub has been an indispensable adjunct of civilized life the effort has been to enable the bather to take a cold or

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warm bath, as he desired, and to do so with safety. The necessity of preventing steam or scalding water from escaping into the tub was manifest from the beginning and many devices have been adopted for this purpose. When it is realized that the tastes of bathers differ as to the temperature of the water and that the same person may desire a cold bath one day and a hot bath the next it will be seen how impossible it is to provide an absolutely automatic device under these changing conditions. Accordingly it appears that in all the structures shown in the record, including those of the complainant and defendant, something is left to the discretion and common sense of the bather. Unless he exercises ordinary prudence he may be chilled or scalded and this may happen with the complainant's apparatus and is much more likely to happen than with the defendant's apparatus. All of these devices proceed upon the theory that a person who knows enough to wash himself, even though a child, will also know enough not to plunge into boiling water or into ice water.

The court is unable to accept the complainant's theory that "Beaumont being first in the field is entitled to a broad construction of this patent." He was not the first. An army of inventors had preceded him and, assuming his apparatus to be an improvement upon the "Gegenstrom Bath" of Schaffstadt, it was only an improvement and nothing more.

It follows that the complainant is not entitled to a broad construction of the claims or a wide range of equivalents.

A construction is not permissible which holds as an infringement a device which omits one of the members of the combination, even if it be admitted that the remaining members accomplish a somewhat similar result. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. Ed. 344; Sharp v. Riessner, 119 U. S. 631, 7 Sup. Ct. 417, 30 L. Ed. 507; Walk. Pat. § 349.

As before stated no attempt has been made upon the part of the complainant to analyze the claims or read them upon the defendant's apparatus. The charge of infringement is asserted generally and the expert is not asked to compare the defendant's device with the claims, but to "compare the valve system in the patent in suit with the valve system in the Mott apparatus."

The complainant's contention as to one of the elements, which is admittedly missing, may be fairly stated in the language of the brief as follows:

> "We find in function and effect, if not in form, the independent valve mentioned in the first two claims. We find a valve doing the same thing in substantially the same way, though with a different form and of a different mechanical construction."

Comparing the defendant's apparatus with the first claim it will be found that it does not contain the compound valve described in the patent and the independent steam valve is entirely omitted. If it be urged that the spring-seated steam valve is the independent valve of the claim then the second (fourth) element is wanting, for there is then no "pair of valves connected for simultaneous operation." The two valves of the Mott device cannot be at the same time the

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equivalent of the two connected valves of the claim and one of them be also the equivalent of the disconnected valve of the claim. In other words, a structure built in exact conformity with the patented device, except that the independent steam valve is omitted, cannot be held to have an equivalent for that valve.

But the defendant's apparatus does not have the compound valve of the claim. It has but two valves and these do not either open or close simultaneously. The steam valve is so located that it is impossible to operate it independently. The water valve must be opened before the steam valve and the steam valve must close before the water valve.

The same reasoning applies to the second claim and, assuming the sixth claim to be valid, to that claim also.

The court is constrained to hold that the defendant does not infringe. The bill is dismissed.

THE LIDA FOWLER.

(District Court, E. D. Pennsylvania. February 7, 1902.)

No. 41.

1. MARITIME LIENS—CREATION BY STATE STATUTE—ENFORCEMENT IN COURT OF ADMIRALTY.

The provisions of Act Pa. March 24, 1851 (P. L. 230), requiring vessels to take pilots when arriving at or leaving the port of Philadelphia, subjecting them to penalties for a failure to do so, to be recovered for the benefit of "the Society for the Relief of Distressed and Decayed Pilots, Their Widows and Children," and making all sums due for pilotage and the penalties so imposed a lien upon the vessel chargeable therewith, relate to a subject which is maritime in its nature, and therefore the liens thereby created are valid, and may be enforced in the admiralty courts of the United States, as authorized by the act.[1]

2. ADMIRALTY JURISDICTION—SUIT FOR STATUTORY PENALTY—ENFORCEMENT OF MARITIME LIEN.

Rev. St. § 563, cl. 8, which confers upon the district courts of the United States jurisdiction "of all civil causes of admiralty and maritime jurisdiction," gives such courts jurisdiction of a suit to enforce a maritime lien created by a state statute for pilotage fees, or for a penalty imposed by such statute for the failure to take a pilot as therein required.

In Admiralty. Suit in rem to enforce a lien for a statutory penalty.

Howard M. Long, for libelant.

John F. Lewis and Horace L. Cheyney, for respondent.

J. B. McPHERSON, District Judge. The facts in this case, which are undisputed, may be thus stated, substantially in the words of libelant's counsel:

This is a proceeding in rem by the Society for the Relief of Distressed and Decayed Pilots, Their Widows and Children, incorporated under the Pennsylvania statute of September 29, 1789, against

[1] Maritime liens created by state laws, see note to The Electron, 21 C. C. A. 21.

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the schooner Lida Fowler, for the sum of $48, with interest, a sum equal to the outward pilotage of the schooner from the port of Philadelphia. On or about March 12, 1901, the Lida Fowler, a registered American vessel of more than 100 tons burden, drawing 12 feet or more of water, engaged in general trading, not solely coal laden, nor engaged in the coal trade, and not licensed as a coasting vessel, was in the port of Philadelphia, about to sail to Central America or the West Indies, and back to the United States. Under the Pennsylvania statute of March 24, 1851 (P. L. 229), she was bound to take a duly licensed pilot of the port; but, notwithstanding that duty, she was towed away without having made an effort to obtain such a pilot, thus neglecting or refusing the statutory duty.

On March 12th, and for a long time prior thereto, the licensed pilots of the port of Philadelphia maintained an office at 319 Walnut street, in this city, for the purpose of supplying pilots to all vessels which under the law were bound to take a pilot; and this fact the captain of the Lida Fowler knew. It is an established custom of the port that the captains or agents of all vessels outward bound shall make application for pilots at that office. On the day the schooner sailed, and for more than 24 hours before and after that time, there were several licensed pilots in attendance at the office, any one of whom could have been employed to take her to sea; but her master made no effort to engage their services, and left the port without a pilot on board. The libelant, being entitled in such case under the act of 1851 to receive a sum equal to the pilotage fee (Collins v. Society, 73 Pa. 194), demanded payment from the agents of the schooner, and, upon their refusal, attached the vessel.

Sections 5 and 6 of the act of March 24, 1851 (P. L. 230), are as follows:

"Sec. 5. Every vessel arriving from or bound to any foreign port or place, and every other vessel of the burthen of one hundred tons or upwards, sailing from or bound to any port not within the river Delaware (except licensed coasting vessels sailing from this port), shall be obliged to take a pilot; and it shall be the duty of the master of every such vessel, within thirty-six hours next after his arrival at said port of Philadelphia, to make a report to the master warden of the name of such vessel, her draught of water and the name of the pilot who shall have conducted her to this port, and when any such vessel shall be outward bound, and not duly licensed to coast, the master of such vessel, and the pilot who is to conduct her to the Capes, and the draught of water at that time; and it shall be the duty of the wardens to enter every such vessel (reported as aforesaid) in a book to be kept by them for that purpose, and if the master of any such vessel shall neglect or refuse to make such report he shall forfeit and pay the sum of ten dollars, and no more. And if the master of any such vessel, being licensed as a coasting vessel, and of the burthen of one hundred tons, or more, shall refuse or neglect to take a pilot, the master, or owner or consignee of such vessel shall forfeit and pay the sum equal to half pilotage of such vessel; and if such vessel be not licensed as aforesaid, then and in such case, the master, owner or consignee thereof, shall forfeit and pay the full pilotage thereof: Provided, always, that wherever it shall appear to the wardens, that in the case of an inward-bound vessel, should a pilot not offer before such vessel reached the Brandywine lighthouse, bearing east, or in case of an outward-bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid for not having a pilot shall not be incurred.

"Sec. 6. All sums due for pilotage, half-pilotage, and all other claims and

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penalties in the nature or in lieu thereof, shall, as they accrue, become and remain a lien upon the vessel chargeable therewith, her tackle, apparel and furniture, until they are paid; and for the recovery thereof, in addition to the remedies now provided (and which shall remain as heretofore), such process and proceedings shall issue and be had in the court of common pleas of Philadelphia county, or in any court possessing admiralty jurisdiction, as are usually had in courts of admiralty for the recovery of seamen's wages. And all half-pilotage forfeitures and penalties in the nature thereof, accruing by virtue of this act, and all other debts, claims and demands, to which 'The Society for the Relief of Distressed and Decayed Pilots, Their Widows and Children,' are legally or equitably entitled to, under any law whatever, shall be recovered in the name and for the use of the said society, to whom, or to whose agent, duly constituted, the same shall be paid: Provided, that in all suits and proceedings, to which 'The Society for the Relief of Distressed and Decayed Pilots, Their Widows and Children,' shall be a party, no person shall be incompetent to testify as a witness, because of his being a member thereof."

The defenses set up by the schooner are thus stated in the brief of its counsel:

"(1) That the provision of the act of 1851, providing that the amount of the penalty for the failure to take a pilot should be a lien upon the vessel, is invalid, because the legislature of this state lacked authority to provide that the penalty should be a maritime lien upon a vessel.

"(2) That this court has no jurisdiction of this action in rem, because the provision of the Pennsylvania act for a lien for the amount of the penalty is absolutely invalid.

"(3) That this court has no jurisdiction of an action to recover a penalty provided for by the laws of the state of Pennsylvania."

The first and second grounds of defense are practically one, and neither, I think, is well taken. The supreme court of the United States has distinctly decided that, where the subject of state legislation is maritime in its character, the legislature may give a lien upon the vessel, and the enforcement of such lien may be committed to the courts of admiralty. It is enough to quote the following paragraphs from The Corsair, 145 U. S. 347, 12 Sup. Ct. 952, 36 L. Ed. 731, and The J. E. Rumbell, 148 U. S. 11, 12, 13 Sup. Ct. 500, 37 L. Ed. 347:

The Corsair: "A maritime lien is said by writers upon maritime law to be the foundation of every proceeding in rem in the admiralty. In much the larger class of cases, the lien is given by the general admiralty law; but in other instances, such, for example, as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action in personam for a cause of action of a maritime nature, the district court may administer the law by proceedings in personam, as was done with a claim for half pilotage dues under the law of New York, in the case of Ex parte McNiel, 13 Wall. 236; but, unless a lien be given by the local law, there is no lien to enforce by proceedings in rem in the court of admiralty."

The J. E. Rumbell: "In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful:

"(1) For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty.

"(2) For repairs or supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute.

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"(3) Wherever the statute of a state gives a lien, to be enforced by process in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States.

"(4) This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty.

"The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure."

See, also, note to The Electron, 21 C. C. A. 21.

The third defense is supported by the argument that section 563, cl. 3, of the Revised Statutes confers jurisdiction upon the district court of suits for "penalties and forfeitures incurred under any law of the United States," and gives no authority to entertain a suit for a penalty imposed by a state statute. This argument overlooks the grant of jurisdiction, in clause 8, "of all civil causes of admiralty and maritime jurisdiction," in which such an action as the pending libel seems to me to be certainly included: The Electron, 21 C. C. A. 30. I can see no difference in principle between The Glendale v. Evich, 26 C. C. A. 500, 81 Fed. 633, in which the validity of a lien given by a state statute for a maritime tort was sustained, and the present action, even if it be regarded as a suit to recover a penalty. Damages for a tort are intended to be compensation for a wrong; and a penalty imposed for the violation of a duty, while it may sometimes operate to punish the wrongdoer, as well as to compensate the person injured, is essentially of the same character. In the present case, the sum which the schooner is required to pay for neglect or refusal to employ a pilot does not go beyond compensation; for the amount is no more than the charge for pilotage, and the money is to be applied to the benefit of the associated pilots, their widows and children. I see no difficulty whatever, under the authorities above referred to, in holding that the act of 1851 is valid, so far as it gives authority to the courts of admiralty to enforce the lien against the vessel. The subject is maritime, and this is the test to be applied. Whether the suit is to recover pilotage for services rendered or offered, or for a penalty because the vessel refused and neglected to employ a pilot, seems to me to be immaterial. The essence of the matter is the same in each of these three cases.

As part of the history of the statute, I may add that the court of common pleas of Philadelphia county has decided that the act of 1851 is invalid, so far as it attempts to give jurisdiction to the courts of the state: Rutherford v. The Ornen, 2 Wkly. Notes Cas. 122.

A decree may be entered in favor of the libelant, with costs.

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SHERMAN v. AMERICAN CONGREGATIONAL ASS'N et al.

(Circuit Court of Appeals, First Circuit. January 24, 1902.)

No. 382.

1. EXECUTORS—PRESUMPTION—PLEADING.
Where the bill, in a suit by an heir to recover a sum given as a legacy and alleged to have been wrongfully paid to defendant as legatee, fails to allege that the payment was not made at the time required by the will, or that an annuity on which such legacy was conditioned was not duly paid, there is a presumption that such payment was properly made.

2. WILLS—LEGACIES—PLEADING—CONSTRUCTION.
Where the bill, in a suit involving the construction of a will giving certain property to a beneficiary on condition that the beneficiary should agree to pay an annuity to testator's wife, contains no allegation showing that the annuity is the principal object of the bequest, it will not be held to be either superior or inferior to the other purpose of the legacy.

3. SAME—COURTS—JURISDICTION.
Where the bill, in a suit which involves the construction of a will which was probated in Massachusetts, contains an indirect allegation that all the proceedings referred to have been approved by a Massachusetts probate court, but does not allege that the probate court on its equity side construed the will, it does not show an adjudication which will defeat the jurisdiction of a federal court to construe the will, as a distinction is preserved in Massachusetts between the jurisdiction of the probate court, acting strictly as such, and having no power to construe wills, and its special equity jurisdiction, conferred by statute, to construe such instruments.

4. CHARITABLE CORPORATION—POWERS.
The fact that a religious association has by its charter certain enumerated powers does not bar it from complying with the terms of a legacy requiring it to pay an annuity, when such compliance is only incidental, and tends to the accomplishment of the substantial purposes of its incorporation.

5. WILLS—CONDITION SUBSEQUENT.
Where a will directs the payment of a certain sum to an association on the death of the testator, on condition that the association agrees to pay an annuity, the estate vests in the beneficiary on the death of the testator, when the condition imposed on the beneficiary is a condition subsequent.

6. SAME—CONSTRUCTION OF BEQUEST—CONDITIONS.
A condition in a bequest, requiring the legatee to pay an annuity to the wife of the testator during her life, is shown to be a condition subsequent.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For decision of the circuit court, see 98 Fed. 495.

Roger M. Sherman, for appellant.

Walter Bates Farr (M. F. Dickinson, on the brief), for appellee the American Congregational Ass'n.

Dudley P. Bailey (Ralph W. Foster, on the brief), for appellees Tenney and Cheever.

W. Frederick Kimball (Walter Bates Farr, on the brief), for appellee Burwell.

Before PUTNAM, Circuit Judge, and ALDRICH and LOWELL, District Judges.

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PUTNAM, Circuit Judge. This case will be found to concern no question except the construction of the will of Isaac P. Langworthy. It is presented on a demurrer to the bill, which was dismissed in the circuit court. Mr. Langworthy died on January 5, 1888, leaving a widow, Sarah W. Langworthy. She died on April 22, 1893, also leaving a will. The parties made defendants, besides the American Congregational Association, are the executor of the will of Mr. Langworthy and the executors of his widow's will. The complainant claims to hold title under Mrs. Langworthy.

A question is made whether all the parties in interest have been brought into the case; and it is also maintained that the bill should have been brought by the executors of Mrs. Langworthy's will. The first question, if a substantial one, could probably be met by reframing the bill, for which leave would, of course, be granted. Therefore, in view of the conclusion which we have reached, it does not require our attention. As to the second, inasmuch as the bill charges that the executors of the will of Mrs. Langworthy are in collusion with the executor of the will of her husband, so that the case may fall within the usual class entitling a party in interest to proceed without the joinder as a coplaintiff of the person in whom the nominal title vests, it may, perhaps, by amendment, be put in proper form in this respect also, if it is not already.

Mr. Langworthy's will, omitting the formal parts, was as follows:

"First. I direct my executors hereinafter named to pay all my just debts and funeral expenses.

"Second. I devise and bequeath to my dearly beloved wife, Sarah W. Langworthy, all of my real and personal estate, wherever the same may be situated, of whatever the same may consist, except as hereinafter provided.

"Third. I direct my executors to pay over to the American Congregational Association, as soon as may be convenient after my decease, the sum of ten thousand dollars (unless previous to my death I shall have deposited said sum with said association), upon condition that said association agrees to pay to my wife, in quarterly payments during her life, the sum of $400, and upon the death of my said wife to pay over semiannually the net income of said $10,000, and any increase thereof, to the library committee of said association; the same to be expended by said committee in the purchase of local histories, genealogies, commentaries of the Bible, and ecclesiastical histories for said library.

"Fourth. I hereby nominate, as executors of this my will, my said wife, Sarah W. Langworthy, and my friends Charles H. Trist and Edward L. Burwell, both of said Chelsea, and request that they, and each of them, may be excused from giving any sureties on their official bonds as such executors."

Although Mr. Langworthy died in January, 1888, and Mrs. Langworthy in April, 1893, the legacy to the American Congregational Association was not paid until April 1, 1898. The bill gives no explanation of the delay, and it charges no one with laches in that connection. It does not even allege when the association was advised of the fact of the legacy, or that it was ever so advised until payment was made to it. It is to be observed that the third clause of the will directed that payment be made as soon as might be convenient. The bill fails to show what was the condition of the estate, and whether, with reasonable efforts on the

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part of the executor, it was convenient to make earlier payment. The ordinary presumption is that the executor properly performed his duty, and, in view of the absence of any allegation to the contrary, the presumption accordingly is conclusive on this record.

Neither does the bill state whether Mr. Langworthy's executor paid Mrs. Langworthy during her lifetime the annuity contemplated by the third paragraph of his will, but, as it was his duty to do so, the presumption is that the payments were made. Moreover, the failure of the bill to allege to the contrary requires us to so assume.

Neither does the bill contain any allegations from which we can ascertain whether the annuity to Mrs. Langworthy was the principal purpose of its third paragraph. As the matter stands, we must refrain from any construction based, in whole or in part, on any hypothesis subordinating either object to the other. Neither can we give a construction which would make the annual payment of $400 a mere charge on the legacy in the third paragraph. The purpose was to support the annuity by a valid agreement by the association for its payment, made either formally, informally, or by implication, so that it would be received by Mrs. Langworthy whether it exhausted the principal sum, or though the principal sum were lost.

The allegations of the bill fail to set out with proper details, or in the exact language known to the law, or in orderly sequence, the facts of the case. It is not easy to ascertain from the pleadings the grounds of the complaint, or what relief is intended to be asked. The bill shows enough to make it plain that it is claimed that the legacy to the American Congregational Association failed, because—First, it made no formal agreement to pay the annuity; and, second, because it had no power under its charter to give such an agreement. Making so much clear, it then alleges that the executor of Mr. Langworthy's will "assumed to sell the estate, real and personal," "in accordance with a pretended trust to apply the proceeds to pay" the legacy to the association. Inasmuch as the will establishes no trust, and gives the executor no authority to dispose of Mr. Langworthy's real estate in order to effectuate its purposes, and inasmuch as the bill fails to allege in a proper way that Mr. Langworthy left real estate, or left personal property, or how much he left of each, this portion of the bill is not intelligible, and must be disregarded.

It next alleges that the executor "sold property of great value, being personalty and land, which descended and passed under the will of Mr. Langworthy to Mrs. Langworthy, and other property, at a price far below its real value." Here, again, comes the same want of sufficient allegations. So far as realty is concerned, for aught the bill properly shows the title passed to Mrs. Langworthy, and remains in her devisees or heirs, whichever the case may be; and the complainant, together with those, if any, interested with him in the estate of Mrs. Langworthy, have a full remedy at law by writ of entry, thus barring any jurisdiction in equity.

The bill next alleges that the executor "wasted said estate," with-

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out further explanation thereof, and without any details whatever; so that here, again, it is insufficient to call on any chancery court to exercise its jurisdiction. Again, it alleges that the executor "placed a cloud upon the title thereto"; meaning, probably, the real estate. If this expression were accompanied with sufficient details to enable a chancellor to perceive what was the nature of the cloud, and how it was placed on the estate, and, indeed, how an executor, without some colorable authority given him by the will, or without some alleged action of a probate court, could have accomplished this, it would, perhaps, have afforded a basis for jurisdiction in equity; but the bare statement here found fails to do so.

Consequently, all the allegations of the bill to which we have referred are useless for the purposes of this suit; and we are left to the remaining allegation, in connection with what we have already said, as to the claim that the American Congregational Association never agreed to the payment of the annuity, and had no power to make such an agreement. This allegation is as follows: "And paid over to said defendant the American Congregational Association the proceeds, to the amount of ten thousand dollars and upward." The effect is to limit the complainant's relief to the reclamation of this sum.

The bill contains an indirect allegation that all the proceedings referred to had been approved by the probate court for the county of Suffolk. If it had properly shown that the real estate of Mr. Langworthy had been sold by his executor under a license from the probate court, or that any personal property had been disposed of wrongfully, for an inadequate value, and if, also, it admitted that the proceedings of the executor in those respects had been approved by the probate court, it would follow that, as that court has normal jurisdiction over such proceedings, and over the executor's accounts growing out of the same, its action would have been res adjudicata. It would, therefore, be clear, whatever might be the jurisdiction of a federal court in the event there had been no action by the probate court, that such action having been taken, and the probate court having jurisdiction, its proceedings would have resulted in a full bar to the present bill, so far as such matters are concerned. The respondents, however, maintain that inasmuch as the bill alleges, although incidentally, that all the transactions to which it relates have been approved by the probate court, the questions of the construction of Mr. Langworthy's will, and of the validity of the payment of the legacy to the American Congregational Association, are likewise res adjudicata. It is, however, true that questions of the construction and effect of a will, or of any particular clause therein, stand, so far as the probate courts of Massachusetts are concerned, on an entirely peculiar basis. Under late statutes, on a special proceeding, the probate court, acting as an equity court, has jurisdiction to determine them; but the distinction between probate courts proceeding as such, and the same courts when exercising the statutory jurisdiction in equity, is a broad one, and is carefully preserved. Bennett v. Kimball, 175 Mass. 199, 200, 55 N. E. 893; Green v. Gaskill, 175 Mass. 265, 56 N. E. 560. It

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is the undoubted law of Massachusetts that any action of a probate court, in the exercise of its normal jurisdiction, with reference to the construction of Mr. Langworthy's will, would have been void. Cowdin v. Perry, 11 Pick. 503; Granger v. Bassett, 98 Mass. 462. In this particular, the normal jurisdiction of the probate courts of Massachusetts remains as it does everywhere in the absence of special legislation, and it leaves to the courts of common law and the chancellor all questions of the construction and effect of devises and legacies. Therefore, notwithstanding the statute referred to in Bennett v. Kimball and Green v. Gaskill, in the absence of any showing that the probate court, on its equity side, passed on the question which, as we have said, is the only one necessary for us to consider, there is no doubt about our jurisdiction. The same result, under legislation in Maryland similar to that in Massachusetts, is reached by a decision of the circuit court of appeals for the District of Columbia, cited as approved in Kenaday v. Sinnott, 179 U. S. 606, 615, 21 Sup. Ct. 233, 45 L. Ed. 339.

Act Mass. 1895, c. 134, which is the only statute enlarging the jurisdiction of the probate courts brought to our attention later than the act of 1891, which was under consideration in Bennett v. Kimball, need be referred to merely for the purpose of stating that it is aside from any of the topics which we have before us.

The question remains whether or not the allegations referred to, stating that certain proceedings have been approved by the probate court, can be accepted as intending the exercise by it of its statutory equitable jurisdiction. In the absence of any allegation otherwise, we are justified in assuming that the reference to it is merely as a court of probate, and the positions taken by the parties at the hearing sustain that assumption. Therefore we hold that we have jurisdiction on this appeal as to the validity and effect of Mr. Langworthy's will, and over no other question.

The issue as to the power of the American Congregational Association to comply with the terms of the legacy is one easily disposed of on various theories. The fact that the association has, by its charter, certain enumerated powers, does not bar it from the exercise of incidental functions which relate to the accomplishment of the substantial purposes of its incorporation (Association v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. ——); and all occasion for any securing of the annuity by the association had gone by before the legacy was paid to it, and before, so far as the case shows, the estate was in condition to pay it conveniently, so that this topic is only a moot one.

Coming to the only other proposition which we have to consider: With two or three peculiar exceptions, as to which the law has necessarily established rigid rules, relating almost entirely to the descent of real estate, wills receive reasonable and fair construction, for the purpose of ascertaining the real intent of testators. Courts make use of various incidental rules to assist them in thus construing wills: but none, with the rare exceptions to which we have referred, are permitted to obstruct the effectuating the substantial purpose of the instrument in question. Having in view the facts that, so far

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as this case shows, the legacy was paid to the association as soon as the progress of the estate would conveniently permit of its being done; that the will gave directions that it should be paid accordingly; that, when it was so paid, Mrs. Langworthy had deceased; that the presumption is that her annuity had been received by her from the executor during her lifetime; and that, therefore, the provision with reference to any agreement as to an annuity had become of no further use,—it requires a strong stretch of any method of reasoning to lead the mind to conclude, fairly and reasonably, that under such circumstances, or under the circumstance of his wife having deceased before him, Mr. Langworthy intended to annul this legacy. There is no reasonable ground for sustaining such an hypothesis; and, looking at the will fairly and reasonably, it cannot be questioned that it was the desire of Mr. Langworthy, under the circumstance of his wife deceasing before him, or, likewise, of his wife deceasing after him but before the legacy was paid, that it should vest absolutely in the association.

To come more closely to the matter, the condition named, according to all the rules of construction, was not precedent, but subsequent. The law leans strongly against construing a legacy or devise so that it does not vest on the decease of the testator. This rule was fittingly expressed for this case by Mr. Justice Swayne, speaking in behalf of the court, in Cropley v. Cooper, 19 Wall. 167, 174, 22 L. Ed. 109, 113, where he said "that a bequest, in the form of a direction to pay at a future time, vests in interest immediately if the payment be postponed for the convenience of the estate, or to let in some other interest." By the express terms of the legacy, the postponement of payment in this case was purely "for the convenience of the estate." This rule favoring the vesting of estates is so well known that it is not necessary to accumulate authorities, and, applying it as it is usually applied, there can be no question that the legacy in issue vested at the death of Mr. Langworthy, although not payable until later. Vesting at that time, everything in it in the form of a condition must, from the necessity of things, be regarded as subsequent. We think we may safely say that this is the rule laid down by all the text writers of authority, and also it is so stated by Chief Justice Marshall in Finlay v. King, 3 Pet. 346, 376, 377, 7 L. Ed. 701, 712. The case at bar seems to be precisely covered by that paragraph of the syllabus which was prepared by the court itself, where it is stated that the court had found no case in which a general devise, importing a present interest, in a will making no other disposition of the property, on a condition which may be performed at any time, had been construed, from the mere circumstance that the estate was given on condition, to require that it must be performed before the estate could vest.

The condition being subsequent, and its performance having been rendered impossible by the death of Mrs. Langworthy, it became void, and the legacy became absolutely effective. This was directly ruled by Lord Romilly, in 1866, in Collett v. Collett, 35 Beav. 312. Although this decision was by the master of the rolls, yet it has never been questioned in England. In Dawson v. Oliver-Massey, 2 Ch.

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Div. 753, while the application of Collett v. Collett was doubted, both the then master of the rolls and the court of appeal accepted it as law. It is accepted by Jarm. Wills (6th Am. Ed.) from the 5th Eng. Ed. *851, where, also, at page *853, is laid down the well-known rule that conditions subsequent are to be construed strictly; that is to say, they are not to be so construed as to unnecessarily defeat the devise or legacy. Indeed, if it were necessary, in order to sustain this legacy, and thus to give effect to the intent of the testator, no weight would be given to the conditional form of expression as to the agreement to be given by the association. This well-known rule is stated in 2 Williams, Ex'rs (7th Am. Ed.) 567, to the effect that a bequest on condition may be considered as merely imposing a trust. We have already shown that this annuity could not be regarded merely as a charge raised on the legacy in the way of a trust; but the case is met in that particular by Stanley v. Colt, 5 Wall. 119, 166, 18 L. Ed. 502, 510, to the effect that a proviso in a will "gives way to the intent of the parties, as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust." In other words, in this case, if necessary, the words "on condition," and so forth, could properly be read, "subject to a covenant or agreement by the association to pay an annuity," and so on.

On the whole, we sum up that there are no allegations charging the association with any express or implied renunciation of the legacy in issue; that, as the legacy vested on Mr. Langworthy's decease, the condition, even if it were strictly such, was, from the necessity of things, a condition subsequent; that according to the authorities, and the reasonable construction to be given as to the intent of the testator, the condition, whether it be regarded as such or as a mere covenant or agreement, had been rendered futile by the decease of Mrs. Langworthy, and the legacy thereupon vested absolutely in the association; and that, therefore, the bill was properly dismissed by the circuit court.

The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellees.

LOWELL, District Judge, concurs in the result.

HOBBS MFG. CO. v. GOODING et al.

(Circuit Court of Appeals, First Circuit. January 24, 1902.)

No. 366.

INJUNCTION—SUIT FOR INFRINGEMENT OF PATENT—MISUSE OF COURT'S OPINION.

The mere fact that a complainant in a suit for infringement of a patent, in whose favor a decision has been rendered by the circuit court of appeals, before the sending down of the mandate publishes circulars in which he makes extravagant claims as to the scope of the decision, based upon his interpretation of the court's opinion, is ordinarily not

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such a case of wrongdoing as calls for the court's interference by injunction, though it may probably exercise such power in an extreme case.

On Petition for an Order Restraining Complainant, and for Other Relief.

Edward S. Beach, for complainant.
William A. Macleod, for petitioners.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. Upon this petition for relief against what is claimed to be an unwarrantable use of the opinion of this court, after decision and before mandate was handed down, we need not examine or discuss the question of jurisdiction. Neither need we discuss the question of the power, nor the extent of the power, of this court in respect to punishment for contempt in misuse or abuse of its process. Nor is the power of the court over its own process, as between the parties, necessarily controlled by the rule of noninterference with press publications as to disputed rights and claims of different parties as to the scope of its decisions. It is probably true that, in a case of honest disagreement or misunderstanding as to the true import of a decision, or in an extreme case of abuse or misuse of process for the purpose of impairing or destroying rights sought to be established by the court through its decision, the court may proceed summarily in reference thereto. Such power, however, would be exercised with reluctance, and ordinarily only in an extreme or clear case.

The circular letter complained of sets out more than the court decided, but an examination of the opinion discloses no ambiguity or uncertainty as to what was decided; and, on the whole, we do not think the facts set out in the petition constitute a case of such wrongdoing as calls for our interference. At the most, it was an extravagant claim by a party as to the scope of the decision, based upon his interpretation of the opinion which this court had handed down.

Petition denied.

ARBUCKLE et al. v. BLACKBURN, Dairy and Food Com'r of Ohio.

(Circuit Court of Appeals. Sixth Circuit. January 7, 1902.)

No. 973.

1. EQUITY JURISDICTION—ENJOINING CRIMINAL PROSECUTIONS.
A court of equity is without jurisdiction to entertain a bill by which it is sought to have it determine the question whether the complainant has been guilty of the violation of a criminal or penal statute, and, if it is found that the statute has not been violated, to enjoin threatened prosecutions thereunder; nor is such jurisdiction given by the fact that the prosecutions, though unsuccessful, will injuriously affect complainant's property rights.

2. JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.
A suit against an officer of a state, to enjoin him from instituting prosecutions under a statute of the state which is conceded to be valid if properly construed, and with the enforcement of which he is

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charged by law, on the ground that he is proceeding under an erroneous construction of the law, which would render it invalid as in violation of the constitution of the United States, is one, in effect, against the state, of which a federal court is denied jurisdiction by the eleventh constitutional amendment.[1]

3. PURE-FOOD LAWS—CONSTITUTIONALITY—POLICE POWERS OF STATE.
The pure-food law of Ohio (2 Bates' Ann. St. §§ 4200–4 to 4200–8) which makes it an offense to manufacture for sale, sell, or offer to sell, within the state, any article of food or drink which is adulterated, within the meaning of the act, and provides that food shall be deemed to be adulterated, among other things, "if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if, by any means, it is made to appear better or of greater value than it really is," but that the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, "if each and every article sold or offered for sale be distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, and are not injurious to health," is one which it is within the police powers of the state to pass and enforce, and is not unconstitutional, as an interference with the right of congress to regulate interstate commerce, as applied to articles, mixtures, or compounds brought into Ohio from other states, and sold in the original packages.

4. SAME.
A law of a state, intended to prevent the sale of adulterated food products, which is constitutional and valid in its language and purpose, is not rendered unconstitutional, so as to authorize a federal court to entertain a suit to enjoin prosecutions thereunder, because the state food commissioner, charged with the duty of enforcing it by instituting criminal prosecutions against those who, in his judgment, have been guilty of violating its provisions, may give it an erroneous construction.

5. INJUNCTION—GROUNDS—THREATS OF PROSECUTION BY PUBLIC OFFICER.
It is not ground for an injunction that a state food commissioner, charged by law with the duty of determining such matter in the first instance, is publishing statements that an article of food or drink made by complainant is adulterated, and its sale is in violation of the laws of the state, and threatening prosecutions against those who sell it, whether such statements are correct or erroneous.

6. PURE-FOOD LAWS—OPERATION—ARTICLES MADE BY PATENTED PROCESS.
That an article of food or drink is prepared by a process which is or has been protected by letters patent of the United States does not prevent it from coming within the operation of laws passed by a state in the exercise of its police powers.

7. INJUNCTION—CRIMINAL PROSECUTIONS.
The fact that a food product, the sale of which is claimed to be in violation of the laws of a state, is widely sold therein, and that many persons may be subject to prosecution, does not give a court of equity jurisdiction to enjoin such prosecutions.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This case was brought by Arbuckle Bros. to restrain Joseph E. Blackburn, dairy and food commissioner of Ohio, from prosecuting the vendors of Ariosa, an article sold by the complainants to many dealers in Ohio, because of alleged violation of pure-food laws of the state. The substance of the bill and an amendment thereof is as follows:

The general assembly of the state of Ohio passed in the year 1884 an act entitled "An act to provide against the adulteration of food and drugs" (81 Ohio Laws, p. 67), the substance of which is recited. For more than thirty years the complainants and their predecessors had been engaged,

[1] Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.

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and still are engaged, in the manufacture and sale throughout the United States, including the state of Ohio, of a certain compound or mixture known as "Ariosa," composed of roasted coffee, compounded and mixed with eggs and sugar, packed in sealed packages, ready for use by the consumer. In order to preserve said product from deterioration, and to retain the original strength and aroma in the coffee, the complainant Arbuckle more than 30 years ago invented, and thereafter patented, adopted, and used, and complainants still use, a certain process whereby the compound or mixture known as "Ariosa" was, and still is, mixed and compounded, and the separate beans thereof coated, and to a large extent hermetically sealed, after roasting, with a compound of sugar and eggs, at first in composition with a quantity of Irish moss, also a wholesome article of food, and for 20 years without such Irish moss. That said letters patent were issued in the year 1868, and, after the expiration of the said patent, trade therein was greatly increased, and still continues to increase, by reason of the increased sale and reputation of said Ariosa. That the good will of said business of making and vending said Ariosa has become, and now is, wholly dependent upon the reputation and sale of Ariosa, and the good will aforesaid. That for many years the complainants, at great expense, widely advertised the use of the aforesaid process, that the purchasers might be informed of the good qualities of coffee so mixed, compounded, and coated. That for many years prior to 1894 every package of Ariosa was labeled in conspicuous type in the words and figures following:

"Ariosa is a compound made from coffee, sugar, and eggs. The coffees are selected especially for their strength, flavor, and superior drinking qualities, are pure, sound coffees, and absolutely free from all the poisonous coloring substances which are now so largely used to improve the appearance of coffee. Coffee, when roasted, is porous, and, unless prevented, loses its best qualities, and absorbs others which are inferior to it. By our process of hermetically sealing the pores of roasted coffee, we secure a threefold object: (1) The retention of the full strength and aroma for any length of time; (2) the prevention, through absorption, of any injurious flavors; (3) the saving to the consumer of the additional expense of eggs incurred when any other coffee is used. Ariosa is self-settling. Choice eggs and pure granulated sugar are the only articles used in hermetically sealing Arbuckle's Ariosa Coffee.

"Formula.

Coffee	.99278
Eggs	.00361
Sugar	.00361

"Four pounds roasted coffee go as far as five pounds green, as coffee loses 20 per cent. in roasting."

That being advised of the character of the preparation known as "Ariosa," and as a result of experience in the use thereof, great numbers of people have preferred and do prefer the use of Ariosa to other brands, mixtures, or compounds of coffee so treated, and the same is sold and purchased in large quantities throughout the United States, and has been so sold and purchased for more than 30 years last past. That the extent and profit of the complainants' business depends upon the good will thereof, and the confidence of consumers that, so long as the same is manufactured and sold by the complainants, it shall be identical in quality and composition with that which, under the same brand and appearance, consumers have theretofore purchased. Certain inferior compounds and mixtures are described and sold in competition with the said Ariosa; said compounds and mixtures being so treated as to conceal defects, or misrepresent the real condition thereof, so as to retain water which would otherwise be eliminated from the coffee in process of roasting, so treated as to increase the weight of roasted coffee, while decreasing its worth for use; mixed and compounded with unhealthful ingredients; none of which processes or methods are used by the complainants, but the process adopted by them is for the purpose of retaining in the coffee the full strength and aroma thereof; preventing the absorption of any injurious or noxious gases or flavors; settling the same when pre-

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pared for use. There is nothing in said process which conceals damage or inferiority in coffee, or makes it appear better or of greater value than it really is. On the contrary, the coffee used in said compound or mixture is of a good quality and undamaged. The articles of food used in the coating thereof are in themselves pure, wholesome, and healthful. Said coating is colorless and transparent. Said process was adopted and used, and still is used, at great expense, for the benefit of the consumer. Complainants have on hand at various points throughout the United States large stocks of the compound and mixture known as "Ariosa,"—in Ohio, about 1,000,000 pounds, more or less, of the value of $100,000; in the United States, 10,000,000 pounds, more or less, of the value of about $1,000,000. Complainants have a large number of agents in Ohio and elsewhere engaged in the sale of Ariosa, and a great number of dealers, to wit, more than 10,000, in Ohio, have in their possession large quantities of Ariosa for sale, and will continue to sell the same in preference to other brands of coffee not similarly prepared, to the profit of complainants, and the increase of their aforesaid business, and of the good will thereof.

The respondent herein, Joseph E. Blackburn, dairy and food commissioner as aforesaid, without authority of law, and falsely and erroneously construing the provisions of said statutes above set forth, notwithstanding the fact that the process used in the manufacture of the said compound or mixture known as "Ariosa" is not in violation of the said statute, and that the said statute is not applicable to the premises, and that there is no law of the state of Ohio warranting his acts, and notwithstanding the healthful character of said Ariosa, and that the same is composed of healthful ingredients, each package plainly marked as aforesaid, personally and through his agents has heretofore, and does now, and will, unless restrained by the order of the court, continue to, widely advertise throughout the state that said process used in the manufacture of Ariosa is within the prohibition of, and in violation of, the aforesaid statute. Said Blackburn falsely claims and pretends that the sixth clause of said statute wholly forbids the glazing of the coffee used in the manufacture of Ariosa. Yet in fact said process does not conceal damage or inferiority, or make said coffee appear to be better or of greater value than it really is. That said coating is for the uses and purposes above set forth, and is not used to affect or change the appearance of said coffee; any change in the appearance thereof due to said glazing being incidental and immaterial in the use thereof, and not such as to assimilate said coffee in appearance to other or better grades. Respondent has menaced and threatened with prosecution, and still menaces and threatens to prosecute, dealers in and vendors of Ariosa in the state of Ohio, for a violation of the aforesaid statute, and will, unless restrained by the order of the court, institute a large number of prosecutions upon the wrongful and erroneous charge that the treatment of said Ariosa by the process aforesaid is a violation of the statute aforesaid, and that the same is an adulterated food product, within the said statute. That by reason of the official capacity of the respondent, and the fact that he claims to act under said statute intended to prevent the adulteration of food products, said respondent's statements and threats of prosecution have led and do lead and will hereafter continue to lead dealers in and consumers of said Ariosa throughout the United States, and more particularly in Ohio, to doubt the healthful character and proper preparation of the same, and will deter wholesale and retail dealers and consumers from purchasing, vending, or using the same, greatly decreasing the repute and sale thereof, to the great and irreparable damage of complainants.

That on or about the 5th day of February, 1901, said respondent issued a certain circular to dealers and vendors of Ariosa within the state of Ohio, of which the following is a copy:

"State of Ohio.

"Office of Dairy and Food Commissioner.

"Dear Sirs: Replying to your inquiry about the coffee situation, would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached, a circu-

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lar notice will be sent to all the jobbers in Ohio, and a sufficient number will be furnished to supply all their salesmen. I might say that the following firms have agreed to accept the law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Company, Toledo. W. F. McLaughlin & Co., of Chicago, have agreed to comply with the laws as soon as construed by the court. The only firm that has refused and still refuses to accept the ruling of this department, or abide by the laws of the state as construed by our supreme court, is Arbuckle Bros., of New York.

"Very truly yours, J. E. Blackburn,

"Dairy and Food Commissioner.

"Columbus, Ohio, February 5, 1901."

Said circular letter is wholly false, in this, to wit: That complainants have not at any time refused to accept the construction of the law of Ohio as construed by the supreme court of the state; and the complainants are informed and believe that the Woolson Spice Company has not agreed to accept the said law as construed by respondent, but, on the contrary, refused, and still refuses, to accept said construction of said law, and still continues to sell coffee prepared and glazed by the processes used by it. That said circular was sent generally to jobbers and dealers in food products in the state of Ohio. That few, if any, of them had inquired of the respondent as therein stated, but said circular was sent to dealers without any such inquiry. That said circular, by falsely and wrongfully singling out complainants as alone refusing to accept the ruling of respondent to abide by the laws of Ohio as construed by the supreme court thereof, necessarily implied that, of the food products manufactured and sold by manufacturers, those made by complainants (particularly the product Ariosa) alone fell short of the standard of purity imposed by said statute; thus wrongfully and falsely implying that Ariosa is inferior in quality, grade, purity, and wholesomeness to the products of other manufacturers, whereas the standard of said Ariosa in the respects stated is at least as high as that of any like product manufactured and sold by like manufacturers. And, unless restrained by order of court, said respondent will issue other and further circulars to dealers of food products in Ohio, in large quantities, cause the same to be widely published and distributed throughout the state and elsewhere, and said subsequent circulars will be directed against the complainants alone, with intent, purpose, and effect of discriminating against complainants and their said product, and to the irreparable injury of the sale thereof, and the trade of complainants, and the good will of their business. By said circular the respondent threatens to accuse complainants and dealers in Ohio in complainants' product of a crime, and to do an injury to the property of complainants, with intent to compel complainants and the dealers in said product to cease from selling and offering for sale the same within the state of Ohio. Such prosecution is threatened by said respondent under his false and erroneous construction of said statute, is without authority of law, and will deprive complainants of their property, of the value of the product already manufactured, and the trade and good will of their business of vending said product within the state of Ohio, without due process of law. That said acts and the menaces and threats have worked, and will continue to work, irreparable injury to the property rights of complainants, and if respondent be permitted to institute or conduct proceedings or prosecutions against the vendors of said product, or be permitted to institute or conduct proceedings or prosecutions against them, will work further irreparable injury to said property rights. Said statute, construed as respondent claims it should be, is in conflict with the fourteenth amendment to the constitution of the United States, in that it would deprive complainants of their property, by prohibiting them from selling in Ohio, and dealers in and vendors of food products from purchasing from the complainants, pure food products which are not injurious to health, and will destroy the value of said product as an article of commerce, by prohibiting the sale thereof in the state of Ohio, and would deprive complainants of the just and lawful benefits accruing to them by reason of their property rights in said food product, and largely destroy the mar-

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ket value of existing stocks of Ariosa in possession of complainants in Ohio and elsewhere, and will deny to complainants and to dealers in said product in the jurisdiction of the state of Ohio the equal protection of the law. Ariosa is manufactured and treated according to the aforesaid process at complainants' factories in New York and Pennsylvania, and not in Ohio. After being so manufactured and treated, it is at said factory packed in said packages, and in said original packages shipped by complainants to Ohio, and sold in said original packages; and said statute, if construed as respondent claims it should be, is a regulation by the state of Ohio of interstate commerce, and is therefore repugnant to and in violation of the third clause of section 8 of article 1 of the constitution of the United States. Owing to the large number of dealers in Ariosa in Ohio who will be prosecuted if said respondent be permitted to carry out his said threats and menaces, a multiplicity of suits will arise, and thereby complainants' property rights will be determined in litigation to which complainants will not be, and could not be, parties. The interests of such dealers are in many cases not in common with, nor representative of, the interests of complainants. Therefore they are in great and imminent danger that in many such suits and prosecutions no defense will be made, either through lack of interest, or in wrongful collusion and conspiracy with respondent, to the great and lasting injury and prejudice of complainants for which they have no adequate remedy at law. Although such prosecutions shall uniformly result in the acquittal of the person charged, yet, by reason of the multiplicity thereof, said prosecutions will result in deterring many, if not all, dealers in food products in Ohio from dealing in Ariosa.

The bill prays relief as follows: "(1) From stating or charging that complainants' said food product, Ariosa, being a compound of pure, roasted coffee, mixed, treated, coated, and glazed with a preparation of sugar and eggs according to the formula and by the process hereinbefore set forth, is an article of food adulterated within the meaning of said statute, and that the use of complainants' said process of coating and glazing the coffee, constituting the chief ingredient of Ariosa, with a preparation of sugar and eggs, as hereinbefore more particularly described, constitutes a violation of said statute, and that the importation of said Ariosa into Ohio, or the selling of or offering for sale the same, constitutes a violation of said statute; (2) from charging the complainants herein, or any of them, or said firm of Arbuckle Bros., or any dealers in Ariosa, with violating said statute by selling or offering for sale Ariosa, or with adulterating food, in violation of said statute, by reason of the aforesaid treatment and coating of the coffee forming an ingredient of Ariosa with a preparation aforesaid; (3) from charging the complainants, or any of them, or said firm of Arbuckle Bros., with violating the said statute by adopting and using said process of coating above described, or by selling or offering for sale Ariosa so glazed; (4) from charging any dealer in Ariosa with the possession, offering for sale, or sale of an adulterated food product, within the meaning of said statute, in having in their possession, offering for sale, or selling Ariosa so glazed; (5) from menacing and threatening any dealer in Ariosa so glazed with prosecution for having in his possession, offering for sale, or selling such Ariosa; (6) from instituting or commencing against any person, partnership, or corporation having in his, their, or its possession, offering for sale, or selling, Ariosa, any action, suit, proceeding, or prosecution based upon the treatment and coating of the coffee forming an ingredient of said Ariosa with a preparation of sugar and eggs, according to the formula and by the process more particularly above described; and (7) that your orator may have such further relief as to the court shall seem equitable and proper in the premises."

The complainants filed an amendment to the bill as follows: "(20) The wrongful acts which said respondent threatens to do, and, unless restrained, will do, as in complainants' said bill of complaint alleged, will make unmarketable in Ohio, and to a very large extent impair and destroy the market value of, the large stocks of Ariosa which complainants now have on hand in Ohio, and will, to a large extent, deprive them of their said business, and the good will thereof, in Ohio, and greatly injure, if not wholly destroy, the value of the same, and enable complainants' competitors, selling in Ohio

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coffees treated by processes similar to, but not identical with, complainants' said process, to obtain complainants' said business, which can only be regained after long time and at great expense; and complainants will be put to other great expense in defending their said property rights in Ohio. And if, pending the final determination of this cause, said respondent shall be permitted to commit the threatened wrongs, the same will, as complainants are informed and believe, damage complainants to the extent of more than one hundred thousand dollars,—an amount largely in excess of respondent's ability to respond in judgment,—and thereby complainants will suffer irreparable injury unless a preliminary injunction shall be granted herein."

John De Witt Warner and Clarence Brown, for appellants.

Walter F. Brown and E. B. Dillon, for appellee.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

As the circuit court dismissed the bill, it is unnecessary to consider the testimony offered in support of the application for a temporary injunction. The matter to be reviewed is the sufficiency of the bill and amendment to warrant the intervention of a court of equity to restrain the defendant as prayed. An analysis of the bill shows the claim to be that respondent, the dairy and food commissioner of the state of Ohio, is proceeding, upon an alleged false and erroneous construction of the statutes of Ohio, to prosecute persons in Ohio dealing in the complainants' product known as "Ariosa," and is giving out the statement that this product is sold in violation of the laws of the state. The act passed March 20, 1884 (2 Bates' Ann. St. Ohio, §§ 4200–4 to 4200-8), provides against the adulteration of foods and drugs, makes it an offense within said state to manufacture for sale, offer for sale, or sell any article of food which is adulterated, within the meaning of the act; and the term "food," used therein, includes all articles used as food or drink by man, whether simple, mixed, or compound. It is further provided in the act that food shall be deemed to be adulterated, among other things, "if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if, by any means, it is made to appear better or of greater value than it really is." It appears that the coffee of the complainants is coated, after roasting, with a compound of sugar and eggs, for the purpose, as alleged in the bill, of retaining the full strength of the coffee, "preventing the absorption of any injurious or noxious gases or flavors, and settling the same when prepared for consumption"; thus bringing Ariosa within the terms of the Ohio law, which provides that the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food "if each and every article sold or offered for sale be distinctly labeled as a mixture or compound with the name and per cent. of each ingredient therein, and are not injurious to health." It is claimed that notwithstanding Ariosa is thus labeled with a statement of the elements of the compound, and is not injurious to health, the food commissioner is threatening proceedings, and is claiming that the same is within the prohibition of the sixth clause of the statute above quoted, making it an offense to coat an article of food, whereby damage or inferiority is concealed, and the same made to appear better

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or of greater value than it really is. It is urged that this statute, "construed as respondent claims it should be," is in conflict with the fourteenth amendment of the constitution, as it deprives the complainants of their property, by prohibiting them from selling it in Ohio, and dealers from selling the same in that state, notwithstanding the same are ordinary articles of food and not injurious to health, and will destroy the market value of the product, and deny to the complainants within the jurisdiction of Ohio the equal protection of the laws. The argument is that conceding, for this purpose, that the statute is constitutional when properly construed and enforced, the respondent's wrongful construction thereof results in an infraction of the constitutional rights of the complainants. This alleged wrong construction, when analyzed, amounts to this: The complainants claim that their compound is not within the terms of the statute. The food commissioner wrongfully claims that it is. Upon this branch of the case the question is, may a court of equity entertain a bill to inquire into this matter, and, if it finds that the complainant is right in its contention, enjoin the food commissioner from instituting proceedings under the laws of Ohio? The jurisdiction of courts of equity has never been carried to this extent in authoritative decisions. On the contrary, the supreme court, in more than one instance, has denied such jurisdiction to a court of equity. The rule is thus stated by Mr. Justice Gray in Re Sawyer, 124 U. S. 200-211, 8 Sup. Ct. 482, 488, 31 L. Ed. 402, 406:

"The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Attorney General v. Cleaver, 18 Ves. 211, 220; Turner v. Turner, 15 Jur. 218; Saull v. Browne, 10 Ch. App. 64; Kerr v. Corporation of Preston, 6 Ch. Div. 463. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story, Eq. Jur. § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under the statutes of the state or under municipal ordinances. West v. Mayor, etc., 10 Paige, 539; Davis v. Society, 75 N. Y. 362; Tyler v. Hamersley, 44 Conn. 419, 422, 26 Am. Rep. 479; Stuart v. Board, 83 Ill. 341, 25 Am. Rep. 397; Devron v. First Municipality, 4 La. Ann. 11; Levy v. City of Shreveport, 27 La. Ann. 620; Moses v. Mayor, etc., 52 Ala. 198; Gault v. Wallis, 53 Ga. 675; Phillips v. Mayor, etc., 61 Ga. 386; Cohen v. Commissioners, 77 N. C. 2; Waters-Peirce Oil Co. v. City of Little Rock, 39 Ark. 412; Spink v. Francis (C. C.) 19 Fed. 670, and 20 Fed. 567; Suess v. Noble (C. C.) 31 Fed. 855."

In the later case of Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, the same rule is recognized and enforced. Mr. Justice Shiras, at page 169, 172 U. S., page 127, 19 Sup. Ct., and page 399, 43 L. Ed., speaking for the court, says:

"No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the commonwealth's attorney, in the prosecution of an indictment found under a law admittedly valid, represented the state of Virginia; and the injunctions were therefore, in substance injunctions against the state. In proceeding by indictment to enforce a criminal statute, the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state. As was said in Re Ayers, 123 U.

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S. 443, 497, 8 Sup. Ct. 179, 31 L. Ed. 216: 'How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court, as an actual and real defendant?' "

Upon the authority of this case and others decided in the supreme court, it seems clear that this action cannot be maintained consistently with the eleventh amendment to the constitution, withholding the judicial power of the United States from suits in law or equity commenced or prosecuted against one of the United States by citizens of another state, or citizens or subjects of any foreign state. In Poindexter v. Greenhow, 114 U. S. 270–287, 5 Sup. Ct. 903, 29 L. Ed. 185, quoted with approval in Re Ayers, supra, it was said "that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties to the record." In the Ayers Case the suit for injunction, which the court held could not be entertained, was brought against the attorney general and treasurers of counties, cities, and towns in Virginia, just as the present case is brought against Joseph E. Blackburn, dairy and food commissioner of Ohio. The injunction sought is against the prosecution of suits in the Ohio courts which are about to be instituted by Blackburn, not in his individual capacity, but as an officer of the state. By the terms of the statute the dairy and food commissioner is an officer of the state expressly charged with the enforcement of all laws against frauds and adulterations or impurities in foods, drink, or drugs, and unlawful labeling in the state of Ohio. It is made his duty by statute to prosecute, or cause to be prosecuted, any person or persons, firm or firms, corporation or corporations, engaged in the manufacture or sale of any adulterated article or articles of food or drink, or adulterated in violation of or contrary to any laws of the state of Ohio. 1 Bates' Ann. St. Ohio, §§ 409–7, 409–8. It is also provided that food so coated as to conceal damage or inferiority shall be deemed to be adulterated. Paragraph 6 of section 4200-6, 2 Bates' Ann. St. Ohio. What, then, is the object of the injunction sought in this case? It is no more or less than to restrain the officer of the state from bringing prosecutions for violations of an act which such officer is expressly charged to enforce in the only way he is authorized to proceed,—by bringing criminal prosecutions in the name of the state. This is virtually to enjoin the state from proceeding through its duly qualified and acting officers. If the food commissioner may be enjoined from instituting such prosecutions, why may not the prosecuting attorney, or any officer of the state charged with the execution of the criminal laws of the state? While the state may not be sued, if the bill can be sustained against its officers it is as effectually prevented from proceeding to enforce its laws as it would be by an action directly against the state. This view of the case, in our judgment, is amply sustained by the cases above cited, and by the later case of Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, in which the subject is fully discussed by Mr. Justice Harlan. In so far as this action seeks an injunction against the respondent from proceeding to

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enforce by prosecution the provisions of the statutes of Ohio above cited, the courts of the United States are deprived of jurisdiction by the eleventh amendment to the constitution.

We are now dealing with an officer of a state proceeding under a valid law of the state, and whose error lies in wrongfully construing the statute so as to include the complainant's product. To entertain the bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. It would be the extension of equity jurisdiction to cases where prosecutions in state courts by the state officers are sought to be enjoined, with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority. It is claimed, however, that conceding that a court of equity cannot enjoin the prosecution of criminal offenses, as a general thing, the rule is different when property rights are involved; and we are cited to cases holding that equity has jurisdiction to enjoin acts likely to be destructive of property rights, although the acts complained of constitute infractions of the criminal law. This is quite a different proposition from enjoining criminal proceedings alleged to be indirectly destructive of property rights. Many criminal prosecutions may affect the property of the person accused. A property may be greatly injured by the wrongful and unfounded charge that it is used for immoral purposes. Such prosecution may destroy its rental value and prevent its sale, yet a court of equity could not usurp the right of trial which both the state and the accused have in a common-law court before a jury. Every citizen must submit to such accusations, if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. It is often a great hardship to be wrongfully accused of crime, but it is one of the hardships which may result in the execution of the law, against which courts of equity are powerless to relieve Suess v. Noble (C. C.) 31 Fed. 855; Hemsley v. Myers (C. C.) 45 Fed. 283; Kramer v. Board, 53 N. Y. Super. Ct. 492; Food Co. v. McNeal, 1 Ohio N. P. 266.

It is further claimed that the act is unconstitutional as an interference with the right of congress to regulate interstate commerce; and we are cited to Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, in which a law of that state was held invalid to the extent that it prohibited the introduction of oleomargarine into the state from another state in original packages. The case was distinguished from the prior case of Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, in which the supreme court upheld a statute punishing the sale of oleomargarine when colored in imitation of butter. In other words, the supreme court held it to be within the power of the state to require an article of food to be sold for what it really is, and to protect the public from imposition in buying one article of food in the belief that it is another, but beyond the power of the state to prohibit the introduction and sale in original packages of a pure article sold upon its merits. As we read the Ohio Stat-

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ute, it does not undertake to prohibit the introduction and sale of a pure article of food, sold for what it really is, but the coloring, coating, or polishing of an article, whereby damage or inferiority is concealed; the act providing in this connection that it shall not apply to mixtures or compounds recognized as ordinary articles of food, if every package sold or offered for sale be distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, and is not injurious to health. The enactment of such a law is clearly within the police powers of the state, upon the principles enunciated in the case of Plumley v. Massachusetts, supra, for the protection of purchasers of food from imposition by the concealment of damage or inferiority in food. As in the Oleomargarine Case, the article is thus required to be sold for what it really is, without misleading the purchaser to buy it for what it is not. In the Plumley Case, Mr. Justice Harlan, speaking for the court, said:

"If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate, which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of congress to regulate commerce among the states."

But it is argued that coffee treated so as to make Ariosa is a pure article of food, and a compound labeled as required by the statute. Again, the act is argued to be unconstitutional because of the construction put upon it by the food commissioner, and this "construction" is his contention that Ariosa is coffee so coated as to conceal damage or inferiority, and that it is not a compound or mixture within the meaning of the statute. These are the very questions the decision of which the statute vests in the discretion of the commissioner, as a preliminary matter, in determining to institute prosecutions in the enforcement of the law which he is charged to execute, leaving the guilt or innocence of the party charged to be decided by the proper tribunals when prosecutions are instituted under the law. The constitutionality of the act is to be determined by its language and purpose, and not by the alleged wrongful institution of prosecutions thereunder against those guiltless of a violation of its provisions. There are cases, as insisted by the learned counsel for the complainant, where the operation of a statute constitutional in itself, as administered by the state authorities, may deprive the citizens of rights secured by the constitution of the United States, where a federal court will interfere by injunction to secure to persons aggrieved the benefits of the federal constitution; but they are not cases where a court of equity must draw to itself the administration of the criminal law of a state, sought to be enforced by the officers of the state, and thus determine whether crimes may be prosecuted under valid enactments, because a party may be able to satisfy the court that he is in fact innocent of the charge. Such a construction of the powers of a court of equity would result in a confusion of jurisdiction, and an embarrassment of the ordinary processes of the law without precedent. If this bill can be entertained, it remits to the federal courts the supervision of the pure-food laws of the states, and

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their dockets will be crowded with cases of those claiming that their particular articles of food and drink are not within the terms of the law.

Nor do we think that there is ground for injunction in the allegations of the bill that the food commissioner is publishing the fact that the product of the complainant is within the prohibition of the law. If this publication is made to those dealing in the article, it would be within the duty of the commissioner, in advising of contemplated prosecutions. If such publications are libelous, the law affords other means of redress. Francis v. Flinn, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165.

The fact that complainants produced Ariosa under a process protected by letters patent of the United States does not prevent it from coming within the operation of laws passed in the exercise of the police power of the state. The enactment of laws for the protection of health and to prevent imposition in the sale of food products is within this power, and the fact that the process by which it is made is protected by a patent, while it may prevent others from using it during the life of the patent, does not deprive the state of this power of regulation for the general good. Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429.

The fact that complainants' product is widely sold in Ohio, and many persons may be subject to prosecution, does not enlarge the jurisdiction of a court of equity to interfere by injunction to control prosecutions for alleged violation of the laws of the state.

We think this case comes within the principles settled by the supreme court in the cases above cited, and the circuit court did not err in dismissing the bill.

LEPPER et al. v. RANDALL.

(Circuit Court of Appeals, Third Circuit. February 8, 1902.)

No. 12, Sept. Term, 1901.

1. PATENTS—INFRINGEMENT—DOCTRINE OF EQUIVALENTS.
   A patentee is not to be denied protection commensurate with the scope of his actual and distinctly described invention by wholly excluding him from the benefit of the doctrine of equivalents, even as against one who has made only such changes as are palpably colorable and of such character as to show that they were studied evasions of the particular devices described in the patent.

2. SAME—HAM BOILING WRAPPERS.
   The Merrill & Lepper patent, No. 624,839, for a wrapper for hams, claim 3, which claims a wrapper "and lacing devices on the back thereof," is infringed by a wrapper which is in all respects identical with the patented article, except that the fastenings are straps and buckles, instead of a lacing cord engaged with hooks, studs, or eyelets.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

E. Hayward Fairbanks, for appellants.

William Morris, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

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DALLAS, Circuit Judge. This is an appeal from a decree dismissing a bill which charges infringement of letters patent No. 624,839, dated May 9, 1899, for "wrappers for hams." 105 Fed. 975. The specification states that:

The "invention consists of a wrapper for boiling a ham therein, more particularly a boneless ham, the same being formed of a piece of canvas or other suitable fabric adapted to envelop a ham, and means for tightly compressing the wrapper thereon and preventing opening thereof, whereby the ham is guarded against disintegration and its juices are retained within the wrapper, thus producing superior results in the flavor, compactness, and appearance of the ham."

The drawings accompanying the specification exhibit a mat or piece of fabric upon which there are four rows of hooks, arranged at right angles, so as to form a quadrilateral figure within the ends of the wrapper. For engagement with these hooks, a cord is provided, and together they constitute a lacing device, by means whereof the ham is tightly and closely secured within the mat. The only claim in question is as follows:

"(3) A wrapper of the character named, formed of a mat and lacing devices on the back thereof, between the corners and center thereof, in series at an angle to each other and to the sides of the mat."

As was said by the court below:

"This invention met with a good deal of success, between 10,000 and 15,000 wrappers being sold during one year. Not long after its introduction to the public, the defendant began to make and sell a wrapper which is in all respects identical with the patented article, except that the fastenings are straps and buckles, instead of a lacing cord, engaged with hooks, studs, or eyelets."

The learned judge who decided the case below had no doubt "that the defendant's straps and buckles are an equivalent of the complainants' cords and hooks," and in this we agree with him; but he held that the complainants were not entitled to invoke the doctrine of equivalency, and this ruling we think was erroneous. By the changes in phraseology which were made pending the application, nothing can fairly be said to have been surrendered or disallowed which the third claim as finally approved plainly included. That claim, as broadly expressed, is for "lacing devices"; and it is not to be implied that either the patent office on the one side or the applicant on the other contemplated any limitation of it which would admit of its evasion by means so palpably colorable as the substitution of straps for cords and buckles for hooks. We cannot impute to either of them an intention to render it practically valueless and its inclusion in the patent a vain thing. Hillborn v. Manufacturing Co., 16 C. C. A. 569, 69 Fed. 958, 28 U. S. App. 525; Société Anonyme Usine J. Cleret v. Rehfuss (C. C.) 75 Fed. 657, 661. It may be conceded that the contrivance claimed, though unquestionably new and useful, was comparatively trivial in character, and it is not necessary to decide whether or not its conception was a primary one; for in no case is a patentee to be denied protection commensurate with the scope of his actual and distinctly described and claimed invention by wholly excluding him from the benefit of the doctrine of equivalents. That doctrine, therefore, should have been applied in this case; for it is plainly obvious

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that the departures made by the defendant from the patent in suit are merely formal, "and of such character as to suggest that they are studied evasions of those described in the claim in issue." Bundy Mfg. Co. v. Detroit Time-Register Co., 36 C. C. A. 375, 391, 94 Fed. 524; Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co., 25 C. C. A. 420, 424, 80 Fed. 287.

The decree of the circuit court is reversed, and the cause will be remanded to that court, with direction to enter a decree in the usual form for the complainants.

AMERICAN COAT PAD CO. OF BALTIMORE CITY v. PHŒNIX PAD CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 422.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
Where a patent sued on is unadjudicated, and its validity and infringement are denied by defendant, who sets up valid defenses, there should be strong proof of acquiescence to warrant the granting of a preliminary injunction.

2. SAME—UNADJUDICATED PATENT—ESTOPPEL TO CONTEST VALIDITY.
A corporation, owner of a patent, brought suit against another corporation for infringement. Defendant denied validity, and pleaded prior use and anticipation, but before trial purchased the stock of complainant, and took an assignment of the patent. A person who had owned one share of stock in complainant corporation, and who was at the time of the institution of the suit employed by it as superintendent, after the sale of the stock obtained a patent for a similar article, and a new corporation was formed to manufacture thereunder, in which he became a stockholder and officer. The assignee of the earlier patent commenced a suit against him and the new corporation for infringement. *Held* that, the patent never having been adjudicated, the former suit afforded no ground warranting the issuance of a preliminary injunction against either defendant, who pleaded substantially the same defenses as were set up therein, since such suit did not establish a public acquiescence in the patent, nor create an estoppel against the individual defendant, who was not a party to the record, and whose position in the two suits, even if considered a party to the former suit in fact, was no more inconsistent than that of complainant.

3. SAME—SUIT AGAINST CORPORATION—ESTOPPEL OF STOCKHOLDER.
In a suit for infringement of a patent against a corporation and a person who is a stockholder and officer therein, the fact that the latter, as an individual, may be precluded from denying the validity of the patent, cannot affect the rights of his codefendant.

4. SAME—GROUNDS FOR INJUNCTION—UNFAIR COMPETITION.
The fact that one employed by the owner of a patent in manufacturing the patented article subsequently obtains a patent for a similar article which he claims to be an improvement, and engages in the manufacture and sale of such article under his own patent, affords no basis for an injunction on the ground of unfair competition.

Appeal from the Circuit Court of the United States for the District of Maryland.

Richard S. Culbreth (Frederick M. Feldner, on the brief), for appellants.

Arthur Steuart, for appellee.

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Before SIMONTON, Circuit Judge, and PURNELL and WADDILL, District Judges.

PURNELL, District Judge. The appeal is from a decree of the circuit court of Maryland in a patent case, granting a preliminary injunction restraining appellants, defendants below, until the further order of the court, from infringing the patent rights to which the appellee, plaintiff below, claims to be entitled under letters patent No. 359,441, issued to Edward Goldman, dated March 13, 1887. The title of appellee to the letters patent is set out in the verified bill, supported by the affidavits of Gustav Goldman, president of the appellee company, and others. Assuming title to the letters patent to be as stated, it is as follows: From Edward Goldman, patentee by assignment September 29, 1890, to the Eureka Coat Pad Company, and by assignment from the Eureka Coat Pad Company March 16, 1901, to the Phœnix Pad Company, appellee. The assignments are not controverted or questioned. This title is not denied. An answer under oath was waived in the usual form, but defendants below, appellants here, verified the answer, and filed therewith affidavits and exhibits consisting of certified copies of letters patent referred to in the answer. Several issues of fact are raised by the pleadings, a consideration of which at this time would tend to embarrass the trial court in the consideration of the case on the final hearing, and this court, should the case be again brought here by appeal. Loew Filter Co. v. German-American Filter Co., 47 C. C. A. 94, 107 Fed. 950. The cause is not in a condition to be heard as to these matters now, and it must be understood what is said is upon the record as now before the court, and not as to the merits as they may be hereafter presented.

It is stated in the brief of counsel for appellee and in the opinion of the court, which it is said the trial judge delivered before leaving the bench, that the validity of the plaintiff's patent and infringement by defendants are not denied. This statement must refer to something said on the hearing, of which this court knows nothing. An examination of the pleadings discloses the fact that defendant corporation, in the first allegation of its answer, sets out in full the answer of the Phœnix Coat Pad Company (to which it alleges the Phœnix Pad Company is to all intents and purposes successor) in 1889 to a bill filed by the Eureka Pad Company, denying the Goldman patent, alleging two prior patents, No. 41,073, January 5, 1864, to Moses A. Thompson, and No. 236,267, January 4, 1881, to Daniel T. Smith, and that Edward Goldman was not the inventor of the coat pad described, but the same was used many years before by parties in Cincinnati, Baltimore, and New York, naming them. The paragraph is adopted by defendants as part of their answer. Another suit (The Eureka Coat Pad Company v. H. M. Marcus & Bro.; 1890) is referred to as involving the Goldman letters patent, and it is conceded that neither of these cases came to a final hearing. There has been no adjudication as to the validity of said letters patent. The validity of the Goldman letters patent is therefore denied in the pleadings.

The infringement of plaintiff's letters patent is set out in paragraph 8 of the bill, and in the eighth paragraph of the defendants' answer

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are these words: "The defendants deny the allegations of paragraph 8 of the bill." In the following two paragraphs of the answer defendants admit they have manufactured coat pads, but explain at some length this was done under letters patent No. 673,331, issued to Louis Bouchat, January 10, 1901, and setting out the difference between the coat pad thus manufactured and the coat pad for which the Goldman letters patent provide, and an improvement claimed in such coat pads so manufactured over the Goldman patent. The validity and infringement are thus denied, and clear-cut issues raised. An examination of the record discloses several defenses set up,—no patentable subject of invention, prior use, no adjudication, no infringement, and ability to respond in damages. This is allowable by statutory provision. 29 Stat. c. 391; Bates, Fed. Eq. Proc. 331.

The ground upon which a preliminary injunction was granted is thus set out in the opinion of the court, which counsel say was delivered by the trial judge before he left the bench:

"This is a motion for a preliminary injunction by the Phœnix Pad Company against the American Coat Pad Company and Louis Bouchat for the infringement of letters patent No. 359,441. There has been no adjudication of the patent, but the motion is based upon public acquiescence and estoppel against the defendants. There are many circumstances which show acquiescence. The patent is one that has been in use now since 1887, and under its protection its various owners have established and maintained a business that has been acquiesced in by the competitors of the owner of the patent. There were two suits on the patent begun, but neither was brought to a final hearing. It is said the validity of the patent has been denied by the same persons who are now asserting it. They have been defendants in the previous suits; but I take it that those were the formal defenses; that the real defense in the Marcus case and the case brought against the Phœnix Coat Pad Company by the Eureka Coat Pad Company was noninfringement. Of course, counsel advised that other defenses should be made, and no doubt thought there was ground for them. But that was the answer made under advice of counsel, who made all the defenses that could reasonably be made. The circumstances of these cases tend to show an acquiescence. It is true there has been no adjudication, which is required in many cases, but that which appeals most strongly to the conscience of the court is the circumstance which tended to show that Louis Bouchat, one of the defendants here, was a stockholder of the Eureka Company, which owned this patent; and I understand it to have been admitted at the hearing that he was the superintendent or general manager of the company at the time that it was making and selling coat pads under this patent and asserting it as valid, and at the time at which the Eureka Company sued the Phœnix Coat Pad Company, charging infringement of it. It is shown that he is the principal stockholder and manager of this new company. He was an important officer of some sort in the Eureka Company, which brought the former suit. It was settled by the defendant company, the predecessors of the present complainant, by buying all the stock. The patent was a valuable asset, and Bouchat received four times the original cost of the par value of the stock for his share of this patent. Now that he should immediately start up a competing business and an infringing business (and the infringement is not denied), I think, makes out a very strong case of estoppel and of unfair competition in business. I therefore grant the application."

From the order granting the temporary injunction defendants below appealed, and there are in the record 15 assignments of error. Many of these it would not now be proper to consider. In the suits referred to, both the counsel, the plaintiff below, and Bouchat, defend-

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ant below, it seems, occupied reverse positions as to the Goldman letters patent from those now occupied by them. The suits were settled. How is not disclosed. There was no adjudication in either; hence these suits can have no bearing on the case at bar, unless there is something in the pleadings to act as an estoppel or acquiescence.

The defendant corporation was created in 1901. It was not a party to either suit,—was not in existence. Hence it cannot be estopped by either suit or the pleadings therein. It is a legal entity. Nor could it have acquiesced in what occurred before it came into existence. The other defendant below, Bouchat, owned one share of stock in the Eureka Company, and it is said it was admitted at the hearing was the superintendent of the company at the time it asserted the validity of the patent. It does not appear what his duties were or that he had any control of the corporate entity. He was not a party of record. A mere stockholder is not bound by the acts of a corporate body or for which he labors as an employé. Machine Co. v. Woodward, 27 C. C. A. 69, 82 Fed. 97. If he were a party, then counsel and the assignor of plaintiff below occupied different relations to the patent from those which they now occupy. Those now asserting its validity then denied it, and vice versa. If the pleadings in those suits, in which nothing was decided, nothing settled, as bearing on the validity of the patent or the present controversy, can act as an estoppel on the one, they are equally an estoppel on the other. On this score the parties would be left on equal footing,—like the soldiers of Franklin, each dead on the other's spear. Bouchat was not a party to either suit. That he was an employé and stockholder in the corporation which asserted the validity of the patent cannot act as an estoppel against him. Suits instituted, but not decided, can have no more effect as an estoppel and acquiescence than the allegation that counsel have represented different parties in such futile litigation. Neither decides principles, affects facts, nor acts as an estoppel. Counsel change their views upon further investigation of a subject. Others may do the same. Even if Bouchat had been a party, formal admissions or allegations in pleadings made by one party to a litigation are not sufficient to bind him in another suit between different parties, involving the same subject-matter. United States Gramophone Co. v. National Gramophone Co. (C. C.) 107 Fed. 129. Bouchat was not even a formal party to the suits set up as an estoppel. He was only an employé of one of the party litigants, an owner of one share of stock. He sold his stock and lost his job. In the case above cited, the facts were very similar to the one at bar. Complainant's patents were unadjudicated. No public acquiescence was sufficiently proven, and the motion for an injunction was based upon admissions made by the defendant, under oath, as to the validity of the patents. Circuit Judge Gray refused a preliminary injunction. Where the validity of the patent and the infringement are denied, and defendant sets up valid defenses, there should be strong proof of acquiescence to warrant the issuing of an injunction. Smith v. Britannia Co. (C. C.) 92 Fed. 1003; Consolidated Fastener Co. v. American Fastener Co. (C. C.) 94 Fed. 523. That plaintiff below alleged, under oath, the patent had been in use by it and its assignors for several years, is not sufficient to prove

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public acquiescence. This is denied under oath; it is an issue of fact; to decide it, there must be proof. Nor is it sufficient that one of the defendants below knew the patent had been used,—had been an employé of a company using it, though he is now a stockholder in, and an officer of, the other defendant.

That other defendant has rights. If Bouchat had permitted a decree pro confesso to have been entered against him, and this corporation, which was the original defendant, had answered, and had set up an available defense, such defense would inure to the benefit of both defendants. Frow v. De La Vega, 15 Wall. 552–554, 21 L. Ed. 60; Andres v. Lee, 21 N. C. 319; Bates, Fed. Eq. Proc. § 327, and authorities cited.

But the trial judge seems to put his conclusion on another ground, unnoticed by counsel in the argument or brief,—unfair competition in trade. What is above said applies to this point in the opinion. Defendants seem to be acting in good faith, and allege their ability to respond in damages, which is not questioned. Louis Bouchat believes he has made an improvement in coat pads entitling him to a patent. He has obtained letters patent therefor. This cost something, and a company has been organized to manufacture coat pads under these letters patent. Is this unfair competition in trade? If so, no improvement in a patented article could ever be made by one versed in the art. Louis Bouchat had worked at the trade of making coat pads, became familiar with the art, experienced in the business, and knew the demands of the trade. True, this was when he was a stockholder, owner of one share, and an employé of a corporation using the Goldman patent, when he probably saw the defects in the coat pads manufactured under that patent, and devised what he conceived to be an improvement in coat pads. He applied for and obtained letters patent for such improvement. Is the fact he was such stockholder and employé of a corporation using a patent to deprive him of the benefit of a supposed inventive genius? If so, no one would probably ever make any improvements on patented articles. The purposes of the patent laws would fail. Persons not familiar with the manufacture of patented articles do not and cannot make improvements. It must be done by an artisan. This is reason, and ratio legis vitæ est is as true now as when first written in Coke on Littleton. To entertain a suit for infringement of a patent, the plaintiff must not only allege, but prove, he is the inventor or owner of the patent, and that it has been infringed. Bates, Fed. Eq. Proc. § 331. The allegations are made; they are denied. The relief depends on the proof.

It seems then the preliminary injunction was improvidently granted by the circuit court, the defendants below being able to respond in damages, there being no threatened irreparable injury, no estoppel, no sufficient acquiescence, and no unfair competition in trade. Defendants should have been required to give bond for an accounting, and the temporary injunction refused.

There is error. Reversed

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LARNED v. JENKINS.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,411.

1. MINING CLAIM—LOCATOR ABANDONS RIGHTS BEYOND LOCATION.
One who discovers and locates a lode mining claim under the act of 1866 thereby renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the law.

2. SAME—LOCATOR CANNOT FOLLOW VEIN BEYOND HIS BOUNDARIES ON ITS STRIKE.
The act of July 26, 1866, does not grant to the patentee of a lode mining claim the right to follow on its strike his vein, with its dips, angles, and variations, beyond the boundaries of his location. It permits him to follow it beyond those boundaries on its dip or descending course only.

3. PATENT—TOWN SITE—EXCEPTION OF MINE.
It is mines known to exist at the time a town-site patent is issued, and those only, that are excepted from its grant by section 2392 of the Revised Statutes.

4. TOWN SITE—DEED OF CITY AUTHORITIES IMPERVIOUS TO COLLATERAL ATTACK.
The deed of the city authorities authorized to convey lots in a town site is presumptively valid, and it cannot be collaterally assailed in an action at law for a failure of the authorities to require the preliminaries or perform the requirements antecedent to its execution.

5. ESTOPPEL—ADVERSE CLAIM CREATES NONE AGAINST EJECTMENT BASED ON PRIOR TITLE.
An action of ejectment based upon a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent is not inconsistent with a claim adverse to that application, under section 2326 of the Revised Statutes, and such adverse claim does not estop the plaintiff from maintaining his action.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

See 109 Fed. 100.

This is an action of ejectment. The court below rendered a judgment for the plaintiff on a demurrer to the answer of the defendant. The writ of error challenges this judgment. The property in controversy is an irregular tract of land adjoining the Cook lode mining claim on the north, and it has a length of 357 feet on one side and 283 feet on the other, and a width of 25 feet on one end and 101 feet on the other, measured upon the diagonal lines which form its ends. This tract of land was patented to the city of Central on July 10, 1876, as a part of its town site, was subsequently vested in its successor, the city of Blackhawk, and that city on September 9, 1897, conveyed it to the plaintiff, John C. Jenkins. He set forth this chain of title in his complaint, alleged that the defendant had wrongfully entered upon the premises; that this action was brought in support of an adverse claim filed in the land office against the entry of this land by the defendant, William Larned; that he had disbursed $30 for plats, abstracts, and copies of papers, and $50 for a counsel fee, in preparing his adverse claim; and he demanded judgment for the possession of the premises, $1,000 damages, and $80 expended in support of the adverse claim. The answer of the defendant is voluminous, but, so far as it relates to any errors assigned in the action of the court below, this is the state of facts which it presents: The patent to the town site and the conveyance under which the plaintiff claims were made as he alleges. On October 8, 1870, a patent was issued to the Cook

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lode, which grants a territory 790 feet in length by 50 feet in width, adjoining the tract here in dispute on the south. The Cook vein for the distance of about 120 feet deflects on its strike from the north side line of the Cook mining claim into the tract of land here in controversy, but the deflection of the apex from the north line of the Cook claim does not exceed 7 or 8 feet, and the dip of the vein is at all points slightly to the south, so that where it is deflected from the Cook claim it enters it on its dip 15 or 20 feet below the surface of the ground. Six shafts were sunk, which exposed this vein within the patented territory of the Cook mining claim, and there was a well-known mine thereon before the patent of the disputed territory to the city of Central was issued. This disputed territory was mineral land of great value, and known to be of great value, and there was in fact a mine of gold-bearing quartz, whose top or apex was partly within and partly without this tract, when the patent to the city of Central was issued. In the year 1871 the patentee of the Cook lode mining claim conveyed it to the defendant. On June 7, 1897, one William Rogers discovered a vein of gold on the tract of land in controversy, located a mining claim thereon, called the "Cook No. 2 Lode," applied to the city of Blackhawk to be allowed to purchase the land before the deed therefor was issued to the plaintiff, and on July 14, 1897, conveyed this mining claim to the defendant. The defendant thus holds a deed from the grantee of the Cook lode mining claim, patented in 1870, and another from the locator of the Cook No. 2 lode mining claim, which was located in June, 1897. The court below held that the town-site patent and the deed under it to the plaintiff must prevail over the title which the defendant pleaded, and this is the ruling which is challenged as error.

Willard Teller and Harper M. Orahood, for plaintiff in error.

Jacob Fillius and R. S. Morrison, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The title of the defendant in error Jenkins consists of a patent to the city of Central, and a regular conveyance from its successor, the city of Blackhawk, to himself. On its face this title is regular and sufficient. Counsel for the plaintiff in error assail it on the grounds (1) that the patent to the city of Central was void and ineffectual to convey this property, because it was reserved from conveyance as a part of a town site, under sections 2386, 2392, Rev. St.; and (2) because the conveyance from the city of Blackhawk was made to Jenkins while Rogers, the grantor of the plaintiff in error, was in possession of the property, and entitled to the deed from the city.

The provisions of sections 2386 and 2392 relevant to this issue are that "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof," and that "no title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws."

Prior to the issue of the patent to the town site the grantor of the plaintiff in error had located his claim to the Cook lode upon a tract of land 790 feet long and 50 feet wide, had marked the exterior boundaries of this claim, had entered it and received a patent for it. These acts constituted a notice to the government and to the public

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that he was the owner of all the exclusive rights and privileges in this tract of land, and in the lode or vein therein, granted by the act of July 26, 1866, under which he located and entered the land. But it was also a notice, and a legal notice, to the government and to the public that he renounced and abandoned all other rights and privileges pertaining to the discovery of his lode which he did not secure by his patent. When he had discovered his vein, he had the right to locate it, in conformity with the local laws, customs, and rules of miners, upon that portion of this vein which is within the tract conveyed to the city of Central. Until he made his location he was entitled to follow the course of the vein. He chose to locate his claim and to take his patent upon a tract which excluded that portion of the lode within the territory now in dispute. His grantee now asks to renounce this location, and the limitations of the law and of the patent upon which it is based, and to follow the lode wherever it leads, as the discoverer might have done before he located and marked the boundaries of his claim. The action of his grantor has forever estopped him from pursuing this course. A discoverer of a vein cannot be permitted to locate his claim, present his diagram, and obtain a grant for the lode and the land he claims, and then disregard the limitations of the grant and follow the lode without his location wherever it happens to lead. One who discovers and locates a lode mining claim under the act of 1866 thereby renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the law. Mining Co. v. Old, 79 Fed. 598, 606, 25 C. C. A. 116, 124, 49 U. S. App. 201, 213, 214; Wolfley v. Mining Co., 4 Colo. 112, 116; Mining Co. v. Rogers, 8 Colo. 34, 38, 5 Pac. 661.

The position of counsel for plaintiff in error, that because the act of 1866 permits the discoverer of a lode to receive a patent therefor, "granting such mine together with the right to follow such vein or lode with its dips, angles and variations to any depth although it may enter the land adjoining," the locator has the right to follow the lode on its strike beyond the boundaries of his location, is not tenable. It is only in its descending course that he may follow its dips, angles, and variations. He cannot follow these dips, angles, and variations "to any depth" on the strike of the vein, or on its ascending course. The words "to any depth," as well as the other provisions of the statute which require the locator to file a diagram of the tract he claims, and permit him to receive a patent of this limited area, demonstrate the fact that it was not the intention of congress to grant to the patentee of a lode mining claim under the act of 1866 the right to follow it on its strike beyond the boundaries of the location he selects and secures. The act of July 26, 1866, does not grant to the patentee of a lode mining claim the right to follow his vein on its strike, with its dips, angles and variations, beyond the boundaries of his location. It permits him to follow it beyond those boundaries on its dip or descending course only. The result is that Lyman Cook, the patentee of the Cook lode, derived no title or interest in the land here in dispute by his patent, and the plaintiff in error has taken none through Cook's deed.

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It is insisted, however, that, if this be true, the patent to the city of Central conveyed no title to this property, because it was reserved from conveyance by the patent as a mine by the sections of the statute to which reference has been made. But it is only mines of gold, silver, cinnabar, or copper which are known to exist at the time of the issue of the town-site patent and mining claims and possessions then lawfully existing that are reserved from patent by section 2392. Davis v. Wiebbold, 139 U. S. 507, 518, 526, 527, 11 Sup. Ct. 628, 35 L. Ed. 238; Dower v. Richards, 151 U. S. 658, 663, 14 Sup. Ct. 452, 38 L. Ed. 305; Smith v. Hill, 89 Cal. 122, 125, 26 Pac. 644; Lindl. Mines, § 175B, p. 216. There is no allegation in the answer in this case that there was any known mine upon the tract here in dispute at the time when the patent to the city of Central was issued. On the other hand, the fact that Lyman Cook, the discoverer of the Cook lode, renounced all claim to this property, and had excluded it from his location and patent, before the grant to the city was made, and the fact that there was no mining claim or possession of this disputed tract in existence at the time the town-site patent was issued, clearly indicate that no mine was then known to exist upon it. The argument of counsel that, because there was a discovery and possession of the Cook lode at places within the limits of the Cook location, that lode and mine were known to exist outside of that location and in this disputed territory, is not persuasive. Indeed, the diagram of his location which Cook made, and the patent which he received, conclusively show that Cook's lode and mine were not known or believed to pass without the north line of the tract he patented, on its strike into this land which he abandoned. Nor was there any possession of this mineral vein within the tract here in controversy which could limit the grant of the patent under the provisions of section 2386. It is only a possession of mineral veins recognized by local authorities, and only to the extent so possessed and recognized, that the title to town lots is subject to under that section. And the answer, the location and patent of Cook, conclusively show that the extent of the possession of this vein recognized by local authorities and by Cook himself was the possession of it within the limits of his patented claim. There was neither possession, nor recognition of possession of it without those limits. There was therefore no exception or limitation of the grant of this land under the patent of the town site by any of the provisions of sections 2386 and 2392.

But it is said that even if the patent conveyed the title to this property to the city of Central and its successor, the city of Blackhawk, the conveyance of the latter to the defendant in error was void, because the property was not appraised and sold at public auction, as required by sections 4339 and 4342 of Mills' Annotated Statutes of Colorado, and because the grantor of the plaintiff in error, William Rogers, who took possession on June 7, 1897, and applied for a deed to himself, was entitled to the conveyance from the city of Blackhawk, while the defendant in error had no right to it. The power and duty of the city of Blackhawk to dispose of this land, however, are not governed by the sections of the statute to which reference has been made, which were first enacted in 1881. They were controlled, on the other hand,

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by a special act of the legislature of the state of Colorado, approved February 1, 1876, which may be found in the Laws of Colorado for that year, at page 175. This act empowered the mayor of the city of Central, with the consent of its council, to sell any unsold lots in the town site at private sale, under certain circumstances, and nowhere required the city authorities to give a preference in the purchase to those who entered upon the possession of the property subsequent to the issue of the patent. No violation or disregard of the terms or limitations of the trust imposed upon the city is therefore disclosed by the pleadings, and the deed to the defendant in error is not invalid.

Moreover, the questions whether or not the city authorities complied with the terms of the statutes prescribing the preliminaries, and declaring the method for a conveyance of the lots in the town site, and whether or not on that account its deed may be avoided, cannot be considered in this action of ejectment. Whether the deed was executed after compliance with the required preliminaries, and in strict accordance with the requirements of the statutes, or not, it conveyed the legal title to this property to the defendant in error. The statutes of Colorado intrusted to the authorities of the city the power to hear and determine the questions whether or not these preliminaries had been performed and these requirements had been fulfilled, and authorized them, upon that determination, to make the conveyance. The legal presumption is that they discharged these duties honestly and in accordance with the provisions of the law. That presumption might undoubtedly be overcome in a suit in equity by pleading and proof of gross mistake, fraud, or error in law. No such proceeding has been instituted. No suit to attack or avoid this deed has been brought. This is an action at law, and in this action the defendant in error had a right to rely upon his conveyance. It cannot be collaterally attacked in this action of ejectment. The deed of the city authorities authorized to convey lots in a town site is presumptively valid, and it cannot be collaterally assailed in an action at law for a failure of the authorities to require the preliminaries or perform the requirements antecedent to its execution. Chever v. Horner, 11 Colo. 68, 71, 79, 17 Pac. 21, 7 Am. St. Rep. 202; Smith v. Pipe, 3 Colo. 187, 199; Anderson v. Bartels, 7 Colo. 256, 263, 266, 267, 3 Pac. 225.

Finally it is contended that the defendant in error is estopped from claiming that he is the owner of this land under the patent of the town site, and that it was not subject to entry as a mining claim on June 7, 1897, because he has pleaded in his complaint that this suit is brought in support of an adverse claim filed in the land office against the entry of this land for patent by the plaintiff in error under section 2386 of the Revised Statutes. But there is nothing inconsistent in the adverse claim of Jenkins and this action of ejectment. The statutes permit any one to file an adverse claim whenever application is made to enter a mining claim upon the public lands for patent. If an attempt is made to secure a patent to land which has already been conveyed by the government, the land department has no jurisdiction to consider or determine the questions it presents. An adverse claim presented to that department which discloses the fact that the adverse claimant holds it under a patent already issued is entirely con-

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sistent with an action of ejectment, based upon that patent, to turn the trespassing claimant out of possession. Not only this, but section 2326 of the Revised Statutes, under which the adverse claim is prosecuted, requires the claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and to prosecute the same with reasonable diligence to final judgment. The averments of the complaint base the claim of the defendant in error upon the patent of the town site issued in 1876. That pleading contains no averment or intimation of any concession or claim that the disputed property was a portion of the public domain, and subject to the disposition of the land department, after the issue of the patent to the city of Central. The only unwarranted averment in that pleading is the allegation of the expenses of preparing and presenting the adverse claim, and the most that can be said of this is that it is immaterial. No relief was granted on account of it, and there is nothing in the pleadings, the proceedings, or the judgment inconsistent with the claim and recovery of possession by the defendant in error upon the patent of the town site in 1876. An action of ejectment based upon a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent is not inconsistent with a claim adverse to that application, under section 2326 of the Revised Statutes, and such adverse claim does not estop the plaintiff from maintaining his action.

The result is that the patent of the town site conveyed the title to this land to the city of Central and its successor, the city of Blackhawk, and the conveyance of the latter vested it in the defendant in error. The deed of Lyman Cook conveyed no title or interest in this property, because he had none. The attempt of William Rogers to initiate a mining claim upon it in 1897 was futile, because all right, title, and interest in it had passed out of the government in 1876. His conveyance to the plaintiff in error, therefore, was ineffectual, and the judgment below must be affirmed. It is so ordered.

DEMING v. McCLAUGHRY, Warden of U. S. Penitentiary, Ft. Leavenworth, Kan.

(Circuit Court of Appeals, Eighth Circuit. February 10, 1902.)

No. 1,656.)

1. **COURT-MARTIAL—REGULAR OFFICERS INCOMPETENT TO TRY VOLUNTEERS.**
   Officers of the regular army are incompetent, under the seventy-seventh article of war, to try the officers or soldiers of the volunteer forces raised under the acts of April 22, 1898, and March 2, 1899 (30 Stat. 361, c. 187; Id. 977, c. 352).

2. **WRIT OF HABEAS CORPUS—FUNCTION.**
   The writ of habeas corpus is not available to review an erroneous judgment of a court having jurisdiction. But it is effective to challenge a judgment rendered by a court without jurisdiction, and to relieve the defendant from its effect.

3. **COURT-MARTIAL—JURISDICTION—INDISPENSABLE CONDITIONS.**
   A court-martial is a court of inferior and limited jurisdiction. Proof (1) that it was convened by an officer empowered by the statutes to call

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it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized to detail for that purpose; (3) that the court thus constituted was vested with power to try the person and the offense charged; and (4) that its sentence was in conformity to the statutes,—is indispensable to its jurisdiction and to the validity of its judgment or sentence.

4. SAME—JUDGMENT AGAINST A VOLUNTEER BY A COURT-MARTIAL OF REGULAR OFFICERS WITHOUT JURISDICTION AND VOID.
No officer is authorized, but every officer is forbidden, to constitute of officers of the regular army a court-martial to try a volunteer, and the judgment of such a court-martial against a volunteer is without jurisdiction and void.

5. CONSTRUCTION OF STATUTES—OPINIONS OF OFFICERS OF OTHER DEPARTMENTS.
The opinions of officers of other departments of the government relative to the construction and effect of statutes intrusted to them to enforce deserve serious consideration, and may well lead the way to decisions where the statutes are ambiguous and their meaning doubtful. But it is a duty of the courts, which they may not renounce, to interpret legislation by their own judgments; and where the words of a statute are clear, and its meaning plain, these must prevail, notwithstanding the opposing opinions of officers of other departments of the government.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Kansas.

This is an appeal from an order of the circuit court, which denied the petition of Peter C. Deming for a writ of habeas corpus upon this state of facts: Deming was, on March 29, 1900, a captain in the subsistence department in the volunteer army of the United States. On that day William R. Shafter, a major general of the volunteer army, and a retired brigadier general of the regular army of the United States, ordered that a general court-martial, composed entirely of officers of the regular army, should convene "for the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. volunteers." The court thus called sat, tried the appellant upon some charge, and sentenced him to dismissal from the service of the United States, and to confinement in the penitentiary for three years, and this sentence was approved by the secretary of war, and confirmed by the president of the United States. Deming is confined in the penitentiary at Leavenworth, Kan., under a mittimus based on this judgment. He avers that the sentence upon him is void, and that he is illegally deprived of his liberty, because Gen. Shafter, a retired officer of the regular army, had no authority to convene the court, and because the court-martial which condemned him was not regularly constituted or organized, in that it was composed entirely of officers of the regular army, who were expressly prohibited to hear or determine any charge against him, an officer of the volunteer army, under the seventy-seventh article of war (Rev. St. § 1342), which reads: "Officers of the regular army shall not be competent to sit on courts-martial to try the officers and soldiers of other forces except as provided in article seventy-eight."

John H. Atwood (William W. Hooper, on the brief), for appellant.

E. H. Crowder and Edward A. Rozier (George C. Hitchcock, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The petitioner, Deming, was an officer of the volunteer force raised under the act of congress of March 2, 1899 (30 Stat. 977, c. 352). He was tried and convicted by a court-martial composed of officers of the

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regular army. The seventy-seventh article of war declares that officers of the regular army are not competent to sit on courts-martial to try the officers and soldiers of other forces. The crucial question in this case is, was this volunteer army the same army as the regular army, or was it a different and supplemental army? Was this volunteer force raised under the act of 1899 the same force as the regular army, or was it one of the "other forces" of the United States within the intent and meaning of article 77? On a cursory reading of the article the question does not seem to be difficult, nor the true answer to it doubtful. And, were it not for the earnest and forceful presentation of their view by the learned counsel for the government, and for the fact that the general commanding the army under the advice of the judge advocate general has held that under the act of April 22, 1898 (30 Stat. 361, c. 187), and of March 2, 1899 (30 Stat. 977, c. 352), the volunteer force is the same force as the regular army, and that the officers of the latter may lawfully try the officers of the former (Circular 21, H. Q. A., June 30, 1898), that contention might not seem forceful. But the opinions of the officers of the executive department of a government relative to the construction of a statute whose execution has been intrusted to them justly command and should receive the careful consideration of the courts, and in doubtful cases they should be permitted to lead the way to their decisions. Their opinions ought not to be overruled or disregarded unless upon a deliberate and careful review of the decisions which they render it clearly appears that they are tainted with error. On the other hand, the decisions of these officers are not controlling or conclusive upon the courts. It is the function and duty of the judicial department of the government to construe its statutes and to declare their meaning. That duty the courts may not renounce or abandon to others, and in its discharge they must exercise their own independent judgments, guided only by the established principles of the law and the recognized canons of interpretation. While the opinions of the officers of the executive department of the government may be permitted to lead the way to the proper construction of ambiguous statutes intrusted to them to enforce, yet where the words of the acts are plain, and their meaning is clear, these must prevail. Hartman v. Warren, 76 Fed. 157, 162, 22 C. C. A. 30, 36, 40 U. S. App. 245, 254; Webster v. Luther, 163 U. S. 331, 342, 16 Sup. Ct. 963, 41 L. Ed. 179; U. S. v. Tanner, 147 U. S. 661, 663, 13 Sup. Ct. 436, 37 L. Ed. 321; Merritt v. Cameron, 137 U. S. 542, 11 Sup. Ct. 174, 34 L. Ed. 772; U. S. v. Graham, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; Swift, C. & B. Mfg. Co. v. U. S., 105 U. S. 691, 26 L. Ed. 1108.

Guided by these familiar and indisputable rules of law, the question whether the volunteer force raised under the act of 1899 was the same force as the regular army, or one of the "other forces" of the United States, within the meaning of article 77, will be considered. That article reads:

"Officers of the regular army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces except as provided in article 78."

The exception in article 78 relates to the officers of the marine corps, and does not withdraw the appellant or the officers who tried him

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from the prohibition of the general rule announced in article 77. The provisions of the act of March 2, 1899, pertinent to the issue under consideration are these:

"That from and after the date of the approval of this act the army of the United States shall consist of * * * ten regiments of cavalry, seven regiments of artillery, twenty-five regiments of infantry," and appropriate officers, departments and corps. 30 Stat. 977, c. 352, § 1.

"That to meet the present exigencies of the military service, the president is hereby authorized to maintain the regular army at a strength of not exceeding sixty-five thousand enlisted men to be distributed amongst the various branches of the service, including the signal corps, according to the needs of each, and raise a force of not more than thirty-five thousand volunteers to be recruited as he may determine from the country at large, or from the localities where their services are needed, without restriction as to citizenship or educational qualifications, and to organize the same into no more than twenty-seven regiments organized as are infantry regiments of war strength in the regular army and three regiments to be composed of men of special qualifications in horsemanship and marksmanship to be organized as cavalry for service mounted or dismounted, * * * provided, further, that such increased regular and volunteer force shall continue in service only during the necessity therefor and not later than July 1st, 1901. All enlistments for the volunteer force herein authorized shall be for the term of two years and four months unless sooner discharged." 30 Stat. 977, § 12.

That the president shall have power to continue in service or to appoint by and with the advice and consent of the senate certain brigadier generals of volunteers and major generals of volunteers; "provided, that regular army officers continued or appointed as general officers or as field or staff officers of volunteers under the provisions of this act shall not vacate their regular army commissions." 30 Stat. 977, § 13.

That the president is authorized to appoint, with the advice and consent of the senate, officers of the volunteer staff, including 12 assistant commissaries of subsistence with the rank of captain. 30 Stat. 977, § 14.

That the officers and enlisted men of the volunteer army shall be mustered out of the military service of the United States and discharged as provided in the act of April 22, 1898, provided that enlisted men of volunteers who desire to remain in the military service may be transferred to and enlisted in the regular army. 30 Stat. 977, § 15.

It will not be unprofitable to briefly call to mind the course of the legislation, decision, and practice of the nation relative to the matter in hand prior to 1899 before entering upon the discussion of the question which that act and the seventy-seventh article of war present. The American articles of war of 1776 provided that "the officers and soldiers of any troops, whether minute men, militia, or others," should, when joined with the regular forces, be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, "save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender." Davis, Military Law, p. 617. Section 6 of the act of May 2, 1792, reads in this way: "And be it further enacted, that courts-martial for the trial of militia shall be composed of militia officers only." 1 Stat. 264, c. 28. This provision was re-enacted in the act of Febru-

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ary 28, 1795 (1 Stat. 424, c. 36), in the act of April 18, 1814 (3 Stat. 134, c. 82), and in the act of July 29, 1861 (12 Stat. 282, c. 25, § 5). From these acts it will be seen how uniformly the legislation and practice of the nation excluded the officers of the regular army from courts-martial to try the officers and soldiers of the militia. Not only this, but the act of April 10, 1806, which established the rules for the government of the armies of the United States, contained this article: "Art. 97. The officers and soldiers of any troops, whether militia or others, being mustered and in the pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war and shall be subject to be tried by courts martial in like manner with the officers and soldiers of the regular forces, save only that such courts martial shall be composed entirely of militia officers only." 2 Stat. 371. The fact will not be overlooked that under this article the officers of the regular forces were disqualified from trying the officers and soldiers of troops joined or acting in conjunction with the regular army, whether such troops were militia, volunteers, or others. This enactment remained unchanged until in 1874 the present article 77 took its place. Rev. St. p. 237; 18 Stat. 113, c. 333. During all this time the nation maintained a regular army, and from time to time the president was empowered by congress to raise volunteer forces to augment the strength of the regular force. Congress provided for the enlistment of volunteers in 1812 for the war with Great Britain (2 Stat. 676, c. 21), in 1836 for the Seminole war (5 Stat. 32, c. 80), in 1839 to protect the Maine boundary (5 Stat. 355, c. 89), in 1846 for the war with Mexico (9 Stat. 9, c. 16), and in 1861 for the war of the Rebellion (12 Stat. 268, c. 9; Id. 274, c. 17). No opinion of any court, or of any officer of the war department, rendered prior to June 27, 1898, to the effect that any of these volunteer forces was the same force as the regular army, or to the effect that the officers of the latter were competent to sit on courts-martial to try the officers of the former, either under the old article 97 or the present article 77, has been called to our attention. On November 19, 1863, Judge Advocate General Holt declared that "the words 'militia officers,' as employed in the ninety-seventh article of war, have been interpreted since the commencement of the Rebellion as synonymous, so far as the organization of courts-martial is concerned, with 'volunteer officers.' This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished." In the practice of the department the officers of the regular army were not permitted to sit on courts-martial to try the officers or soldiers of the volunteer force. G. O. 53, Dept. East, 1864; G. O. 16, Dept. Missouri, 1864; C. C. M. O. 11, 13, 16, Dept. Kentucky, 1865. The unanimous opinion of the writers upon military law was that the volunteer army was one of the "other forces" than the regular army, and that the officers of the latter were prohibited from sitting on courts-martial to try the officers or soldiers of the former. Bénet, Military Law (Ed. 1866) p. 25; Winthrop, Abridgment of Military Law, 29; Winthrop, Military Law and Precedents (2d Ed.) 92; Da-

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vis, Military Law, pp. 27, 496. The decisions of the courts had recognized the two forces as different,—the one as temporary, called forth by the exigency of the time, to serve during war or its imminence, and then to be dissolved into its original elements; the other as permanent and perpetual, to be maintained in peace and in war. U. S. v. Sweeny, 157 U. S. 281, 15 Sup. Ct. 608, 39 L. Ed. 702; U. S. v. Merrill, 9 Wall. 614, 19 L. Ed. 664; Kerr v. Jones, 19 Ind. 351; Wantlan v. White, Id. 470. The laws and the long-continued practice of a people evidence its public policy. Vidal v. Girard's Ex'rs, 2 How. 127, 197, 11 L. Ed. 205; U. S. v. Association, 58 Fed. 58, 69, 7 C. C. A. 15, 73, 19 U. S. App. 36, 54, 24 L. R. A. 73. The uniform course of legislation, decision, and practice upon the subject under consideration for more than a century establish the fact that it had become the public policy of the United States to prohibit the trial of the officers and soldiers of the volunteer force and of the militia by the officers of the regular army.

Nor is the reason for this legislation and action far to seek or difficult to discern. It was not, as suggested by counsel for the government, that the volunteers and militia were citizens of the states, and that their officers were generally commissioned by the governors. It lies deeper, and is more fundamental and potential. It is grounded in that cardinal principle of Anglo-Saxon jurisprudence that no man shall be tried or condemned save by the hearing and judgment of his peers; in that principle which inspired the rule that deprives judges of the power to try persons accused of heinous crimes in civil life, and remits their trial to the forum of their peers, the jury. The officers of the regular army are generally taught in their youth the laws that govern the regular force, that high regard for truth and honor and that prompt and exact obedience to orders which condition its high efficiency. The officers of the volunteers spend their earlier days without knowledge of military law, preparing for agricultural, mechanical, mercantile, or professional pursuits, unaccustomed to military discipline, and exempt from the controlling commands of superiors. The officers of the regular army make the discipline of that army, the preparation for war, and war itself the work of their lives. Their hopes and their aspirations are to excel in this, their chosen profession, and upon it they rely for their livelihood. The officers of the volunteers look to civil pursuits for their ultimate success and sustenance. They leave these pursuits for a few short months at the call of their country to subdue a rebellion against or to defeat an enemy of their nation. They seek not so much to discipline the army they join, and to prepare it for war, as to speedily conclude the war, restore peace, and return to their chosen pursuits. Their hopes and aspirations center, not in their temporary occupation, but in the pursuits they have left, and to which they are soon to return. More than all this, the officers of the regular army know the unwritten code of military thought and action, and the habit of the trained soldier's life, and know them so well that their practice is involuntary, while a neglect of them seems inexcusable. The officers of the volunteer force come to the army in ignorance of this code and custom. They have short time to learn or to practice them. Their invariable practice does

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not always seem to them essential to the defeat of the enemy and a speedy peace, and the heinousness of a disregard of some of their requirements does not always impress them. So it is that the thoughts, actions, habits, and ambitions of the officers of the regular army differ widely from those of the volunteers. Many things in the life of the soldier seem vital to the former that have small importance in the eyes of the latter. Many military offenses seem heinous to the former that appear venal to the latter. Congressmen have not been ignorant of these facts. They have associated with, known, and honored the officers of the regular army. They have known their pride in their profession, in the efficiency of the regular force, and the abhorrence with which they have looked upon any breach of either the moral or the military law. They have known the volunteers. These have been their constituents and their friends. Many of the members of congress have been volunteers themselves. In the light of these facts, and with this knowledge, they have thought that the officers and soldiers of the volunteer force ought not to be tried by the officers of the regular army; and they have made and maintained for more than a century the legislation which has been quoted to carry that thought into effect.

This, then, was the situation when the act of April 22, 1898, under which a judge advocate general first held that officers of the regular army could lawfully sit on courts-martial to try the officers and soldiers of the volunteer force, was passed. The acts of congress had prohibited for nearly a century, and still expressly forbade it. The decisions and the practice of the officers of the war department interdicted it. The established policy of the nation inhibited it. In the light of this legislation, decision, and policy the acts of 1898 and 1899 must be read and construed. What was there in these acts to repeal the statutory inhibition and reverse the public policy of a century? The decisions, the policy, and the practice rested on the acts of congress, and certainly nothing less than an express repeal by that body of the plain inhibition of article 77, or such legislation as clearly shows the undoubted intention of congress to strike it down, ought to be permitted to withdraw it, and to reverse the policy and practice of so many years.

The first argument in support of the contention of the government that the acts of 1898 and 1899 have had this radical effect is that, while the volunteer army was one of the "other forces" than the regular army under article 77, prior to the act of 1898, that act made it the same force as the regular army, because it provides that the organized and active land forces of the United States shall consist of the army of the United States and of the militia of the several states when called into the service of the nation; that the regular army is the permanent military establishment, which is maintained in peace and war, and that the volunteer army is maintained only during the existence of war, or while war is imminent, and is raised and organized only after congress authorizes the president so to do. 30 Stat. 361, c. 187, §§ 2–4. They insist that this enactment declares that there were but two forces of the United States,—the army and the militia,—and that, as the regular army was one part of the former force and the volunteer army was

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another part of the same force, the latter army could not, after this enactment, be one of the "other forces" than the regular army, under article 77. There are several reasons why this argument fails to convince. In the first place, there is no repeal, modification, or reference to the provisions of article 77 in this act or in the act of 1899. There is nothing in either of them to indicate that in considering or enacting this legislation congress intended to modify the terms or the effect of that article, and, as no such intention appears in the legislation, the conclusive presumption is that no such intention existed. Moreover, the care and emphasis with which the difference between the regular army and the volunteer army is maintained throughout the act of 1898 demonstrate the fact that it was the positive intention of congress to maintain the distinction between the two forces. Starting with the declaration that the active land forces shall consist of the army and the militia, that the regular army is the permanent military establishment and the volunteer army is the temporary force in which enlistments shall be for a term of two years, unless sooner terminated, it contains these significant provisions:

"Sec. 5. That when it becomes necessary to raise a volunteer army the president shall issue his proclamation stating the number of men desired.

"Sec. 6. That the volunteer army and the militia of the states when called into the service of the United States shall be organized under, and shall be subject to, the laws, orders and regulations governing the regular army.

"Sec. 7. That all organizations of the volunteer army shall be so recruited from time to time as to maintain them as near to their maximum strength as the president may deem necessary."

Sec. 8. That all returns and muster rolls of the volunteer army "shall be rendered to the adjutant general of the army and filed in the record and pension office of the war department."

"Sec. 9. That in time of war, or when war is imminent, the troops in the service of the United States, whether belonging to the regular or volunteer army or to the militia, shall be organized" into divisions of three brigades.

Section 10 relates to the staff officers.

Sec. 11. That the president is hereby authorized to appoint in the volunteer army "one major general for each army corps or division and one brigadier general for each brigade," and any officer so selected and appointed from the regular army shall be entitled to retain his rank therein.

"Sec. 12. That all officers and enlisted men of the volunteer army and of the militia of the states when in the service of the United States, shall be in all respects on the same footing as to pay, allowances, and pensions as that of officers and enlisted men of corresponding grades in the regular army.

"Sec. 13. That the governor of any state or territory may, with the consent of the president, appoint officers of the regular army in the grades of field officers in organizations of the volunteer army, and officers thus appointed shall be entitled to retain their rank in the regular army.

"Sec. 14. That the general commanding a separate department or a detached army is authorized to appoint from time to time military boards of not less than three nor more than five volunteer officers of the volunteer army to examine into the capacity, qualifications, conduct and efficiency of any commissioned officer of said army within his command."

These various sections are utterly inconsistent with the view that the volunteer army was made the same force as the regular army, and that all distinctions in the treatment and trial of the members of the two forces were stricken down by the casual enumeration of the active land forces of the nation in the first section of the act. If the volunteer army was the regular army, why the declaration in section 6 that

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the volunteer army should be subject to the laws, orders, and regulations governing the regular army; in section 12, that the officers and enlisted men of the volunteer army should be on the same footing as men of corresponding grades of the regular army; and in section 13, that officers of the regular army commissioned as officers in the volunteer army should retain their rank in the former? These provisions are pregnant with significance. But section 14 places the purpose and intention of the lawmakers to maintain the established rule that the volunteer army was one of the "other forces" than the regular army within the meaning of article 77 and the law and the policy that their officers and soldiers should not be tried by the officers of the regular army beyond doubt or cavil. It provides for military boards to examine into the capacity, qualifications, conduct, and efficiency of officers of the volunteer army. But, in accordance with the then existing law and policy of the nation, it excludes from these boards all officers of the regular army, and directs that they shall be composed entirely of officers of the volunteer force. When the entire act of 1898 is carefully read and considered, it is found to contain no indication of any intention on the part of congress to modify the terms or the settled construction of article 77. On the other hand, it evidences a plain purpose to maintain the rule and policy which classified the volunteer army among the "other forces" than the regular army, and prohibited the officers of the latter from sitting on courts-martial to try the officers and soldiers of the former.

Another reason why the argument based upon the classification in the first section of this act is not persuasive is that it is fallacious. Stated in syllogistic form, it is: The land forces are composed of the army and the militia. The army is composed of the regular army and the volunteer army. Therefore the volunteer force is the regular force. When thus stated, the fallacy is apparent. The contention is based on the false assumption that every part of a military force is the same part as every other part; that every species of a genus is the same as every other species of that genus; that every class properly described by a generic term is the same class as every other class covered by that term. Illustrations make the fallacy plain. Oranges and apples are fruit, yet oranges are other fruit than apples. The Russians and Americans are people, and yet the white Americans are other people than the black Americans. The cavalry, infantry, and artillery of the regular army is a military force, and yet the cavalry and infantry are other forces than the artillery. So the regular army and the volunteer army, under the classification of 1898, constitute a force, and yet the volunteer army, both in fact and within the meaning of article 77, is another force than the regular army.

Again, even if the contention of counsel for the government were conceded, it would but serve to strengthen the position that the petitioner, who was commissioned under the act of 1899, was a member of other forces than the regular army. The argument rests entirely on the declaration of the act of 1898 that the army of the United States is composed of the regular army and the volunteer army, and that the land forces consist of the army and the militia. The act of 1899 contains no such classification, but, on the other hand, expressly declares

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that the "army of the United States shall consist" of the cavalry, infantry, and artillery of the regular army; that the regular army may be temporarily increased to 65,000 men, and that the president may "raise a force of not more than thirty-five thousand volunteers." 30 Stat. 977, 979, c. 352, §§ 1, 12. The petitioner is one of these volunteers, and, if the effect of the classification of 1898 had been all that counsel claims, yet by the literal terms of the act of 1899 Deming was a member of another force than the regular army,—a member of the volunteer force.

Counsel for the government advance another argument in support of the contention that the volunteers, under the acts of 1898 and 1899, were not other forces than the regular army. It is that the law and the practice upon this subject during the war of the Rebellion were established to prevent state troops from being tried by the officers of the regular army; that the volunteers during that war were raised by the states, and officered by their governors; and that their regiments were designated by the names of the states from which they came, while the volunteers called under the acts of 1898 and 1899 were raised under a different system, were not so nearly assimilated to the militia, and that those received under the act of 1899 were not apportioned to or raised by the states, their regiments were not designated by the names of the states, but, like the regulars, they were enlisted from the country at large, their regiments took numbers supplemental to those of the regiments of the regular army, and their officers were appointed, not by the governors, but by the president. This contention, in our opinion, is based on a misconception of the real reason which inspired the legislation and the policy which for so many years has prohibited the trial of volunteers by regulars. That reason was, not that the volunteers were state troops and the regulars national troops, that the volunteers were raised by the states and their officers were appointed by the governors, while the regulars were raised by the nation and their officers were commissioned by the president. It was, as has been shown in an earlier part of this opinion, that the knowledge, training, habits, hopes, and ambitions of the officers of the regular army, who had devoted themselves for life to the discipline and efficiency of that force, necessarily conditioned their opinions of the heinousness of military offenses; and these opinions, this knowledge and training, these hopes and ambitions, differed so widely from those of the officers of the volunteer force, who came from civil life, for a limited time, ignorant of military law and of the customs and practices of a soldier's life, and anxious to speedily return to their civil occupations, that congress established the rule that the former should not be competent to sit on courts-martial for the trial of the latter. The reason of this rule applies to the volunteer force raised under the act of 1899 with as much force as to those raised during the war of the Rebellion.

Finally, it is contended that the provision of section 6 of the act of April 22, 1898, "that the volunteer army and the militia of the states when called into the service of the United States shall be organized under, and shall be subject to, the laws, orders and regulations governing the regular army," indicates that the volunteer army and the

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militia are a part of the regular army, and hence the same force as that army, within the meaning of article 77. The enactment appears to us to demonstrate the contrary, and that because, if the volunteers and the militia were a part of the regular army, they were subject to the laws, orders, and regulations governing it, without a special declaration to that effect. A similar provision may be found in the act of July 22, 1861 (12 Stat. 269, c. 9, § 2), under which the volunteer forces for the war of the Rebellion were enlisted, and yet those volunteers were held to be other forces than the regular army.

The result is that when the acts of 1898 and 1899 were passed there was an article of war in force enacted by congress which expressly prohibited the officers of the regular army from sitting on courts-martial to try the officers or soldiers of other forces. Prior to the passage of these acts the volunteer force was in fact, and had been uniformly held to be, one of these other forces, so that in law and in practice this article of war forbade the officers of the regular army to try the officers or soldiers of the volunteers. There is no express repeal or modification of this inhibition in the acts of 1898 and 1899. There is nothing in these acts repugnant to or inconsistent with the prohibition, nothing to show that congress intended thereby to withdraw or to change it, but strong indications, in the marked distinction it studiously maintains between the regular army and the volunteer army, and in the fact that it provided for military boards composed entirely of officers of the volunteer army to examine into the efficiency and qualifications of the volunteer officers, that it intended to preserve and to maintain the inhibition. The reason which inspired this legislation and the policy and practice it evidences apply with all their cogency and force to the officers and soldiers of the volunteer force raised under the act of 1899. These facts and the considerations to which we have adverted have irresistibly forced our minds to the conclusion that the volunteer force raised under the act of 1899 was not the same force as the regular army, but that it was one of the "other forces" specified in article 77, and that the officers of the regular army were forbidden by that article to sit on any court-martial to try the petitioner, who was an officer of the volunteer force raised under the act of 1899.

It is insisted, however, that, if the members of this court-martial were disqualified to try the petitioner, that objection was waived, because not made at the trial, and the judgment was not void, but merely erroneous and voidable, so that it was impregnable to collateral attack by the writ of habeas corpus. A writ of habeas corpus cannot be made to perform the office of a writ of error, but it is the proper process to challenge a void judgment and to relieve the defendant from its baleful effect. It may not be invoked to review and avoid an erroneous judgment of which the court had jurisdiction, but it is always effective to relieve a prisoner from the restraint imposed by a judgment that is absolutely void. In re Reese, 47 C. C. A. 87, 107 Fed. 942, 948; Ex parte Buskirk, 72 Fed. 14, 21, 18 C. C. A. 410, 417, 25 U. S. App. 613, 615; Ex parte Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; Ex parte Fisk, 113 U. S. 713, 718, 5 Sup. Ct. 724, 28 L. Ed. 1117; Dynes v. Hoover, 20 How. 81, 83, 15 L.

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Ed. 838; Ex parte Reed, 100 U. S. 13, 23, 25 L. Ed. 538; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; U. S. v. Pridgeon, 153 U. S. 48, 59, 14 Sup. Ct. 746, 38 L. Ed. 631; Rose v. Roberts, 99 Fed. 948, 40 C. C. A. 199. A judgment or sentence of a court which had no jurisdiction of the subject-matter or of the person affected by its adjudication is absolutely void. But the judgment or sentence of a court empowered to hear and determine the issues relative to the subject-matter and the person affected by its decision, although it may be wrong and irregular, is simply voidable, and cannot be successfully attacked collaterally. Foltz v. Railroad Co., 60 Fed. 316, 318, 8 C. C. A. 635, 637, 19 U. S. App. 576, 581. Hence the question here presented is, did this court-martial have jurisdiction to hear and try the petitioner for the offense for which he was charged? The legal presumption is that courts of general jurisdiction have the power and the authority to make the adjudications which they render, and that their judgments are valid. But no such presumption accompanies the sentences of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that their jurisdiction shall be clearly and unequivocally shown. A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it. The articles of war specify the officers who are empowered to convene these courts (articles 72, 73, 74, 81, 82), the officers who may compose them (articles 75, 76, 77, 78, 80), and the persons and charges which they are empowered to try (articles 77, 78, 80, 81, 82, 83). It necessarily follows that the jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned by these indispensable prerequisites: (1) That it was convened by an officer empowered by the statutes to call it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that purpose; (3) that the court thus constituted was invested by the acts of congress with power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes. The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial coram non judice, and absolutely void, because such a judgment and sentence is rendered without authority of law and without jurisdiction. Runkle v. U. S., 122 U. S. 543, 546, 7 Sup. Ct. 1141, 30 L. Ed. 1167; Mills v. Martin, 19 Johns. 7, 30; Wise v. Withers, 3 Cranch, 331, 2 L. Ed. 457; Ex parte Watkins, 3 Pet. 193, 207, 7 L. Ed. 650; Dynes v. Hoover, 20 How. 65, 80, 15 L. Ed. 838.

Let us now measure the contention that the judgment of this court-martial, which condemned the petitioner to dismissal and imprisonment, was not void, but was merely irregular or erroneous, by these indisputable principles. The eighty-eighth article of war reads:

"Members of a court martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and

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validity thereof and shall not receive a challenge to more than one member at a time."

The acts of congress make no provision for a challenge to the array, and point out no method whereby the question of the disqualification of all the members may be determined in the first instance by any one but the members of the court themselves challenged one by one. It is said that a court-martial is like a jury; that the reviewing officer occupies the place of a judge; that the disqualification of a juror, if not suggested at the trial, is waived, and does not render the verdict void (Kohl v. Lehlback, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432; Clark v. Van Vrancken, 20 Barb. 281; In re Voorhees, 6 Op. Atty. Gen. 206); and that the judgment of this court-martial ought not to be held void because all its members were incompetent to sit upon it. But in the essentials of the issue the analogy does not hold. The question of the qualification of triors arises in limine. It is to be determined before the trial commences. In the case of a trial by jury, the judge, not the jury, determines the qualifications of the jurors; while in a trial by a court-martial the members of the court must determine their own qualifications, and, if all the members are incompetent to sit in the court at all, how can they be competent to decide that they are either competent or incompetent to act there? Moreover, a jury decides nothing but questions of fact, while the members of a court-martial determine both the law and the facts. This argument by analogy is not persuasive. Indeed, the analogy between the judgment of a court-martial and the judgments of courts composed of disqualified judges is much closer. All the members of this court-martial were disqualified. It was a court of inferior—of limited—jurisdiction. Why should its judgment have more virtue than those of courts of general jurisdiction some of whose judges are incompetent to sit? Yet the general rule, supported by the great weight of authority, is that the judgments of such courts are void, and that neither waiver nor consent can give them validity. Case v. Hoffman, 100 Wis. 314, 356, 75 N. W. 945, 44 L. R. A. 728; Oakley v. Aspinwall, 3 N. Y. 547, 552; Low v. Rice, 8 Johns. 409; Clayton v. Per Dun, 13 Johns. 218; Edwards v. Russell, 21 Wend. 63; People v. Connor, 142 N. Y. 130, 133, 36 N. E. 807; Chambers v. Clearwater, *40 N. Y. 310, 314; Sigourney v. Sibley, 21 Pick. 101, 106, 32 Am. Dec. 248; Gay v. Minot, 3 Cush. 352; Hall v. Thayer, 105 Mass. 219, 224, 7 Am. Rep. 513; Railway Co. v. Summers, 113 Ind. 10, 17, 14 N. E. 733, 3 Am. St. Rep. 616; Ochus v. Sheldon, 12 Fla. 138; Chambers v. Hodges, 23 Tex. 112; Gains v. Barr, 60 Tex. 676, 678; Templeton v. Giddings (Tex. Sup.) 12 S. W. 851.

The insuperable objection, however, to the jurisdiction of this court-martial and to the validity of its sentence is that the officer who called it was not only unauthorized, but was positively forbidden by act of congress, to constitute it of the officers of the regular army, to detail these officers to sit upon it; and when these officers were so detailed they were in like manner prohibited from responding to the call and from becoming members of the court. The order convening the court-martial declared that the purpose of its call was "for the

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trial of Captain Peter C. Deming, assistant commissary of subsistence U. S. volunteers," and it commanded nine officers of the regular army to meet and sit upon the court. The seventy-seventh article of war prohibited Gen. Shafter, who issued this order, from directing these officers to sit upon a court-martial to try this officer of the volunteer force, and forbade them to do so. The court was therefore illegally constituted. It did not have a single member upon it that the commanding officer had the power to direct to participate in the trial of the petitioner, or that could lawfully do so. "It was necessary to show that the court was legally constituted in order to gain jurisdiction of the persons and offenses of those who were to be tried before it." Mills v. Martin, 19 Johns. 33. "To give effect to its sentences, it must appear affirmatively and unequivocally that the court was legally constituted, that it had jurisdiction, that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law." Runkle v. U. S., 122 U. S. 556, 7 Sup. Ct. 1141, 30 L. Ed. 1167. In the army of the United States courts-martial derive their power—their jurisdiction—from the acts of congress. Neither the silence, the consent, nor the agreement of the parties can confer it if it is not granted by the statutes. This court-martial derived no power or jurisdiction from the acts of the congress of the United States, because it was constituted in direct violation of, and not in accordance with, them. It was therefore entirely without jurisdiction to try the petitioner, and its judgment against him was absolutely void.

The judgment below must accordingly be reversed, and the case must be remanded to the circuit court, with directions to issue the writ of habeas corpus, and to proceed in accordance with the views expressed in this opinion; and it is so ordered.

KINLOCH TEL. CO. et al. v. WESTERN ELECTRIC CO.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1902.)

No. 1,640.

1. PATENTS—DEVICE NOT CLAIMED ABANDONED.
   Where a patentee has made his claim, he has thereby disclaimed and abandoned to the public all other combinations and improvements that are not mere invasions of the device, combination, or improvement which he claims.

2. SAME—CLAIM SECURES MECHANICAL EQUIVALENTS.
   But one who claims and secures a patent for a new machine or combination thereby necessarily claims and secures a patent for every mechanical equivalent of that machine or combination, because, in the light of the patent law, every mechanical equivalent of a device is the same thing as the device itself.

3. SAME—MECHANICAL EQUIVALENTS.
   Where form is not the essence of the invention, machines or combinations which are constructed upon the same principle, which have the same mode of operation, and which accomplish the same result by the same or by equivalent mechanical means, are mechanical equivalents, within the meaning of the patent law, although they differ in form or in name.

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4. SAME—MECHANICAL EQUIVALENTS.

Shot and wax or other fusible material holding them in perforations in the faces of conducting plates until released by the heat of the plates, produced by a persistent arc between them, so that they will then run down between the plates and form a conducting link, are mechanical equivalents of the mass or plug of fusible material described in patent No. 438,788, when they are used in a potential discharger for the same purpose and perform the same function as that plug.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Charles C. Bulkley, for appellants.

George P. Barton and De Witt C. Tanner, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree which enjoined the defendants, the Kinloch Telephone Company and Samuel M. Kennard, from infringing upon the first claim of letters patent No. 438,788, for a potential discharger, issued October 21, 1890, to Anthony C. White. (C. C.) 111 Fed. 175. This is the claim:

"(1) A potential discharging protector or lightning arrester comprising two conducting plates placed with parallel surfaces closely adjacent to each other, adapted to be connected, respectively, with an electric circuit and the earth, and an interposed thin dielectric, one of the said plates having a plug or mass of easily fusible conducting material embedded in its approximate surface, substantially as hereinbefore described, and for the purposes specified."

The device protected by this claim consists of an upper conducting plate, preferably of carbon, electrically connected with the line to be protected, and provided with a perforation in its lower surface filled with a plug of some easily fusible material or alloy, a lower conducting plate of carbon electrically connected with the earth by wire, and a thin dielectric partition, preferably of mica, slotted in the middle opposite the fusible plug, and securely fastened between, and in contact with, the plates. The purpose of this combination is to protect telephone and other apparatus used in connection with electric currents of low intensity from injury by means of currents of electricity of high potential which occasionally intrude upon telephone and telegraph wires when they are accidentally crossed with electric currents conducting heavy electric and power currents developed under high potential, or when, by induction or a stroke of lightning, atmospheric electricity charges them. The patentee stated the object he sought to attain in his specifications very clearly, in the following terms:

"The object of my present invention is to provide an improved form of the second element of this system of protection, namely, the lightning arrester or potential discharger, which can be applied with equal facility to either metallic or earth completed circuits; which shall not involve the normal conductive connection of an earth wire to the circuit; which can readily be adjusted to discharge with any given or desired potential; which shall be equally efficient whether the charge coming on the circuit be a transient and instantaneous impulse, as in the case of lightning, or a sustained and protracted impulse, as in the case of a cross with a dynamo circuit operated under any electro-motive force exceeding the minimum to which the appliance is set, and which in the latter event will rapidly and

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certainly establish a short circuit to earth, thereby effecting a discharge which is permanently maintained as long as the charge continues, and preventing the said charge, irrespective of the period of its continuance, from causing injury to cable or apparatus."

The combination which White described and claimed accomplishes the purpose for which he constructed it. The conducting plates are located at such a distance apart that the air dielectric in the slot of the partition prevents the legitimate operating currents of the circuits with which the device is connected from leaving those circuits, and they pass on and perform their appropriate work. If, however, a transient charge of electricity of dangerously high potential, due either to lightning, a momentary dynamo cross, or to any other similar accident, intrudes upon the line, this charge passes to the earth by means of a disruptive discharge across the dielectric of air between the plates. If such a charge persists, the sparks of discharge develop into an arc between the plates through which a current passes to the earth. This current heats the plates and fuses the material composing the plug. As this material melts, it runs down into the slot between the plates and forms a conducting link between them. The current then follows this link, the arc is extinguished, the fused metal cools and forms a solid and permanent conductor between the plates, which safely leads the trespassing current to the earth. In this way the legitimate operating currents of the protected lines are repelled by the thin dielectric, and prevented from short-circuiting to the earth through the potential discharger, while both the transient and persisting charges of dangerous intensity are led off the line and to the earth by it, without injury to the telephone or other apparatus connected with the protected lines.

The novelty, utility, and patentability of this combination are conceded. But the decree of the court below is challenged on the ground that the device used by the appellants does not infringe upon the patent to White. The appellants' device consists of two plates of the same character, electrically connected and used in the same way as the conducting plates of White, a silk dielectric partition between them, and two leaden balls or shot secured by wax, one in a perforation in the inner surface of the upper plate, and the other in a hole in the inner surface of the lower plate. The appellants do not claim to escape liability for infringement on account of the substitution of the silk dielectric for the slotted mica partition, because White describes and claims a thin dielectric of any suitable material, and his slotted partition is only the preferable form of that dielectric. The shot secured in the plates by wax discharge the function of White's fusible plug. A transient charge of dangerous intensity produces a disruptive discharge through the interstices in the silk partition. When this discharge continues, forms an arc, and develops sufficient heat, the silk is burned away, the wax is melted, the shot roll down together and form a conducting link between the plates, through which the dangerous current is led to the earth. The arguments advanced in support of the contention that this device of the appellants does not infringe upon that of White are (1) that the patentee, by the terms of his claim and specification, restricted his monopoly to the

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use of a "plug or mass of easily fusible conducting material" to constitute the conducting link between the carbon plates, and the defendants do not use easily fusible material for that purpose, but leaden balls or shot, which cannot be readily fused; and (2) that, when attention is given to the parts which really do the work, the device of the appellants does not perform its function in substantially the same way as the device of White, because the wax, the fusible material of the appellants, is not essential to the operation of their combination, but is a mere means of assembling and holding the parts of the device in its construction, while the fusible material of White is indispensable to the operation of his device.

It is true that the statute requires the inventor to particularly point out and distinctly claim the improvement or discovery which he seeks to secure (Rev. St. § 4888), and that when he has made his claims he has thereby disclaimed and abandoned to the public all other combinations and improvements that are not mere invasions of the device, combination, or improvement which he claims. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. Ed. 344; Manufacturing Co. v. Sargent, 117 U. S. 373, 378, 6 Sup. Ct. 931, 29 L. Ed. 950; McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; McBride v. Kingman, 97 Fed. 217, 223, 38 C. C. A. 123, 129–130; Building Co. v. Eustis, 65 Fed. 804, 807, 13 C. C. A. 143, 145, 27 U. S. App. 693, 709; Stirrat v. Manufacturing Co., 61 Fed. 980, 984, 10 C. C. A. 216, 220, 27 U. S. App. 13, 47; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 451, 23 C. C. A. 223, 241, 40 U. S. App. 482, 514. But it is no less true that a copy of the thing described and claimed in a patent, either without variation, or with such variations as are consistent with its being in substance the same thing, is, for all the purposes of the patent law, the same device or combination as that described in the patent. Burr v. Duryee, 1 Wall. 531, 573, 17 L. Ed. 650. One who claims and secures a patent for a new machine or combination thereby necessarily claims and secures a patent for every mechanical equivalent for that device or combination, because, within the meaning of the patent law, every mechanical equivalent of a device is the same thing as the device itself. Moreover, in determining what is a mechanical equivalent of a given device, where, as in the case at bar, form is not the essence of the invention, forms and names are of little significance. The similarities and differences of machines and combinations are to be determined by the offices or functions which they perform, by the principles on which they are constructed, and by the modes which are used in their operation. A device which is constructed on the same principle, which has the same mode of operation, and which accomplishes the same result as another by the same or by equivalent mechanical means, is the same device, and a claim in a patent of one such device claims and secures the other. Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935. Mere changes of the form of a device or of some of the mechanical elements of a combination secured by a patent will not avoid infringement, where the principle or mode of operation is adopted, unless the form of the machine or of the elements changed is the distinguishing characteristic of the invention. National Hollow Brake Beam Co. v. Interchangeable

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Brake Beam Co., 106 Fed. 693, 711, 45 C. C. A. 544, 562; Watch Co. v. Robbins, 64 Fed. 384, 396, 12 C. C. A. 174, 178, 22 U. S. App. 601, 634; New Departure Bell Co. v. Bevin Bros. Mfg. Co. (C. C.) 64 Fed. 859.

In the light of these principles of law, how can the contention of the appellants be sustained? It is conceded that the wire connections, the plates of the appellants' combination, and their silk dielectric are the mechanical equivalents of the like connections, the plates, and the slotted dielectric of the patented device. It is conceded that the appellants' combination performs the same function discharged by that of the complainant. The only question is whether the means used by the appellants to produce the metallic conducting link between the plates are the mechanical equivalents of the plug of easily-fusible material adopted by White. The principle on which White's device for the production of this conducting link is constructed is to secure the material for it in the face of one of the plates until it is released by the heat of the plate after an arc has been formed between the plates. The device of the appellants is constructed upon the same principle. The shot are held in holes in the faces of the plates until the heat produced by the arc between them melts the wax and releases the leaden balls. The mode of operation whereby White forms the metallic conducting link between the plates is that the heat of the plates, resulting from the continual maintenance of an arc between them, melts his fusible material in the upper plate so that it runs down between the plates and forms the conducting link. The mode of operation of appellants' device is that the heat of the plates, resulting from the continued maintenance of an arc between them, melts the wax which holds the shot in their holes, and they run down between the plates and form the conducting link. Thus it will be seen that the two devices are constructed upon the same principle that they have the same mode of operation, that they accomplish the same result, and that the means whereby they reach it are mere mechanical substitutes for each other. When the fact was discovered and illustrated by the fusible plug in the carbon plate of White, that material held in the face of a plate until the latter was heated by a persistent arc so that it would melt and release the plug, prevented the formation of the metal conducting link between the plates until, and produced it at, the proper time to discharge the function of the patented device, a shot or a piece of insoluble conducting material of any kind held in the face of a plate by wax, or any other fusible material, so that it would be prevented from making the metal conducting link until the proper time, and would then be released and form the link by the melting of the wax or the other material, so that the function of the device would be properly discharged, became the plain mechanical equivalent of White's fusible plug, and was, in legal effect, the same thing as that plug, because it was an evident mechanical substitute for it, used for the same purpose, and accomplishing the same result. The result is that White's claim of his device was, within the meaning of the patent law, a claim of the device of the appellants as much as of his own device, and he did not surrender or abandon to the public that combination, or any similar mechanical equivalent of his invention.

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An attempt is made to escape from this conclusion under the rule that, if the element substituted for the one withdrawn has been discovered since the date of the patent, it cannot be said to be its mechanical equivalent. Gould v. Rees, 15 Wall. 187, 193, 21 L. Ed. 39. Counsel for the appellants says that the shot and the wax have been discovered since the patent to White, and have been secured by a subsequent patent to Frank B. Cook, No. 658,976, dated October 2, 1900. It is true that such a patent has been issued; but it is too plain for argument or serious consideration that there was neither discovery nor invention in perceiving or applying to the device of the complainant the fact that an insoluble metal secured by wax or other fusible material was the mechanical equivalent of, performed the same function and worked the same result as, the fusible plug of White, and could be effectually used as its substitute. The shot and wax were not, therefore, newly discovered elements, but constituted a mere mechanical substitute for the element which White described and claimed.

The second position of counsel for the appellants is that they do not infringe, because, when attention is paid to the parts which really do the work, their device does not accomplish its result in the same way as does that of the complainant. Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935, Cahoon v. Ring, Fed. Cas. No. 2,292, 1 Cliff. 592. It is contended that in the combination of White the fusible material forms the conducting link between the plates, while in the device of the appellants the fusible material (the wax) does nothing at all, but is simply used to hold the shot in place while the machine is constructed. There is testimony in the record in support of this statement of the purpose and use of the wax, but it is not convincing evidence. The patent to Cook, in practical accord with the description in which the device of the appellants is constructed, shows clearly that the purpose of the wax was not to hold the leaden balls until the combination was made, but to withhold them after its construction so that they would not close the circuit until the wax was melted into a liquid by means of the heat created by the abnormal discharge of the current across the dielectric between the plates, and then to permit them to make the conducting link and close the circuit as in the combination of White. One witness testifies that in practice he thinks the burning away of the silk occurs before the melting of the wax. The court below reached the conclusion that the testimony of this witness was the truth; that the silk dielectric is sometimes burned away at a point which would permit the loose balls to come together, although the heat is not sufficient to melt the wax. In view of the evidence to which reference has been made, this finding of fact ought not to be disturbed. The patent to Cook is of much greater value as evidence of the purpose and operation of the wax than the testimony of interested witnesses after this litigation had commenced. We accordingly adhere to the view of the court below that the purpose and effect of the wax was to hold the conducting material until the heat generated by the arc melted the wax and released the shot, so that they would run down and form the conducting link between the plates. In this state of the case, the only difference in the operation of the two devices to form this conducting link is that in the one the fusible material, when it

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melts, not only releases the material which forms the conducting link, but itself becomes that link, while in the other the only function of the fusible material is to hold until it melts, and then to release the shot which become the conducting link between the plates. This, however, is an immaterial difference. It is not of the essence of the invention or of its operation. The essence of that part of this invention which relates to the fusible plug—the mode of operation which distinguishes it from all other devices—is the holding of a conducting material out of the circuit in one of the plates by means of a fusible material until an arc heats the plate and melts the fusible material so that it releases the conductor, and causes it to form the link between the plates. This mode of operation—this distinguishing characteristic of the invention—the appellants have completely appropriated. Their device holds the conducting material out of circuit in the same way that White's does,—by a fusible material. It releases it in the same way that White's device does,—by the melting of the fusible material. And it forms the conducting link between the plates in the same way that the combination of White does,—by permitting the conducting material to run down between the plates and in contact with them at the appropriate time. The two devices were constructed for the same purpose. They have the same mode of operation, and they accomplish the same result in the same way, by equivalent mechanical means. The appellants cannot escape liability for the appropriation of the entire essence of this invention by the slight change they have made in a single element of the combination which embodies it.

This conclusion has not been reached without a careful consideration of all that has been said and written concerning the effect of the silk dielectric, its partial burning, and its carbonization in the operation of the device of the appellants. But inasmuch as the complainant's patent clearly covers a potential discharger using a silk dielectric in the place of the slotted mica partition, our conclusion is that the discussion of the operation and effect of the silk dielectric is not material to the determination of the issue presented in this case, and for that reason it has been pretermitted. This case stands as it would have stood if the device described in the patent had contained a silk dielectric in the place of the slotted mica partition. The appellants can reap no advantage and can escape no liability on account of the peculiarities of the operation of the silk which they have substituted for the mica partition of White.

The decree below is sustained by the evidence, is warranted by the law, is equitable and just, and it is affirmed.

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KINLOCH TEL. CO. et al. v. WESTERN ELECTRIC CO.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1902.)

No. 1,637.

1. PATENTS—COMBINATION OF OLD ELEMENTS.
A new combination of old elements, whereby an old result is attained in a more facile, economical, and efficient way, may be protected by a patent.

2. SAME—INVENTION—IMMEDIATE AND GENERAL USE EVIDENCE OF.
Where the question of novelty is fairly open for consideration under the law, the fact that a patented device or combination has displaced others which had previously been used to perform its function, and has gone into immediate and general use, is pregnant and persuasive evidence that it involves invention.

3. SAME—LETTERS PATENT NO. 330,067 VALID.
Letters patent No. 330,067, dated November 10, 1885, to John A. Seely, for an improvement in grouping spring jacks and annunciators for multiple switchboards, are not void for want of novelty in the device, or of invention in its production, and they are infringed by the divisional system of the Kinloch Telephone Company.

4. SAME—INDEPENDENT INVENTIONS PATENTABLE WHERE ADVANCE IN ART GRADUAL.
Where the advance toward the desideratum is gradual, and several inventors form different combinations which accomplish the desired result with varying degrees of operative success, each is entitled to his own combination, so long as it differs from those of his competitors and does not include theirs.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

R. S. Taylor, for appellants.
Frederick P. Fish and George P. Barton, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The circuit court rendered a decree in favor of the Western Electric Company, the complainant in that court, to the effect that the defendants, the Kinloch Telephone Company and Samuel M. Kennard, had infringed the first three claims of letters patent No. 330,067 issued to John A. Seely on November 10, 1885, for an "improvement in grouping spring jacks and annunciators for multiple switchboards," and perpetually enjoined them from using the invention described in those claims. The defendants have appealed from this decree, and they insist that it is erroneous, on the usual grounds, that the combination described in the patent was the product of mechanical skill, and not the result of the exercise of the inventive faculty, and that they have not used the combination. The three claims of the patent involved read in this way:

"(1) In a multiple switchboard system in which the individual annunciators are distributed in groups upon the different boards, switches for all the lines on each of the boards, and, in addition thereto, sets or groups of switches

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on the different boards corresponding to the different groups of individual annunciators, each group of annunciators and its corresponding group of switches being placed relatively to each other in the same position on each of the boards, whereby the manner of answering the subscribers is made uniform upon all the boards. (2) In a multiple switchboard system, a spring-jack switch on each board for each line, and additional spring-jack switches, one in each line, for the initial connection, said additional spring-jack switches being distributed on the different boards in uniform groups, and the individual annunciators of the different lines arranged in corresponding groups, substantially as and for the purpose specified. (3) In a multiple switchboard system, a spring-jack switch on each board for each line, and additional spring-jack switches, one in each line, for the initial connection, said additional spring-jack switches being distributed on the different boards in uniform groups arranged in lines across the boards, and the individual annunciators of the different lines arranged in corresponding groups, substantially as and for the purpose specified."

The improvement of Seely described in these claims relates entirely to the placing and grouping of switches and annunciators in a multiple switchboard system. He describes in his claims two classes of switches which in the operation of his combination perform different functions. A switch is any device by which one line may be electrically connected with another. The form in common use on switchboards in the telephone exchanges consists of a socket set in the switchboard containing the terminals of the two sides of the subscribers' circuit, and this is used by means of a plug which contains the terminals of the two wires that are attached to it in a cord. The insertion of the plug in the socket makes the electrical connection between the subscriber's line and the wires attached to the plug, and these wires usually lead to another similar plug or to the telephone of the operator. If they lead to another plug, electrical connection may be made between the lines of two subscribers by inserting these plugs in the respective switches of the subscribers upon the switchboard. These sockets set in the switchboard through which the subscribers communicate with each other are called "switches" in Seely's patent, but they are also called "jacks," "spring-jacks," "spring-jack switches," and "line jacks." In this opinion they will be termed "line jacks." They are the "switches for all the lines on each of the boards" specified in Seely's first claim. The "groups of switches on the different boards corresponding to the different groups of individual annunciators" will be called answering jacks, to distinguish them from the line jacks, and because their function is to enable the operator to answer the calls of the subscribers and to learn their wants by plugging into them instead of into the line jacks, and thus electrically connecting her telephone with the wires of the subscribers when their annunciators announce their calls. When Seely made his invention the annunciator commonly used was a shutter hinged at its lower edge, which dropped and disclosed the subscriber's number when he took his telephone from its hook or otherwise actuated the current so as to release the catch which held the shutter in place. The multiple switchboard upon which Seely made his improvement was the switchboard divided into sections usually by perpendicular lines described in the patent to Firman of January 17, 1882. After Seely had placed his improvement upon it each section of this board contained all the line jacks of all the subscribers served by the entire

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board and the annunciators and answering jacks of about 200 of the subscribers. If there were 1,200 to be served by the entire board it might consist of six sections, upon each of which a line jack would be placed connected with the line of each subscriber, while each section would contain the annunciators and answering jacks of only about 200 members of the exchange. For instance, the first section might contain the annunciators and answering jacks of subscribers numbered from 1 to 200, inclusive; the second section those numbered from 201 to 400 inclusive; the third section those numbered from 401 to 600, inclusive. But each section would contain a line jack for every subscriber served by the entire board. The annunciators and answering jacks are divided between the sections in order to enable a single operator to attend to the calls of all the subscribers whose annunciators appear upon a section, and it is impracticable for a single operator to serve more than 200 subscribers. In the combination of Seely the annunciators on each section of the board are formed into a group, and the answering jacks of the subscribers represented by these annunciators are formed into another group by themselves and placed upon the same section. The members of the several groups of annunciators, and their corresponding answering jacks, are placed in the same relative positions to each other on each section, so that the method of finding and plugging into the answering jacks of the subscribers is uniform on all the sections of the board. When a shutter drops the operator plugs into the answering jack of the subscriber who calls, switches her telephone into the circuit, answers the call, learns the number of the subscriber sought, plugs into the line jack of the latter upon her section of the board, calls the subscriber wanted, and then switches her own telephone out of the circuit and leaves the two subscribers electrically connected, so that they may talk with each other. Prior to Seely's invention the line jacks on a multiple switchboard performed the function of Seely's answering jacks. When a shutter dropped the operator was required to find the line jack of the calling subscriber, to plug into that, to answer the call, then to find the line jack of the subscriber called, to plug into this line jack, to call him, and then by means of a cord with plugs at each end to connect the line jack of the caller with that of the called. Seely's invention consisted in the combination with the line jacks and groups of annunciators on the sections of a multiple switchboard of groups of answering jacks in such a way that each group of annunciators should have on the same section with it a group of the answering jacks of the subscribers represented by the annunciators thereon, so that the members of the corresponding groups of annunciators and answering jacks should be placed in uniform relative positions to each other on every section of the board. The essence of his invention was the convenient and uniform grouping of the annunciators and their corresponding answering jacks relatively to each other. Some of the obstacles removed and some of the advantages derived from this combination were these: In the absence of Seely's groups of answering jacks, when a shutter dropped and disclosed the number of a calling subscriber, the operator was obliged to search through all the line jacks on her section, perhaps 1,200 in number,

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to find the jack of the subscriber and to plug into that line jack in order to answer the call and to learn what was wanted. The desired line jack might be at some distance from the annunciator, and time and thought would be required to find it and to make the connection with it. Seely placed the groups of answering jacks near to their corresponding groups of annunciators. No group contained more than 200 jacks. When a subscriber called, the operator was relieved from a search for his line jack among a very large number, perhaps 1,200 similar jacks. She was only required to find and connect with his answering jack in order to learn his wants. As the number of these answering jacks was small, not more than 200, and they were uniformly placed and arranged relatively to their corresponding annunciators, a little experience soon enabled her to plug into the right answering jack automatically, without noticing the number described by the annunciator or thinking of or searching for it. This automatic and almost involuntary habit of the operators greatly increased the accuracy, speed, and efficiency of the service. It is sometimes necessary to transfer an operator from the section at which she has been employed to another section of the board. The line jacks corresponding to the group of annunciators on one section of a multiple board are in a different place upon the section from those which correspond to the group of annunciators on any other section of the board. In the absence of Seely's uniformly grouped answering jacks an operator would become accustomed to find the line jacks through which she must answer on a certain part of her section. When she was sent to another section she would be compelled to devest herself of the habit of plugging into that part of the section to answer the calls, and to learn to answer them through another set of jacks on another portion of the section. This condition of things necessarily resulted in delay, mistakes, and confusion. But when the groups of answering jacks were combined with their corresponding groups of annunciators in the way discovered by Seely, an operator who once learned the relative positions of the answering jacks and their corresponding annunciators on one section knew their relation upon all the sections, because their relative grouping was uniform throughout, and she could serve equally well on any section of the board. It is frequently convenient, and sometimes necessary, to change the service of a subscriber from one section of a board to another, because the subscribers represented on a certain section require more service, while those assigned to another require less service, than a single operator can render. The only convenient method to make this transfer without the uniformly grouped answering jacks of Seely was by changing the number of the subscriber, and many subscribers seriously objected to changes in their numbers, because these changes involved a change of thought and habit, and because their numbers came to have value in trade. Seely's groups of answering jacks enabled the telephone companies to transfer the service of a subscriber from one section to another by a simple transfer of his annunciator and answering jack without any change in his number, because the uniform relation of the respective members of the corresponding groups of annunciators and answering jacks renders numbers upon

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them unnecessary, and enables the operators to serve the subscribers with equal facility in any section to which they are assigned. Seely's groups of answering jacks diminished the congestion of lines and the matting which resulted from the connection of the line jacks with each other for purposes of communication. Without these answering jacks the line jack of the calling subscriber was first used for answering purposes, and was then connected with that of the subscriber called by a cord attached to a plug at each end. One of these plugs was inserted in the line jack of the calling subscriber, and the other in that of the subscriber called. Every connection made stretched a cord across a portion of a section of the board. In busy times these cords became numerous and matted. When Seely's groups of answering jacks were placed upon the board it became unnecessary to use the line jacks to answer calls, and the electrical connection of the caller with the called could be effected by connecting the answering jack of the former with the line jack of the latter, thus greatly relieving the congestion of the cords upon that portion of the section covered by the line jacks. These, and perhaps other, benefits conferred by this invention, commended it to the trade, and it immediately went into general, perhaps almost universal, use in all the large telephone exchanges of the country. Its utility is not denied. But it is earnestly contended that it was not patentable because any mechanic skilled in the art could have produced it without the exercise of any of the genius of the inventor. In support of this contention it is argued that letters patent No. 246,481, issued on August 30, 1881, to Eldred and Durant for improvements in telephone exchange systems and apparatus, discloses an annunciator, a line jack, and an answering jack for each subscriber, while letters patent No. 258,234, issued on May 23, 1882, to M. G. Kellogg, shows a board containing line jacks and other boards provided with annunciators and their corresponding answering jacks, so that when Seely made his combination there was nothing left for him but the grouping of the answering jacks, and that there could have been no invention in the mere arranging of these jacks to correspond with the annunciators. A careful examination and analysis of the devices described in these patents discloses the fact, however, that neither of them either suggests the improvement of Seely or was designed to or capable of removing the evils which he sought to remedy. His invention was directed to the improvement of the service on a multiple switchboard, to an effort to enable one operator to render more speedily and efficiently all the service required by the subscribers intrusted to her care. Neither of the patents cited contemplates the use of a multiple switchboard with the improvements it describes, and neither of them in any way suggests that separate but uniform grouping relative to each other of corresponding annunciators and answering jacks which constitutes the essence of Seely's invention. The patent to Eldred and Durant shows a signal box and two spring jacks at the exchange for each subscriber. The operator is provided with a telephone connected by two wires with the metal sides of a wedge. The sides of this wedge are insulated from each other by a piece of rubber between them. By the insertion of this wedge under a spring jack

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upon the side of the signal box the telephone of the operator is switched into the circuit, so that she may answer a call or notify a subscriber that some one has called him. When the wedge is withdrawn the circuit is completed through another spring jack, and by the insertion of the plugs of a cord circuit under two of these spring jacks the lines of two subscribers may be electrically connected. It is true that this patent shows an annunciator, a spring jack for answering calls, and a second spring jack for connecting with other subscribers for each of the subscribers to the exchange. But the device lacks Seely's uniform grouping, his combination with and improvement on the multiple switchboard, his means of accomplishing his purpose, and it is utterly incapable of performing any of the functions or accomplishing any of the objects of his invention.

Nor is the contrivance of Kellogg much nearer in function, means, or effect to the combination of Seely. It has no multiple switchboard. It consists of one board, on which the line jacks of all the subscribers are placed, and two or more other boards, among which the corresponding annunciators are distributed. In practice each annunciator board is served by one operator, while the board which contains the line jacks is worked by switchmen who connect the line jacks as directed by the operators at the annunciator boards. Each operator at an annunciator board is provided with a telephone which she may switch into the circuit of a subscriber by pressing the plug attached to it upon a connecting bolt near or on his annunciator. Conceding that these connecting bolts are the equivalents of Seely's answering jacks, we have here a single switchboard containing the line jacks of all the lines and several switchboards, each one of which is provided with annunciators and corresponding answering jacks of a part of the lines. But here is no multiple switchboard, no separate and uniform grouping of corresponding annunciators and answering jacks, but an answering jack on each annunciator; no purpose or effort to concentrate all the work of serving each line in the hands of a single operator, but a successful effort to divide it between two or more operators, thereby increasing delay, confusion, and chance of mistake. The combination of this patent does not teach the way to remove the evils which Seely remedied or to reach the desiderata which he sought. The patent describes no means which could perform the function of improving the service of the multiple switchboard which the combination with that board of corresponding annunciators and answering jacks separately but uniformly grouped upon each section of the board effected. Our conclusion is that the patents of Eldred and Durant and of Kellogg do not anticipate or suggest the combination of Seely. The question recurs, did it require any exercise of the inventive faculty to produce his combination, in view of the state of the art which the multiple switchboard of Firman and these patents disclose? No one has yet been able to formulate a test whereby a line of demarkation between the products of the inventor's intuition and the results of the skill of the mechanic may be surely drawn in all cases as they arise. That question is and always must be left for determination by a careful exercise of the judgment, enlightened by a knowledge of the state of the art and of the advance in it which the device in question marks, and guided by the

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established rules and principles of the law. The two classes of cases led by Atlantic Works v. Brady, 107 U. S. 192, 200, 2 Sup. Ct. 225, 27 L. Ed. 438, and Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177, have been again cited and reviewed for our guidance, and have been carefully considered in reaching our conclusion. A plausible and persuasive argument may be made that this combination falls under either class of cases, that it might have been and was produced by the skill of the trained mechanic or by the intuitive genius of the inventor. The patent which describes it, however, raises a presumption in favor of its novelty and its patentability. It was a new combination. No such separate yet uniform grouping of corresponding annunciators and answering jacks with a multiple switchboard had ever been made or used before Seely conceived and described it. That combination was not a pioneer; perhaps it was not a great invention. But it discharged the functions of the multiple switchboard, its annunciators, and switches more speedily and efficiently than they had ever been performed without it, and a new combination of old elements by which an old result is attained in a more facile, economical, and efficient way may be protected by a patent. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 707, 45 C. C. A. 544, 557; Seymour v. Osborne, 11 Wall. 516, 542, 20 L. Ed. 33; Gould v. Rees, 15 Wall. 187, 189, 21 L. Ed. 39; Thomson v. Bank, 53 Fed. 250, 252, 3 C. C. A 518, 520, 10 U. S. App. 500, 509.

The combination had great utility. It went into immediate and general use. While this fact is insufficient in itself to sustain a patent where the machine or combination is clearly without novelty, yet where the question of novelty is fairly open under the law, the fact that a patented device or combination has displaced others which had previously been used to perform its function and has gone into immediate and general use is pregnant and persuasive evidence that it involved invention. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 707, 45 C. C. A. 544, 558; Smith v. Vulcanite Co., 93 U. S. 486, 495, 23 L. Ed. 952; Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Manufacturing Co. v. Adams, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; Magowan v. Packing Co., 141 U. S. 332, 342, 12 Sup. Ct. 71, 35 L. Ed. 781; Graphophone Co. v. Leeds (C. C.) 87 Fed. 873; Topliff v. Topliff, 145 U. S. 156, 164, 12 Sup. Ct. 825, 36 L. Ed. 658. It cannot be truthfully said that it is so clear that there was no invention in Seely's device that the question whether or not it was the product of the inventive genius is not open for consideration under the law.

Again, the court below has considered this question in the light of the state of the art, and of the conflicting testimony of the witnesses, and has decided that Seely's combination was an invention. This conclusion is presumptively correct, and ought not to be reversed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the facts by the circuit court. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 716, 45 C. C. A. 544, 567; Mann v. Bank, 86 Fed. 51, 53, 29 C. C. A. 547, 549, 57 U. S. App. 634, 637; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31

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L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; Plow Co. v. Carson, 72 Fed. 387, 388, 18 C. C. A. 606, 607, 36 U. S. App. 448, 456; Trust Co. v. McClure, 78 Fed. 209, 210, 24 C. C. A. 64, 65, 49 U. S. App. 43, 46; Exploration Co. v. Adams, 104 Fed. 404, 408, 45 C. C. A. 185, 188. There does not appear to have been any such error or mistake in the consideration or decision of this question. Fairly open for debate as the question undoubtedly was under the law and the facts, the novelty of the combination the cleverness of its conception, its obvious utility, the evils it remedied, the advantages it conferred, the presumption accompanying the patent, and the immediate general use of the contrivance furnished ample warrant for the finding that this device was not produced without some exercise of the inventive faculty, and these considerations forbid us to reverse the conclusion. The patent to Seely is not void for want of novelty or invention.

The second objection to this decree is that the combination of the defendants does not infringe that of the complainant. The principle of the multiple switchboard lies at the foundation of both combinations. The defendants, instead of placing all the line jacks of all their subscribers upon the same multiple switchboard, divide their subscribers into four equal parts or divisions, called divisions A, B, C, and D. They place the line jacks of each division on a separate multiple switchboard, consisting of seven sections, but put none of the line jacks of the other three divisions upon this switchboard. On each of the four switchboards they place annunciators and answering jacks for all their subscribers so grouped on the sections of the board that the groups of annunciators have corresponding groups of answering jacks arranged uniformly relatively to each other on all the sections of all the boards. Each subscriber is provided with a directory which shows the members of each of the four divisions. His line has a line jack on one only of the four switchboards, but it has annunciators and answering jacks on all the boards. He is provided with four buttons, one for each of the divisions A, B, C, and D. The directory shows him to what division each subscriber belongs. When he wishes to talk to a member of the A division, he presses his A button, and this actuates his annunciator on the A board, and the operator then proceeds as in Seely's combination to answer through the group of answering jacks, to call the subscriber wanted through the latter's line jack, and to make the electrical connection between the two subscribers. All the annunciators and all the answering jacks of all the lines of the defendants are distributed in corresponding groups upon the sections of each of the four boards, so that each group of annunciators and its corresponding group of answering jacks occupy the same uniform relative position to each other on each section of each of the boards. This uniform grouping relative to each other of the annunciators and their corresponding answering jacks is, however, the principle of Seely's invention. It is the peculiar combination of devices which distinguishes his combination from all other contrivances. Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650. This, with

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all the effects which flow from its use, the facile and automatic finding by the operator of the right answering jack, the change of operators from section to section without loss of efficiency, the practical transfer of the service of subscribers from section to section without change in their numbers, and the diminution of cords upon, and use of, those portions of the boards occupied by the line jacks, the defendants have unquestionably appropriated. They seek to escape from the decree which enjoins them from continuing this infringement upon two grounds: They say, in the first place, that the presence of the line jacks of all the subscribers to an exchange on each of the sections of the multiple switchboard is an essential element of Seely's combination, and that this element is not found in their device, because only one-fourth of the line jacks of their subscribers appear on any section of any board in their system. And in the second place, they insist that, while all the annunciators and their corresponding answering jacks, when taken together, are uniformly and relatively grouped as in the combination of Seely, yet this is not true of the annunciators of the lines of any division and their corresponding answering jacks when these are considered apart from the annunciators and answering jacks of the other divisions. The portion of the claim of Seely upon which reliance is placed to support the first objection here reads: "In a multiple switchboard system in which the individual annunciators are distributed in groups upon the different boards, switches for all the lines on each of the boards, and, in addition thereto, sets or groups of switches on the different boards," etc. But the fair interpretation of the words "switches for all the lines on each of the boards" is not that all the line jacks for all the lines in an exchange must necessarily be placed on the same multiple switchboard. "The boards" and "the different boards" in the quotation mean sections of a single switchboard, and not different switchboards, and the true interpretation of Seely's call for "switches for all the lines on each of the boards" is that the line jacks of all the lines served by a single multiple switchboard are to be placed in the usual manner on each of the different sections of that board. And this is exactly what the defendants have done. They have, it is true, divided their subscribers into four divisions; but they have, in effect, installed four multiple switchboards,—one to serve each division of their customers. The line jacks of the A subscribers appear on the A board only. But every line jack served by that board appears upon all the different boards or sections which compose it. This arrangement falls within the plain meaning of Seely's claim, and the fact that the defendants operate three other multiple switchboards arranged in the same way does not lessen their liability for the appropriation.

Nor can they successfully exempt themselves from their just liability for taking the principle and means disclosed in Seely's invention because the grouping of the annunciators and answering jacks pertaining to each of the separate divisions, when these are considered by themselves, may not be uniform upon the various sections of the boards. The essence of Seely's invention is the uniform correspondence in relative position of all, and not of a part of the members of the groups of annunciators and answering jacks, so that, given the

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place in a group of answering jacks corresponding to an annunciator in one group of annunciators, and every answering jack corresponding to an annunciator in the same place in the other groups will be found in the same relative position in every corresponding group of answering jacks. This uniform correspondence in the relative positions of the groups and the members of which they are composed, the defendants have taken and preserved. Their combination involves the principle, uses the means, and, by the operation of that principle and the use of those means, performs the function of the improvement patented to the complainant.

The history of this art shows that this is a case in which many men have contributed, not only the skill of mechanics, but the genius of inventors toward reaching the high state of efficiency which it has now attained. The advance has not been made in a single leap, but step by step. Many inventors have formed differing combinations which accomplished the desired result with varying degrees of success. Many of these inventions are limited in their character and their operation. The invention described in the patent to Seely was one of them. It differs from all others, and he is entitled to its use and its protection. Many other combinations are open to free use by the defendants, but that of Seely is not. When the advance toward the desideratum is gradual, and several inventors form different combinations which accomplish the desired result with varying degrees of operative success, each is entitled to his own combination so long as it differs from those of his competitors and does not include theirs. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 712, 45 C. C. A. 544, 563; Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053; McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930; Stirrat v. Manufacturing Co., 61 Fed. 980, 981, 10 C. C. A. 216, 217, 27 U. S. App. 13, 42; Griswold v. Harker, 62 Fed. 389, 391, 10 C. C. A. 435, 438, 27 U. S. App. 122, 150; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 440, 23 C. C. A. 223, 231, 40 U. S. App. 482, 498.

The decree below must be affirmed, and it is so ordered.

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BURGET v. ROBINSON.

(Circuit Court of Appeals, First Circuit. January 24, 1902.)

No. 404.

CORPORATIONS—SUIT BY RECEIVER TO ENFORCE PERSONAL LIABILITY OF STOCKHOLDERS—SET-OFF.

By well-settled rules, the individual liability of a stockholder in a Minnesota corporation is not to the corporation, but to its creditors; and hence, in a suit against such stockholder to enforce such liability, the defendant cannot set off an indebtedness due from the corporation to him.

In Error to the Circuit Court of the United States for the District of Massachusetts.

John Corcoran and William B. Sullivan (Crosby & Nixon, on the briefs), for plaintiff in error.

Stiles W. Burr (John W. Saxe, on the briefs), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This suit was brought to enforce the liability of the defendant below as a stockholder in a corporation organized under the laws of Minnesota. The judgment of the circuit court was against him, and thereupon he sued out this writ of error. With the exception of a single particular, the case involves questions disposed of by us in Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747, and is determined by it.

It is not necessary to consider the proposition made by the defendant below that certain legislation of Minnesota, subsequent to his acquiring the stock in the corporation in question, is ineffectual, because, independently of that, the principles asserted in Hale v. Hardon are sufficient to sustain the judgment, unless the defendant below is entitled to an offset as a general creditor of the corporation. He is admittedly a general creditor for a larger amount than that claimed from him as a stockholder. Nevertheless, in order to lay the foundation of a right of set-off, either at law or in equity, the claims pro and con must be in the same interest. A trustee, enforcing a claim in behalf of his trust, is not subject to set-off of the claims of the debtor of the trust against the trustee individually. In the present case, the plaintiff below stands as the representative of the creditors of the corporation, and not of the corporation itself, so that the cross demands are not in the same interest within the rules applicable to set-offs. The underlying principle which applies in this respect has been so many times, and so thoroughly and broadly, stated by the supreme court, that it is not necessary for us to explain them further.

The judgment of the circuit court is affirmed, with interest, and the costs of appeal are awarded to the defendant in error.

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HALE v. CALDER et al.

(Circuit Court, D. Rhode Island. February 8, 1902.)

No. 2,623.

1. CORPORATIONS—SUIT BY RECEIVER TO ENFORCE PERSONAL LIABILITY OF STOCKHOLDERS—SET-OFF.

The individual liability of a stockholder in a corporation created by the statute of Minnesota is not to the corporation, but to its creditors; and hence, in a suit by a special receiver to enforce such liability against a stockholder, the defendant cannot set off an indebtedness due from the corporation to him.

2. SAME—DEFENSES—SUIT IN ANOTHER JURISDICTION.

Gen. St. Minn. § 5911, provides for the calling in by publication of all creditors of a corporation in a suit on behalf of creditors to enforce the statutory liability of the stockholders, and all who become creditors of a Minnesota corporation by their contract submit themselves to such provision. Hence, in an action by a special receiver, appointed in such a suit, to enforce the assessment made therein against a stockholder, a plea alleging that defendant is a creditor of the corporation, and did not receive notice of the suit, nor appear therein to prove his claim, where the declaration alleges that the provision of the statute was complied with, is insufficient; nor does a plea setting up such fact constitute ground why a court of another jurisdiction should not entertain the action upon the principles of comity.

At Law. On plaintiff's demurrer to fourth, fifth, and sixth pleas.

M. H. Boutelle, Robert W. Burbank, and Eben Winthrop Freeman, for plaintiff.

Van Slyck & Mumford, for defendants.

BROWN, District Judge. The fourth plea is a strict plea of set-off, and the demurrer to this plea must be sustained, on the authority of the decision of the circuit court of appeals for this circuit in Burget v. Robinson, 113 Fed. 669, rendered January 24, 1902.

I am of the opinion, also, that the fifth plea must be regarded merely as a plea in set-off, and that the main defense of the defendants must be considered solely upon the sixth plea. The demurrer to the fifth plea is therefore sustained, for the same reason applicable to the fourth plea.

By the sixth plea the defendants set up the fact that they were creditors of the corporation to the amount of about $2,000, with interest; that by reason of this fact they were, at the time of the commencement by Rogers of the suit in behalf of himself and all other creditors of said Northwestern Guaranty Loan Company, entitled to be notified of the pendency of said suit, and to have an opportunity to intervene therein, and to have the said sums of money due them set off against their liability as stockholders. They aver that they did not receive notice of the pendency of said suit, and did not have an opportunity to intervene therein as aforesaid. They contend that, since the equities arising from the dual position of the defendant as creditor and stockholder cannot be adjusted in this suit, the action will not be permitted, and rely on Mathez v. Neidig, 72 N. Y. 100. Quoting the opinion of Judge Aldrich in Hale v. Hardon, 37 C. C. A. 268, 95 Fed. 775, to the effect that "whether a receiver shall or shall not maintain an action

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extraterritorially is not a question of absolute right," the defendants contend that the additional facts pleaded by them take the case at bar out of the reason of the decision in Hale v. Hardon, and present to this court grounds which should induce it to deny the exercise of principles of comity in favor of the plaintiff in the present case.

It should be observed, however, that the declaration, not demurred to in this respect, alleges that in the suit by Rogers, "according to and as provided by the laws of said state, such proceedings were had in said cause that an order was therein entered limiting the time within which creditors desiring to participate therein should intervene and present and file complaints in intervention, and due notice of such order given to all parties in interest, all as provided by the laws of said state." Section 5911 of the Minnesota statute, referred to in Hale v. Hardon, 37 C. C. A. 243, 257, 271, 272, 95 Fed. 750, 764, 778, 779, and at other places, provides for notice by publication. The plea does not set forth that notice was not given by publication, as provided for in the statute, but merely that the defendants did not receive notice of the pendency of said suit. The question then arises whether, as creditors of the corporation, the defendants submitted themselves to the laws of Minnesota, which provided for notice by publication. On page 257, 37 C. C. A., and page 764, 95 Fed., in the opinion in Hale v. Hardon, it was said:

"The Minnesota statute (section 5911) provides for calling in all the creditors, and the creditors have by contract submitted their rights to the operation of such provision of law of the corporate domicile."

In view of this it would seem that this court, despite arguments to the contrary, must apply in this case the rule that these creditors, in dealing with the corporation, have assented to this provision making publication due notice to them. Therefore the plea is insufficient to meet the allegations of the declaration. Although it is true that the declaration avers that by reason of the nonresidence of the defendants they were not and could not have been served with process in said suit, and did not enter an appearance therein, I think we are forced to assume on this record (the declaration alleging the fact that the statute was complied with) that there was statutory notice by publication. It is apparent, however, that the right of which the defendants complain that they have been deprived through lack of actual notice was merely a right as creditors to participate in the distribution of the proceeds realized by this receiver. The declaration avers that creditors filed claims and demands in intervention aggregating upward of $2,000,000. The right, if any, of these creditors, was to add their $2,000 claim to the claims for $2,000,000, and in proper proportion share in the proceeds of a judgment against them upon their liability as stockholders. The contention that they are entitled to offset against their liability as stockholders the entire amount of their claim against the corporation is untenable.

As the plaintiff states a cause of action sustainable upon the principles of Hale v. Hardon and Burget v. Robinson, and as the defendants' sixth plea does not allege any failure on the part of the plaintiff, or of those through whom the plaintiff derives his rights, to observe the provisions of the Minnesota statute, and as the plea does not disclose

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sufficient ground upon which, by the application of the principles of comity, we could deny the plaintiff's right to maintain this suit, even were the legal questions on this point free from doubt, the demurrer to the sixth plea must be sustained.

Demurrers to fourth, fifth, and sixth pleas sustained.

GOW et al. v. WILLIAM W. BRAUER S. S. CO.

(District Court, S. D. New York. January 14, 1902.)

1. ADMIRALTY—WRONGFUL ARREST OF VESSEL—DAMAGES.
While ordinarily the arrest of a vessel in a cause of damage by due process is an inconvenience to which the owner is required to submit, without remedy, upon his success in the action, beyond the recovery of costs, yet when the libelant proceeds without an honest belief that he is using a rightful remedy, and his action is in the nature of a malicious prosecution, he should be held to pay any damages sustained by the owner through his wrongful act.

2. SAME.
The charterer of a ship for two voyages, the hire to be paid by the month, on the completion of the vessel's discharge after the second voyage, and before her actual redelivery, caused her arrest on a libel filed against her asserting a claim against the owner. At the time the charterer was concededly indebted to the owner for hire under the charter in a sum exceeding that claimed in his libel. *Held*, that the arrest was made in bad faith, and by an abuse of the process of the court, and that the charterer would be held to the payment of hire under the charter to the time when the vessel was released from such arrest.

3. SAME—SUIT ON CHARTER—PLEADINGS AND ISSUES.
A libel by a shipowner against a charterer to recover charter hire gives the admiralty court jurisdiction over the entire contract, and it will inquire into all its breaches, and award all the damages suffered thereby, although such breaches were not all specifically alleged in the libel, but some occurred after it was filed. A libel to recover charter hire for a month in advance, where the charterer redelivered the vessel within the month, sufficiently raises the issue as to when such redelivery was made.

4. SHIPPING—CHARTER—CARGO SPACE.
Evidence *held* insufficient to sustain the claim of a charterer to damages because of an alleged warranty or representation that the cargo space of the ship was greater than it in fact was, no complaint or claim on that account having been made at the time of loading, nor until after the completion of the two voyages for which the ship was chartered.

5. SAME—COMMISSION ON ADVANCES BY CHARTERER.
A charterer is entitled to the stipulated commissions on advances made for the disbursements of the vessel upon entering on the charter, although she then had coal in her bunkers of equal or greater value, which the charterer was bound to take and pay for, where the advances were actually required and made before an adjustment could be made of the amount due for coal.

In Admiralty. Suit to recover charter hire.

Convers & Kirlin, for libelants.
Warren, Warren & O'Beirne, for respondent.

ADAMS, District Judge. This is an action brought to recover $7,493.85, the hire of the steamship Ventnor for the month commencing June 18, 1901, alleged to be due under a charter party

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made in the city of New York the 13th day of February, 1901, between the parties hereto, respectively owners and charterer, which provided for a monthly hire of £1,575, payable in advance, of which amount the said sum of $7,493.85 is the equivalent. The hiring was for two round trips between "U. S. Atlantic port or ports and Europe," and to commence on the day of delivery to the charterer at a United States Atlantic port north of Hatteras, which delivery was duly made on the 18th day of March, 1901, at 10 o'clock a. m., and to continue until redelivery to the owners upon the completion of the second trip at a similar port. Payments were duly made for the hiring prior to the 18th of June. At the time of filing the libel—June 26, 1901—the steamer had begun the second trip, and was on her way towards Philadelphia, the port of return delivery. The charter party provided:

"(5) That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as the owners or other agents and charterers or their agents may agree as the estimated time necessary to complete the voyage, and when the steamer is delivered to owners' agents any difference shall be refunded by steamer or paid by charterers, as the case may require."

The parties were unable to reach an agreement under this clause, and the action was brought on the theory that another month's hire became due. Tonnelier v. Smith, 2 Com. Cas. 258. The steamer subsequently arrived at Philadelphia, and completed the delivery of her inward cargo there in the afternoon of July 4, 1901, but was immediately arrested under process issued upon a libel filed on the 3d day of July by the charterer in the United States district court for the Eastern district of Pennsylvania, alleging that the vessel had failed to comply with the terms of the charter party. The eighth clause provided:

"That the whole reach of the vessel's holds, decks, and usual places of loading, and accommodation of the ship (not more than she can reasonably stow and carry), shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel."

The charterer claimed damages under the clause to the extent of $966.24. The libel also contained another claim against the ship for delay at the port of Hamburg owing to sufficient steam not being furnished to run the winches, in conformity with the twenty-fourth clause of the contract, and asking damage in such respect in the sum of $512.40. The vessel remained in custody under the seizure until the next day, when she was voluntarily released. These same matters set up in the Philadelphia libel are alleged by the charterer in its answer in the case at bar, excepting that the damages claimed for the ship's failure to furnish cargo space are $971.84, instead of $966.24. Additional offsets are also claimed in the answer for coal remaining in the bunkers of the steamer at the time of redelivery, which the owners were to pay for under the contract, amounting to $458.20; for sundry disbursements made at the return port upon the request of the master of the vessel, amounting to $14.55; for disbursements made on behalf of the vessel at Ham-

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burg, amounting to $699.92; and for an address commission of 2½ per cent. The libelants herein admit the coal claim, $458.20, the disbursement claim of $14.55, and the address commission claim. No proof was offered by the respondent to sustain the claim of $512.40, loss of time at Hamburg, and it has been abandoned. The claim of $699.92 for disbursements at Hamburg was paid by the libelants there. There is a claim made by the libelants for $18.18 deducted by the respondent as a commission on advances alleged to have been made on the first voyage. It was admitted by the respondent on the trial that hire was due up to July 4th, and such hire has been proved to amount to $4,163.25. There are now, therefore, three matters in controversy, viz.: (1) Whether the hire should be computed up to July 4th, when the vessel was free from cargo, or to July 5th, when she was released from custody; (2) whether the respondent has an offset by reason of not receiving all the cargo space it was entitled to; (3) whether the libelants are entitled to recover the sum of $18.18, deducted by the respondent from the hire for the first voyage.

1. It does not appear that there was any actual notice of a redelivery of the steamer on the 4th of July. Nor were there any steps taken by the respondent to indicate an intention on its part to terminate its relations to the steamer. Doubtless a redelivery would have been effected by operation of the provisions of the charter party when the inward cargo was discharged, and the hiring would have been in fact then terminated, in the absence of any act by the respondent to prevent it; but, instead of permitting the owners to resume possession, the respondent invoked the process of the court to prevent it, and by such means actually detained the vessel 25 hours beyond the time when the owners would otherwise have taken her back. At this time the respondent admittedly owed the libelants $4,163.25, less a deduction of 2½ per cent. address commission, amounting to $104.08, or $4,059.17. The respondent's claims against the steamer or the steamer's owners then were the sums mentioned in the Philadelphia libel, $966.24 and $512.40. The only other claims which it has at any time pretended to have were, respectively, $458.20, $14.55, and $699.92, as hereinbefore described, and the additional $5.60 on the cargo space claimed, aggregating, with the libel claims, $2,656.91. The respondent, therefore, when it caused process to be issued and the vessel arrested, was, according to any possible computation, actually in debt to the libelants some $1,402.26. Under the circumstances it is claimed by the libelants that the hire should continue during the 25 hours the vessel was under seizure. While the ordinary arrest of a vessel in a cause of damage, security for costs having been given by the libelant, is an inconvenience to which the owner is required to submit without a remedy, upon his success in the action, beyond the costs, yet where the libelant proceeds without an honest belief that he is using a rightful remedy, and his action is in the nature of a malicious prosecution, he should be held in any damages suffered by the shipowner through his wrongful act. The Walter D. Wallet [1893] Prob. Div. 202; The Adolph (D. C.) 5 Fed. 114; Kemp v. Brown (D. C.) 43 Fed. 391;

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The Alex Gibson (D. C.) 44 Fed. 371, 374; The Wasco (D. C.) 53 Fed. 546. The facts here conclusively establish that the respondent could not have proceeded against the steamer in good faith. If all the facts of the transaction known to the respondent had been stated in the most favorable manner, it would have appeared on the face of the libel that nothing was due, and process could not properly have been issued. The arrest of the steamer was obtained by a suppression of the facts, and the proceedings on the part of the respondent were mala fide, and an abuse of the process of the court. The respondent contends, in this connection, that the libelants' claim is not properly raised by the pleadings, and is not in issue. I think that a libel claim for a month's hire sufficed to raise the question, which has been so litigated that the respondent has had ample opportunity to present any defense it wished to make. There does not seem to be any dispute about the facts, and, if my views are correct with respect to the law, it seems that I should grant the relief. The contract is maritime, and, the court "having jurisdiction over the entire contract, it will proceed to inquire into all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they may involve." Church v. Shelton, 2 Curt. 271, 5 Fed. Cas. 675 (No. 2714). And see The Electron (D. C.) 48 Fed. 689, 690; The Normannia (D. C.) 62 Fed. 469, 472; Boutin v. Rudd, 27 C. C. A. 526, 82 Fed. 685, 686. I hold, therefore, that there was no proper redelivery of the steamer on the 4th of July, but that the hire continued to the 5th of July, when the steamer was released from custody. The hire to such time amounts to $4,430.12, from which should be deducted an address commission of 2½ per cent., —$110.75,—leaving a balance of $4,319.37.

2. The claim of the respondent in this respect is stated in the answer as follows:

"Seventh. That at the time of the making of the charter party the said steamship Ventnor was in the United Kingdom, and was unknown to the respondent, except by name. That the libelants, by their duly-authorized agent, warranted and represented to this respondent that the space to be occupied by cargo in the said steamship and as shown on her plans in the peaks, lazarette, and poop was 16,565 cubic feet, all of which, reserving only proper and sufficient space for the ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel, should have been at the disposal of the charterers; that a proper and sufficient space for these purposes would be 4,000 cubic feet; that said plans showed the upper forepeak of said vessel was of the cargo carrying capacity of 2,023 cubic feet, that the intermediate forepeak and lower forepeak was of the cargo carrying capacity of 4,421 cubic feet, that the afterpeak was of the cargo carrying capacity of 2,372 cubic feet, and that her poop was of the cargo capacity of 7,349 cubic feet,—in all 16,565 cubic feet. And relying upon such warranty and representation, and believing the same to be true, entered into the charter party marked 'Exhibit A,' annexed to the libel herein."

It was assumed that the terms of the clause 8, covering the contention, opened the door for proof as to the quantity of space the charterer was entitled to, exclusive of that which belonged to the ship for stores, etc., and full opportunity was given the respondent to prove all the circumstances relating to the matter, including representations prior to the contract; but nothing was elicited tending to show the

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representations claimed. It appeared that the owners' agent in the negotiations gave a card to the respondent's agent on which the estimated general capacity of the vessel was stated, but it was also stated thereon that such particular was "believed correct, but not guarantied." It was after the contract was executed that a plan of the vessel was sent to the respondent, and it is upon such plan, and some plans made by the respondent's agents, that the claims are made. There was, therefore, no guaranty or warranty of space, and the question is whether the terms of clause 8 were complied with. There is testimony on the part of the respondent tending to show that it did not get all the space its agents thought they ought to have had, and for which they applied to the officers of the steamer; but such testimony is denied in substance by the officers of the steamer, who say that no such demands were made upon them, but that, on the contrary, the whole control of the loadings of the steamer was under the charterer's agents, as provided by clause 9 of the contract, to the effect that the captain should be under the orders and direction of the charterer as regarded "employment, agency, or other arrangements," and that the entire capacity of the steamer was at the charterer's disposal, excepting proper reservations for the ship's stores, not exceeding about the quantity conceded by the charterer, even excluding some latitude which the master could reasonably have exercised in the matter. Upon consideration of the testimony, some of which I heard, I do not feel inclined to allow the claim. In the midst of the conflict probabilities intervene which are persuasive against the respondent. For example, after the loading for the first voyage was completed (the claim embraces both voyages) the respondent made no claim in respect to deprivation of space, but on the 21st of March wrote to the master of the steamer, "Your vessel being now loaded, please proceed to the port of Hamburg." After the loading for the second voyage was completed, similar sailing orders were given containing the expression, "Your vessel being loaded." There was no protest to the owners on either occasion, nor anything to indicate positive dissatisfaction at such times, and there is ground for reasonable belief that the whole claim is a resuscitation for the purposes of a legal dispute of some controversies between the officers of the steamer and the respondent's loading agents, which, if of serious existence, were abandoned. I therefore disallow it.

3. The claim of the libelants for $18.18 alleged to have been improperly deducted from the hire by the respondent, I do not allow. It was not made a subject of contention by the pleadings, and, in any event, is not sufficiently established. It arose out of charges made for advances to the steamer on her first entry to the port of Philadelphia. The testimony shows that the advances were actually made by the charterer for the steamer's disbursements, but it is contended that the ship then had coal in her bunkers, which the charterer was bound to pay for when the ship arrived, and that it was therefore in funds to pay the claim out of the owners' money. There is some plausibility in the claim, but the difficulty is that the disbursements seem to have been made before any adjustment could be made of the amount due for the coal. The money was paid out by

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the charterer before it was under any obligation to pay for the coal, and, I think, became a proper subject for a commission charge.

Decree for the libelants for the sum of $3,846.62, with interest and costs.

NEWBURYPORT WATER CO. v. CITY OF NEWBURYPORT.

(Circuit Court, D. Massachusetts. March 5, 1902.)

No. 924.

1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

St. Mass. 1893, c. 471, authorized a city to build its own waterworks, after submission to a vote of the people, notwithstanding the previous grant of a franchise to plaintiff. After a vote of the city to supply itself with water without buying the works of plaintiff, St. Mass. 1894, c. 474, was passed, obliging the city to purchase plaintiff's waterworks before proceeding to supply itself with water, if plaintiff within a certain time notified the mayor of the city of its desire to sell. *Held*, that such latter act is not a violation of Const. U. S. art. 1, § 10, prohibiting an act impairing the obligation of contracts, because of the contract for water existing between the plaintiff and the city, as it simply gave plaintiff the option of selling its property on the terms mentioned.

2. SAME.

Evidence that the commissioners, in valuing plaintiff's property under the act of 1894, did not in fact value the water contract which plaintiff had with defendant, could not affect the terms of the act, so as to render it unconstitutional.

In Equity For former opinions, see 85 Fed. 723, and 103 Fed. 584.

Robert M. Morse and Lauriston L. Scaife, for complainant.

Albert E. Pillsbury and Horace I. Bartlett, for defendant.

Before COLT, Circuit Judge, and BROWN, District Judge.

PER CURIAM. It has been decided by this court, upon full and careful consideration, that there was no taking of the complainant's property under the acts of 1893 and 1894; that the deed of the complainant's property was voluntary, and not compulsory; and that consequently the complainant had not been deprived of its property without due process of law, in violation of the fourteenth amendment to the constitution of the United States. The complainant now maintains that the act of 1894 was in violation of section 10 of article 1 of the constitution, which provides that "no state shall pass any law impairing the obligation of contracts." The complainant raises this question by asking the court to admit the testimony of the commissioners appointed to value the complainant's property under the act of 1894, to the effect that they did not in fact value the water contract entered into between the complainant and defendant. The act of 1893 authorizes municipal competition, which the legislature had a legal right to authorize. The act of 1894 forbids municipal competition, provided the complainant chose to deed its property to the defendant on the terms specified. This act did not impair any contract which had been entered into between the complainant and defendant. It simply gave the complainant the option, if it chose, to sell

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its property to the defendant on the terms mentioned. The complainant, if it so desired, could have retained its property and its contract with the defendant; but it did not do so, and voluntarily deeded its property to the defendant. If it lost any right to any contract by this action, it was because it deemed it wise to take advantage of the provisions of the act of 1894, which obliged the defendant to buy the waterworks, if the complainant so desired, before it should undertake to build waterworks of its own. Assuming that this testimony could properly be offered at this stage of the case (a question which we do not find it necessary to pass upon), and that the complainant could show that the commissioners did not in fact value the water contract in estimating the value of the complainant's property, we are of the opinion that this testimony would not be material, and that it would be entirely ineffectual. It does not tend to prove that the act of 1894 was in violation of the contract clause of the constitution, because what was done or omitted by commissioners appointed under the act could not affect the terms of the legislative act itself, or make the act unconstitutional. Furthermore, after a full hearing upon the question of duress, this court has already decided that all the proceedings which took place under the act of 1894 were entered into voluntarily by the complainant in order to avoid great disaster arising from municipal competition.

Our conclusion upon this point is conclusive against the admission of the testimony, offered by the plaintiff, that the commissioners did not value the water contract. The motion to enter the final decree dismissing the bill is granted.

DAVIS v. MILLS et al.

(Circuit Court, D. Connecticut. February 20, 1902.)

No. 457.

CORPORATIONS—TRUSTEES—FAILURE TO FILE REPORT—ACTION—LIMITATIONS.

Where an action was commenced in Connecticut in 1897 against the trustees of a Montana corporation to recover of them individually debts owing by the corporation in 1893, because of the failure of such trustees to file the report which they were required by statute to file in that year, the action was barred either under Code Civ. Proc. Mont. § 515, providing that an action upon a statute for a penalty or forfeiture given to an individual must be brought within two years, or Gen. St. Conn. § 1379, providing that no suit for any forfeiture upon any penal statute shall be brought after one year from the commission of the offense.

John A. Shelton and William A. Wright, for plaintiff.
Gross, Hyde & Shipman, for defendants.

TOWNSEND, District Judge. Demurrer to complaint in action at law. This case has already been considered on motion for leave to amend (83 Fed. 982), and on demurrer to plea to jurisdiction (99 Fed. 39). The present demurrer is on the ground that the cause

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of action is barred by the statutes of limitations both of Montana and Connecticut. The defendants contend as follows:

"First, that the statute of the state of Montana under which this action is brought is penal, in so far as the application of the statute of limitations is concerned; second, that the statute of limitations of the state of Montana must govern the decision of this court; and, third, that, whether the statute of the state of Montana or the statute of the state of Connecticut is applied, the court must hold that the plaintiff's cause of action is barred."

The question of the character of the Montana statute was exhaustively discussed on a former hearing, and was fully considered in the opinion. The conclusion was there reached that the statute was not a penal one in the sense that it could not be enforced in a foreign jurisdiction. 99 Fed. 39. The statute of Montana (Code Civ. Proc. § 515) reads as follows:

"Sec. 515. Within two years. (1) An action upon a statute for a penalty or forfeiture when the action is given to the individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

The Connecticut general statute as to penalties is as follows:

"Sec. 1379. No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense."

That the statutory liability in this case comes within the terms of the Montana statute has been decided in the highest court of that state (Gans v. Switzer, 9 Mont. 408, 413, 24 Pac. 18; Elkhorn Trading Co. v. Tacoma Min. Co., 16 Mont. 322, 40 Pac. 606; Bank v. Johnson, 45 Pac. 662, 33 L. R. A. 552, 56 Am. St. Rep. 591; Wethey v. Kemper, 17 Mont. 491, 43 Pac. 716), and the construction of the Montana statute is binding upon this court. Plaintiff claims strongly that the Connecticut statute of limitations, and not that of Montana, must be applied. If the liability comes within the terms of the Montana statute, it would seem that it also comes within that of the Connecticut statute. The words "penalty or forfeiture" in the Montana statute are substantially equivalent to the words "forfeiture upon any penal statute" in the Connecticut statute. If the Connecticut statute above quoted is not applicable, it is not clear that any statute of that state would bar this action, and the liability of defendants might thus be continued indefinitely. While there is no decision of the highest court in Connecticut precisely bearing upon the question arising here, Mitchell v. Hotchkiss, 48 Conn. 18, 40 Am. Rep. 146, concerns a somewhat similar state of facts. The Connecticut statute provided that if the president and secretary of a corporation should intentionally neglect or refuse to file annually certificates showing the condition of the corporation with the town clerk, those officers should be liable for all the debts of the corporation contracted during the period of such neglect. The question raised was whether the cause of action survived the death of the officer who had become liable under this statute. The court held that the statute did not create any contract relation or duty between the creditors of the corporation and its president; that there was no privity between the president and the plaintiff, and that the former had owed the latter "no private duty from which a promise might be implied";

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that the duty to be performed was a public duty, required by public policy for the general welfare; and that the willful neglect of the prescribed duty was a public wrong, invoking the penalty of the statute,—and cites various authorities to the same effect. A comparison of Mitchell v. Hotchkiss, supra, with Plumb v. Griffin, 74 Conn. 132, 50 Atl. 1, very recently decided in the supreme court of Connecticut, confirms this view. A statute of Connecticut provides that "any person who cuts trees or timber on the land of another without a license, shall pay to the party injured two dollars for every tree, or one for any timber." It was claimed that this was a forfeiture, and that suit must be brought within one year. The court holds that a statute which merely gives to the party injured increased damages, is not a penal statute. In Mitchell v. Hotchkiss the court held that the statute making officers of corporations liable for failure to file reports comes clearly within the definition of a penal one, and that the action did not survive against the executor. If necessary for the decision of this case, it should be held, following the intimation in Hobbs v. Bank, 37 C. C. A. 513, 96 Fed. 396, Id., 41 C. C. A. 205, 101 Fed. 75, and the decision in Brunswick Terminal Co. v. National Bank of Baltimore, 40 C. C. A. 22, 99 Fed. 635, 48 L. R. A. 625, that the Montana statute of limitations controls the operation of the statute governing the penalty in other states as well as in Montana; and, if this be not so, it should be held that the action is for a penalty and should be brought within one year under the Connecticut statute.

The demurrer is sustained.

W. H. BEARD DREDGING CO. v. HUGHES et al.

(District Court, S. D. New York. January 27, 1902.)

1. SHIPPING — DAMAGES FOR BREACH OF CHARTER — SALE OF VESSEL BEFORE EXPIRATION OF TERM.
   Where a dredge and three scows, to be used in connection therewith, were chartered for a minimum term of three months, but were returned and the dredge was sold by the owner before the expiration of the term, the charterer is not chargeable with the hire of either vessel as damages for breach of charter after the date of such sale.
2. SAME—INJURY TO CHARTERED VESSEL—LIABILITY.
   A charterer is liable for an injury to the chartered vessel through the negligence of a company which he hired to tow the same.
3. SAME—NEGLIGENCE.
   There can be no recovery from a charterer for injuries to the vessel, without proof of negligence.

In Admiralty. Action to recover charter hire and damages.

Addoms, Hinman & Smith, for libelant.
Robinson, Biddle & Ward, for respondents.

ADAMS, District Judge. This is an action brought to recover some unpaid hire and damages for a breach of a charter of the libelant's dredge Samson and three scows, known as Nos. 1, 2, and 3; also for damages alleged to have been caused to two of the scows

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by the negligent manner in which they were used. The charter was a verbal one, confirmed by a letter dated March 9, 1901, as follows:

"Mess. Hughes Bros. & Bangs, 1 Madison Av., N. Y.—Gentlemen: We herewith confirm the verbal agreement made on the 8th inst. with your Mr. Morrison, which was as follows: We agree to furnish the combination dredge Samson, with crew of eight men and equipment, for dredging at New Haven, Conn., also three scows, No. 1X, 572 yards, No. 2X, 643 yards, and No. 3X, 644 yards, U. S. Govt. measurement, at one hundred and fifty ($150.00) per day; time to begin when the plant commences work at New Haven; minimum time to be three months. You are to tow the plant from New York, and to return it to New York when the work is finished, and to furnish coal and water to the dredge at your expense. Loss of time caused by breakdown of dredge in excess of thirty minutes to be charged against the plant at the rate of twelve ($12.00) dollars per hour. Payments to be made on the 15th of each month for work of the preceding month. The dredge is to be rigged with a dipper. Should you wish to equip her with a clamshell bucket, it can be shipped on at any time. Sundays and holidays are not to be included in working time.

"Yours, truly, The W. H. Beard Dredging Co.,
"By William Beard, Pres."

The vessels were delivered to the respondents, under the contract, on the 18th day of March, and were returned to the libelant on the 3d day of May. The respondents admit a breach of the contract, and liability on their part for hire from May 3d to May 16th, at which time the dredge was sold by the libelant. A question arises whether the sale of the dredge relieved the respondents from subsequent liability under the contract. The further claim for damages to the vessels is in consequence of injuries received by them while in possession of the respondents, the theory of the libelant being that a failure to return them uninjured imposed liability upon the respondents. The injury claim is resisted by the respondents on the ground that there was no proof of negligence as to one of the scows, and that the other was injured by an independent contractor.

With respect to the hire, it seems that after the return of the vessels the plant was kept in reasonable readiness for service until the dredge was sold, and after that the scows were kept so, and efforts made to obtain employment for them, with little success, up to the time of the expiration of the contract. But I do not see how there can be any recovery for damages, in the nature of hire, after the dredge was sold. The plant was thereby dismembered, and, for aught that appears, the sale may have been a profitable one to the libelant, which it was enabled to take advantage of by having obtained possession of the vessels through the respondents' breach of contract. The libelant will be allowed hire up to the 16th of May, credit being given for payments made in March and April.

There can, I think, be little doubt as to the liability of the respondents for any injuries to the scows through negligent handling, whether caused by the respondents directly, or by a towing company employed by them, which is called an "independent contractor." Smith v. Bouker, 1 C. C. A. 481, 49 Fed. 954; Hastorf v. Moore (D. C.) 92 Fed. 398. Scow No. 3 was negligently towed on a rock while in the respondents' service, and they must respond for the damages caused thereby. With respect, however, to scow No. 2, though there is testimony tending to show that she was returned to the owner

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in a damaged condition, there is no evidence from which it can be determined in what manner the injury was received. This contract amounts to a simple bailment for hire, and, without proof of negligence on the part of the hirers or charterers, there can be no recovery against them. Clark v. U. S., 95 U. S. 539, 542, 24 L. Ed. 518; Association v. Moore (Jan. 13, 1902) 184 U. S. 10, 11, 22 Sup. Ct. 240, 46 L. Ed. ——.

Decree for the libelant, with an order of reference.

THE PENCOYD.

(District Court, D. New Jersey. January 29, 1902.)

TUGS AND TOW—LIABILITY OF TUG FOR LOSS OF TOW—IMPROPER COUPLING. Evidence considered, and *held* insufficient to sustain the allegation of the libel that the sinking of a barge while being towed with others was due to the fault of the tug in improperly coupling the barges to each other.

In Admiralty. Action against tug for loss of tow.

Linsly Rowe and James J. Macklin, for libelant.
James Armstrong, for claimant.

KIRKPATRICK, District Judge. This libel is filed by Albert J. Cook, as the owner of the barge Swenson, which sank in the East river in February, 1899, owing, as is alleged, to the negligence of the steam tug Pencoyd. The libel sets out that the barge Swenson, laden with a cargo of coal, was, with five other boats, taken in tow by the Pencoyd, to be transported from Port Liberty, N. J., to foot of Stanton street, East river, New York; that the tow was made up under the direction of the master of the Pencoyd, and in such manner as to cause the captain of the Swenson to object thereto; that, in consequence of the improper coupling of the tow, the barge Swenson sustained injuries which caused her to sink and become a total loss.

It appears from the testimony in the case that both the North and East rivers were at the time of the accident full of heavy floating ice, and it is suggested in the libel that the method of coupling the tow caused the sterns of the Swenson and Philadelphia & Reading Barge No. 5, which was abreast of her, and upon her port side, to be drawn together, so that the ice accumulated between the boats, and caused the injury complained of. While it is apparent that the drawing together of the sterns of the Swenson and Philadelphia & Reading Barge No. 5 would have had the effect to prevent the ice from passing between them, and, by becoming tightly packed in the space, thereby have had a tendency to cut through the boats, and in that way caused her to spring a leak, yet there is not a scintilla of evidence that the sinking of the barge was due to that cause. On the contrary, the testimony of libelant's witnesses tends to show that the injury which the barge sustained was due to a bumping by the boat astern of her in the tow, which bumping was the result of improper coupling. The allegation of libelant is that the starboard bow of

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the hindmost boat was attached to the starboard side of the Swenson, and that her port bow was attached to the port side of Philadelphia & Reading Barge No. 5, and that, in consequence, as the tow veered from a straight line, the McLain (the boat astern of the Swenson) would bump into the stern of one of the boats ahead of her, at one time the Swenson, and then Philadelphia & Reading Barge No. 5, until finally she struck the Swenson such a crushing blow in the stern that she sprang a leak and in 15 minutes sank by the head. The testimony upon which libelant relies is that of Cook, the owner of the Swenson, who tells the story as above, Lyttle, the captain of the Swenson, and Brundage, the captain of the McLain. But the testimony of Cook is impeached by the story which he told to Bloomsbury immediately after the sinking of his boat, when he made no mention of any bumping, but supposed the accident was due to the ice. Brundage's evidence is contradictory of itself and inconsistent with his letter written soon after the occurrence. The captain of the Philadelphia & Reading Barge No. 5 testified that, although he was on the deck of his barge from the time the tow left Port Liberty until after the accident, he was not aware of any bumping of his boat, as alleged by Cook, the libelant; and the fact that the Philadelphia & Reading Barge No. 5 did not show any signs of injury upon an examination made soon afterwards would seem to corroborate his statement. It also appears that an inspection of the McLain failed to discover that the McLain had sustained any damage from the alleged bumping, and it does not appear that any claim therefor has ever been made. It is, of course, immaterial whether the tow was properly coupled or not, unless it be shown that the damage to the Swenson resulted from improper coupling, which is the negligence complained of.

The evidence fails to show to the satisfaction of the court that the sinking of the Swenson was due to the negligence of the claimant. The burden of proof being on the libelant, his libel must be dismissed.

UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia, E. D. February 17, 1902.)

1. CONSPIRACY—INDICTMENT—PLEA IN ABATEMENT—NATURE OF PLEA.
A plea in abatement to annul an indictment of a grand jury, being dilatory, and not favored by the courts, must conform with strict exactness to the requirements as to form, and contain all essential averments, pleaded with accuracy.

2. SAME—IRREGULARITY IN DRAWING GRAND JURY—JUDICIAL NOTICE.
The court, in considering a plea in abatement to an indictment for an omission of the clerk in drawing the grand jury, will take judicial notice of its record relative to the duty which it is claimed the clerk failed to perform.

3. SAME—SUFFICIENCY OF PLEA—PERFORMANCE OF CLERK'S DUTY BY DEPUTY.
A plea in abatement to an indictment averring that the clerk did not place the names of the grand jurors in the box, but that they were placed therein by the jury commissioner and a deputy clerk, without mentioning the deputy's name, or that his action was not done in the clerk's presence, nor alleging that the deputy and commissioner were

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of the same political faith, that either was moved by improper motives, or that incompetent or partial jurors were selected, is insufficient.

4. SAME—MANNER OF PLACING JURORS IN BOX.
Where jurors were lawfully chosen by jury commissioners of opposing political faiths, it is of no moment that their names were placed in the jury box by the handfuls, instead of alternately by the clerk and by the commissioner.

5. SAME—CUSTODY OF JURY BOX.
An indictment will not be quashed on the ground that the jury box was not kept continuously in the clerk's custody, but was delivered by him to strangers, thus giving an opportunity to tamper with the jury box, where it has been the practice, when necessary at the official residence of the judge to draw a jury for another division of the district, to issue a suitable order to the clerk to transmit the jury boxes by a reliable express company, and that was done in the instance referred to in the plea.

6. SAME—PUBLIC DRAWING—JUDICIAL NOTICE.
The court will take judicial notice that a grand jury was publicly drawn in the presence of the officials required to be present.

7. SAME—VENIRE FACIAS—ISSUANCE.
An indictment will not be quashed on the ground that no venire facias was issued by the clerk, nor filed in the clerk's office for the Eastern division of the Southern district of Georgia, until after the persons whose names were drawn had been summoned, where it is not denied that a venire facias was issued by a deputy clerk of the court having his residence in the Western division.

8. SAME—INSTRUCTIONS TO JURORS.
A plea in abatement to an indictment that instructions were given by "those in authority" that the officers serving a grand jury summons should keep secret the names of persons drawn, and enjoin on those summoned the necessity of keeping secret that they had been summoned to serve as a grand jury, is insufficient, where it is not alleged who "those in authority were," and no such instructions were issued by the court.

9. SAME—NUMBER OF NAMES IN BOXES.
Where the district court jury box and the circuit court box at the time of the drawing of a grand jury contain exceeding 300 names, and the court directs the jury drawn from the "jury boxes," the indictment cannot be quashed on the ground that the jury box from which the jury were drawn contained less than 300 names, for, though the particular jury was drawn from one of the boxes, all of the names in both boxes may be regarded as the jury body from which the grand jury were selected.

10. SAME—DRAWING FROM PARTICULAR COUNTIES.
Under Rev. St. § 802, requiring that jurors shall be returned from such parts of the district as the court shall direct so as to be most favorable to an impartial trial, the fact that the court directs that grand jurors be drawn from particular counties does not disqualify other jurors from other counties, whose names are in the jury box.

11. SAME—IMPARTIALITY OF JURORS.
An indictment for conspiracy to defraud the government of money appropriated for harbor improvements will not be quashed on the ground that grand jurors from counties where the improvements were located, and who were peculiarly qualified to act because of familiarity with such improvements, were excluded from the jury box, where such alleged conspiracy was notorious in such counties, and the court was endeavoring to secure an impartial jury.

12. SAME—WAIVER OF PLEA.
Defendants under indictment for conspiracy to defraud the government waive their right to plead in abatement to the indictment for alleged irregularity in the drawing of the grand jury where they, by unnecessarily resisting the processes of the court, and resorting to dila-

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tory proceedings in another state to prevent being brought before the court, have delayed the trial for more than two years before appearing to present their plea.

18. SAME—ADVICE OF COUNSEL.

In such case it is of no avail to the defendants that they were advised by their counsel that they could not be removed to Georgia for trial, and were under bond to the courts in New York for appearance in proceedings instituted by them to prevent their removal.

Indictment for Conspiracy.

The parties arraigned before the court are under indictment with Michael A. Connolly and Oberlin M. Carter for the offense of an alleged conspiracy to defraud the United States of America of large sums of money appropriated by congress for certain river and harbor improvements within the Southern district of Georgia. It will suffice at present to state in general terms that it is alleged that Oberlin M. Carter was a captain in the engineer corps of the United States army; that he was in charge of the improvements; that it was contemplated by the alleged conspirators that competition in bidding for contracts for this government work would be cut off, and that the alleged co-conspirators, or some person or corporation acting for them, would be the only bidders for such work; that this was done secretly for the benefit of the parties indicted; that the contracts would be let at high and exorbitant cost; that Carter should, with fraudulent intent, so draft the specifications for constructing jetty works and training walls as to provide that, in his option, he might require large quantities of material known as the "log and brush mattress" to be paid for by the square yard at a cost comparatively very great, but which also enabled him to permit the contractor to place in the works the same number of square yards of another specified design of brush mattress, of much less value, at a much cheaper cost to the contractors, but at the same cost to the United States; that the specifications were so devised and drafted that all persons not parties to the said scheme to defraud would be kept in ignorance of this option on the part of the engineer until the bids were in; that other bidders were compelled to put in bids based on the design of mattress of the most expensive and costly construction, while the alleged conspirators would be advised beforehand that if they, or some one of them, were successful bidders, Carter would require to be put in the works mattresses of the cheapest design; that these alleged conspirators were thus enabled to be successful bidders for all of this work at the lowest cost to the contractor and the very highest cost to the United States; that, if there were other successful bidders, Carter, the engineer officer, would require from them the utmost exactitude in the performance of the most expensive contract, but, while passing on the work of the alleged co-conspirators, he would deal most liberally with them; that he would so order and inspect the contracts of his co-conspirators as to insure to them the maximum profit at the least cost and for work and material of inferior value to the government. It is further alleged that this fraudulent scheme was furthered by rejecting on technical grounds other bids, and by enabling the co-conspirators to meet unanticipated competition by second bids on guaranties known to be forgeries; by the fraudulent approval by Carter for payment to the alleged co-conspirators of accounts thus fraudulently made, and as disbursing officer by fraudulently paying to them, or to some person or corporation for them, the amount alleged to be due on such contracts so fraudulently entered into and performed. This being done, it is alleged that the conspirators would divide between them and appropriate to their own use said moneys so fraudulently obtained. It is further charged in the indictment that as the result of this alleged conspiracy, and by means of a number of overt acts, to wit, the presentation for payment of such fraudulent accounts set out therein, the alleged conspirators have defrauded the government in the amount of $700,000.

On arraignment the following defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, presented and filed a plea in abatement. This document consists of nine grounds, constituting one

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plea or nine pleas, accordingly as they may be construed. The first ground is that the indictment was found by a body of men purporting to be a grand jury, but which had no legal existence, for the reason that the names of persons placed in the jury box from which the said alleged grand jury was taken were not placed therein by H. H. King, the clerk of this court, and the jury commissioner, nor put in at all alternately as required by law, but that, the said H. H. King, clerk as aforesaid, being accessible, and in no wise disabled or disqualified, the said names were placed in said box by the said jury commissioner and a deputy clerk by the handfuls or bunches, contrary to the statute laws of the United States of America, which required that the clerk should be one of the persons to place the names in the jury box, and that they should be placed therein alternately by the said clerk and the said commissioner; and which tended to the injury and prejudice of these defendants, and of each of them, in that they are entitled by the law of the land to have any charge against them considered by a grand jury selected under the restrictions prescribed by law, and in accordance with the provisions thereof, and in which selection no unauthorized persons shall have or take any part; and this they are ready to verify. A second ground or plea is that the indictment should be quashed because the jury box of the division was not kept, as required by law, continuously in the custody of the clerk of the court, but that during the month of November, 1899, it was delivered by him, or some one connected with his office, and without authority of law, into the hands of strangers in no wise connected with this court, and was carried away from the city of Savannah, where was the office of said clerk, and transported beyond the limits of this division, which gave abundant opportunity to outsiders, who were not under any binding oath or obligation to this court, to violate the sanctity of said jury box. A third ground or plea is that the grand jury was not publicly drawn in the Eastern division, as required by the laws of the United States, and that, not being drawn publicly, these defendants could have no opportunity to challenge said jurors for any cause, or even to know that there was to be a grand jury. A fourth ground or plea is that the indictment should be quashed for that the names of the persons who were drawn as the grand jurors who found the indictment were drawn in the city of Macon, beyond the limits of this division, in a court house other than that of the Eastern division; that no publication of said drawing of the names drawn was made; that no venire facias was issued by the clerk of this court, nor any filed in the clerk's office of the said Eastern division, until after the persons whose names were drawn had been summoned, instructions having been given by those in authority that the marshal and his deputies serving said summons should keep secret the names of such persons so drawn, and should enjoin on each person so summoned the necessity of keeping secret the fact that he had been summoned to serve as a grand juror at said term; so that the choice and selection of such alleged grand jurors were not made public until the court met on December 1, 1899. A fifth ground or plea is that the alleged indictment should be quashed for that there were not, as required by law, 300 names of qualified jurors in the box, and in fact there were less than 200 names of qualified jurors therein on November 22, 1899. A sixth ground or plea is that the indictment should be quashed for that the judge, by an order on November 22, 1899, disqualified as grand jurors all persons whose names might be in the jury box who at that time resided in the counties of Chatham and Glynn, and prescribed in such order that the said grand jury be returned from the counties of the Eastern division other than Chatham and Glynn and thus eliminated from the prospective grand jurors those who were most familiar with public harbor improvements, the necessity therefor, and the cost thereof, and who, from such knowledge, would be in a better position to impartially consider the matters urged against the defendants. A seventh ground of plea or plea is that the indictment should be quashed for the reason that the judge of this court by his order directed that the grand jury be returned from the counties of said Eastern division other than the counties of Chatham and Glynn, and that the grand jury be drawn from the jury box of the Eastern division, before a jury box had been constituted which did not include jurors

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from Chatham and Glynn. An eighth ground of plea or plea is that the indictment should be quashed because the judge of this court directed that the grand jury should be returned from the jury box of the Eastern division under the restriction aforesaid, because it appeared to said court that such return of jurors would be most favorable to an impartial trial, and prevent the incurring of unnecessary expense; it being illegal for said judge then and there to pass any such order restricting the drawing of a grand jury to any particular part of said division for any reason, and tended to the injury and prejudice of these defendants. A ninth ground of plea or plea is that the indictment should be quashed for the reason that the judge of this court having, upon the said 22d day of November, 1899, outside the limits of this division, to wit, in the city of Macon, Ga., passed the order before described, did in the city of Macon on said day proceed to draw said grand jury from a box which did not contain the names of grand jurors returned from the counties of said Eastern division other than the counties of Chatham and Glynn, but which only contained, irrespective of said counties of Chatham and Glynn, the names of jurors from the counties of Bryan, Liberty, Ware, Wayne, Pierce, Clinch, Lowndes, Brooks, Thomas, Decatur, Effingham, and Bulloch, there being in said Eastern division, in addition to said counties, the following counties: Appling, Berrien, Camden, Coffee, Charlton, Colquitt, Echols, Emanuel, Irwin, Montgomery, McIntosh, Screven, Tattnall, and Worth, there having been no revision of the jury box, or any return, as contemplated by said order; and that the drawing of said alleged grand jury was illegal, and tended to the prejudice of the defendants, and was further illegal for the reason that the box did not contain names from the counties of McIntosh and Camden, which are the only other counties of this division in which are or might be public harbor improvements, and the citizens whereof would, from their knowledge of such matters, like the citizens of Chatham and Glynn, be best qualified to pass impartially on the charges made against these defendants.

It is averred: That because of the alleged illegal proceedings before mentioned they were not advised in any manner or form that a prosecution of any character or description was impending against them. That they were in the state of New York, in the pursuit of their legitimate business, which at that time required their presence there. That they were not residents of Georgia. That the records of the court show that the bill of indictment was found against them on the 8th of December, 1899, and that a warrant thereupon was issued for the arrest of these defendants; these defendants not having been under arrest or recognizance when said grand jury was empaneled. That so soon as these defendants were advised that such a warrant was in New York for their apprehension, they voluntarily sought out the officer in whose possession they were told it was, and surrendered themselves into his custody. That, having been advised by lawyers skilled in the law that they could not be compelled to go from where they were to the Eastern division of the Southern district of Georgia to answer for any alleged offense said to have been committed therein unless a valid indictment had been preferred against them, and that probable cause of their guilt existed, they, in pursuance of their legal rights and of their constitutional privileges in this respect, demanded an examination into these matters by the constituted authorities having jurisdiction thereof in the state of New York. That the questions involved were considered by a United States commissioner, who decided that these defendants should be remanded to this jurisdiction; but that they, being further advised that said decision was erroneous, and that they were being deprived of their constitutional rights, brought the questions involved to the consideration of the judge of the United States district court for the Southern district of New York, who, after patient consideration, decided that the said commissioner had erred in his decision, and remanded the case to him for further inquiry. That the said commissioner having again reported, adjudging that these defendants should be remanded to the said jurisdiction of the Eastern division of the Southern district of Georgia, these defendants again laid said questions before the said judge of the Southern district of New York, who, having decided against these defend-

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ants, they, under legal advice that the decision of said court was erroneous, caused to be brought against the official having them in charge the writ of habeas corpus to inquire into the legality of their detention; the case thereupon arising having been finally disposed of by the supreme court of the United States at its present October term. That on the 12th day of March, 1900, when, as they have since been informed, the case at bar was called in this honorable court, and these defendants then and there summoned to appear and plead, these defendants were in the state of New York, subject to the jurisdiction of the said court for the Southern district of New York in regard to the case at bar, and under a solemn bond and obligation, given on the 20th day of February, 1900, by the terms of which they obligated themselves to personally appear before said district court for the Southern district of New York, or the judge thereof, whenever and as soon as the final order should be entered in the said proceeding, and then and there surrender themselves to the marshal of said district of New York, and abide the order of said district court, or the said district judge, and not depart without leave. That upon the 5th day of March, 1900, and upon the 12th day of March, 1900, and at all intervening times, the said bond and the said obligation to answer to said court, and not to depart without leave, was operative against these defendants. That the February term, 1900, of this honorable court adjourned on the 7th of May, 1900, and that the said bond was operative on that day, and operative on all dates intervening the said 12th day of March, 1900, and said last-named date. That no session of the district court in and for this division was held until the 7th day of January, 1901, and that on said date and on the 9th day of February, 1901, when this court adjourned for the term, and at all intervening dates, these defendants were still under said bond and obligation to appear day by day in the jurisdiction of the district court of New York. That since the session last named of this honorable court there has been no session of this court until January 25, 1902, when the court met for the purpose of sounding the dockets thereof, these defendants then being under bond to appear in this court on this, the 11th day of February, 1902, and were by and with the consent of the district attorney of the Southern district of Georgia, to appear now and here for the purpose of pleading to this indictment. That these defendants, had they been within this jurisdiction at any time from the 22d of November, 1899, until the 8th day of February, 1902, could not have interposed the pleas in abatement to the said alleged indictment on the ground that instructions were given to keep the drawing and summoning of said jury secret, because said facts did not come to the knowledge of the defendants, or either of them, and were therefore not available until the said last-named date: they having the right to assume, if they had ever heard of the drawing of said alleged grand jury, that the same was publicly done. Wherefore they pray judgment on the said alleged indictment, and that the same be quashed.

To this plea the United States attorney for the government filed a special demurrer on grounds which may be sufficiently indicated in the opinion of the court.

See 100 Fed. 941, and 108 Fed. 816.

Marion Erwin, U. S. Atty., and Samuel B. Adams, Sp. Asst. U. S. Atty., for the United States.

Walter G. Charlton, Fleming Du Bignon, Thomas B. Felder, and Daniel W. Rountree, for defendants.

SPEER, District Judge (after stating the facts as above). The defense offered at this period of the case by the persons arraigned is a plea in abatement, which is a dilatory plea. It is an attempt to annul an indictment of the grand jury of a United States court, without any regard to the question of the guilt or innocence of the prisoners or of the public interest at stake. Pleas of this character, where it is not made to appear that any unfair prejudice has been

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done to the accused, are regarded with great disfavor. This is made to appear not only by the controlling act of congress on the subject, but by a long and unbroken line of decisions of courts of the highest repute. The act of congress, which is section 1025, Rev. St., provides:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding therein be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

In the valuable Encyclopædia of Pleading and Practice (volume I, p. 23) the general rule is stated as follows:

"Pleas in abatement, as they do not deny the merits of the plaintiff's claim, but merely tend to delay the remedy, are not favored by the courts, and the greatest strictness is applied to them, and they will not be aided in construction by any intendments. With them correctness of form is matter of substance, and any defect of form is fatal. They must answer the whole case, and contain a full, direct, and positive averment of all material facts."

In the same volume, on page 44, it is declared:

"Such pleas must be certain to every intent, and leave nothing to be drawn by inference. They must anticipate and include all such supposable matter as would, if alleged by the opposite party, defeat the plea."

It is said that the doctrine thus announced with regard to pleas in abatement is but an application of the harsh rules of the common law, and it is contended in the interesting argument of counsel for the accused that the rules of pleading are much more liberal now than they were at common law. This statement is not without an important qualification. The more liberal methods evolved by the advance in modern jurisprudence have been designed to make effective the trial of a case, whether civil or criminal, upon its merits, that the right may in truth be ascertained, that the innocent may be acquitted or the guilty brought to justice. In the case of U. S. v. Terry (decided in the Northern district of California, by Judge Hoffman, in 1889) 39 Fed. 364, the learned judge remarks:

"It may, I think, be justly said that, while the rigorous and apparently harsh, though ancient and well settled, rules of the common law have in some instances been departed from, it has always been in the interest of substantial justice, and to prevent a manifest wrong to the defendant; and conversely where it is plain that substantial justice will not be promoted, nor a manifest wrong to the defendant prevented, the indictment should not be set aside on grounds of technical errors, informalities, or irregularities."

This deliverance of Judge Hoffman related to a plea in abatement where facts contrary to the record were alleged, and not only did the court hold that a demurrer to such a plea cannot be regarded as admitting the truth of such allegations, but it was held that the plea in abatement was bad so far as it contradicted the record. The learned judge continues:

"Assuming, however, that the plea in the case is open to exception as a formal plea in abatement, it does not follow that the defendant is without remedy. Thus, for example, where it is alleged that there has been improper conduct on the part of officers employed in the designating, summoning, and returning of the grand jury, the defendant who may have been

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prejudiced thereby may bring the matter before the court by suggestion or motion or affidavit, even where no right of challenge to the array is allowed by law. But this motion is addressed to the discretion of the court, and the court, having general power to preserve the pure administration of justice, will freely exercise its sound discretion for the purpose of serving that end."

A more recent decision upon the same subject and by the supreme court of the United States is Agnew's Case, 165 U. S. 44, 17 Sup. Ct. 238, 41 L. Ed. 627. In that case the plea in abatement was filed because of what seemed at first to be an unusual proceeding in the drawing of the grand jury. Under the practice in the district of Florida it seems that the clerk and marshal draw grand jurors from the jury box. The grand jury was incomplete, and, as stated by the chief justice in his opinion:

"The court ordered a special venire to issue for ten grand jurors to be drawn according to law, 'to be taken from the county of Duval; that the clerk and marshal, in drawing said venire, whenever a name was legally drawn from the box, if said party so drawn was not from the county of Duval, laid aside said name, and continued drawing until ten names from the county of Duval were obtained'; and that, some of the ten returned on the second venire being excused, other names were drawn in the same way, and a third venire was issued, and still another, until the grand jury was completed with grand jurors from Duval county."

It also appeared from the statement of the chief justice that there were orders of court, certified as part of the record, which directed the drawing according to law from the various counties exclusive of Duval county, and then from that county. This, like the order of the court in this case, excluding jurors from the counties of Chatham and Glynn, was done in pursuance of the power given by section 802, Rev. St. Says Chief Justice Fuller, for the court:

"Section 802 of the Revised Statutes was brought forward from a clause of section 29 of the judiciary act of September 24, 1789, which was regarded by Mr. Justice Curtis as applicable to grand as well as petit juries."

It is interesting, then, to reflect that the statute under which the court in this case selected jurors from counties other than Chatham and Glynn was, in substance, enacted by the first congress of the United States, which assembled after the formation of the constitution, received the approval of George Washington, and has been in full force and effect for more than 110 years anterior to the action of the court now under consideration.

The doctrine that for such irregularities as do not prejudice the defendant he has no cause of complaint and can take no exception is expressly reaffirmed in the opinion of Chief Justice Fuller in the case just cited, and the learned chief justice cites in support of his statement a number of authorities from the courts of the states and of the United States. Indeed, the chain of authorities on all of the cardinal principles hereinbefore stated seems to be unbroken, and so clear is this that the efforts and research of counsel in this case have not produced a single decision in which a plea in abatement has been sustained by the United States courts in a criminal case. On the contrary, a multitude of authorities have been cited where such pleas were denied where they did not conform with strict exactness to the requirements of the law, and failed to contain the essential

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averments of such dilatory pleading. In U. S. v. Williams, decided in the circuit court for Minnesota, and reported in 12 Myers, Fed. Dec. pars. 1826, 1827, Fed. Cas. No. 16,716, Circuit Judge Dillon, sitting with District Judge Nelson, declared:

"Pleas of this character are dilatory, and, not being favored, the law requires that they shall contain all essential averments, pleaded with strict exactness."

In U. S. v. Hammond, 2 Woods, 197, Fed. Cas. No. 15,294, Circuit Judge Woods held that although, in view of the law at that period of our history, the disqualification of a grand juror was absolute, and did not rest in the discretion of the court, the juror, having been a Confederate soldier, the plea was bad, because it did not state "when and where the juror took up arms and joined the rebellion and insurrection against the United States." In the same case this famous circuit judge, afterwards associate justice of the supreme court, expresses with emphasis the disfavor with which such pleas are regarded, and the exactitude with which every requirement in form as well as substance is insisted upon by the courts. On the latter requirement, see I Chit. Pl. *479, *583; I Chit. Cr. Law, *448; 1 Enc. Pl. & Prac. p. 27, and authorities cited; 1 Archb. Cr. Pl. *82; 1 Bish. Cr. Proc. par. 435; U. S. v. Richardson (C. C.) 28 Fed. 64. The decision in the last case cited was by Mr. Justice Gray. A very instructive case upon the general topic is U. S. v. Chaires, decided in the Northern district of Florida by Circuit Judge Pardee and District Judge Swayne, reported in 40 Fed. p. 821. The opinion contains this pertinent language:

"The third plea is to the effect that the names of the persons placed by the jury commissioner and the clerk in the box were not drawn from the entire territory within the Northern district of Florida, but were drawn from an alleged division of the district. No injustice or prejudice is averred. Section 802, Rev. St., permits jurors to be returned on an order of court from parts of a district. No injury or prejudice can, therefore, be inferred. We think this plea is bad in form and substance."

In view of principles so clearly announced and so incontrovertibly established by text writers and courts, all of whose conclusions deserve, and some command, obedience, the questions raised by this plea may, we think, be readily determined.

The first ground is that the names of persons placed in the jury box from which the grand jury was taken were not placed therein by H. H. King, clerk of this court, and the jury commissioner, but that, H. H. King being accessible, and in no wise disabled or disqualified, the names were placed in the box by the jury commissioner and a deputy clerk by the handfuls or bunches, and that they should be placed therein alternately by the said clerk and by the said commissioner, and that this tended to the injury and prejudice of these defendants. In passing upon this plea the court will take judicial notice of its own record relative to the duty which it is said the clerk failed to perform. On January 26, 1897, the following order was made:

"In the District Court of the United States for the Eastern Division of the Southern District of Georgia. In re Revision of the Jury List. It appearing to the court that there is a necessity for a revision of the jury of

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this court, it is upon consideration ordered that Edward S. Elliott be, and he is hereby, appointed jury commissioner of this court for the Eastern division of the Southern district of Georgia; and it is ordered that the said Edward S. Elliott and H. H. King, clerk of this court, conformably to law, shall proceed as soon as may be to revise the jury list of said court, and for the purpose of convenience and economy in serving said jurors it is ordered that the jurors be selected from the counties of Chatham, Bryan, Liberty, Ware, Glynn, Wayne, Pierce, Clinch, Lowndes, Brooks, Thomas, Decatur, Effingham, and Bulloch."

This order is on the minutes, and is also found attached to the jury list or jury book, as it is indifferently called, which is also of file. Thus, by order, a distinct duty was placed upon the clerk to act with the jury commissioner. The order attached to the jury list which is found of file in the clerk's office sufficiently identifies such list. It is not averred that the names in the jury box did not conform to the names on the jury list or book referred to. It is averred that a deputy clerk placed these names in the jury box. This would not, in my judgment, have been a violation of law, and assuredly would not have disqualified the jurors whose names were placed in the box, provided the clerk was present, took part in the selection of the names, and supervised the manual act of placing the tickets in the box. Whart. Cr. Law, p. 171. While the statute on this subject is apparently mandatory, and while, in my opinion, there is a personal trust imposed by the act of congress upon the individual who is the clerk, yet, in the absence of any charge of bad faith or corrupt motive in the selection of a jury, or other conduct prejudicial to the defendant, if he fails to comply with literal strictness to the provision of the statute, yet does substantially comply, his action will not be regarded as vicious and unlawful. This is especially true where no juror selected is alleged to be disqualified, and no intimation of political or other bias is ascribed to a person or the persons whose names are placed in the box. In the case of U. S. v. Ambrose, 3 Fed. 286,—decision by the circuit court Southern district of Ohio, Circuit Judge Swayne presiding,—the learned judge declared with regard to the manner in which the names of persons shall be placed in the jury box:

"Upon full consideration of the subject I feel bound to hold that this provision of this act of congress was not directory, as I was inclined to think at first; and I think no sound view of the subject will warrant any other conclusion than that that provision is mandatory, and I think it is the duty of every court of the United States to regard it and carry it out; * * * but, on the other hand, * * * that all that is required is an honest intention to conform to the statute, and to carry out its provisions in good faith. Beyond that I think the statute has no efficacy. Beyond that I think it may be held to be merely directory. I think that any irregularity arising from motives other than those of an evil character—any slight irregularity, such as may arise in any case in spite of the greatest care and caution—is not fatal to the indictment."

Upon the same topic it is stated in 12 Enc. Pl. & Prac. p. 277, that:

"The great weight of authority is to the effect that the mere fact that officers intrusted with the several duties prescribed failed to conform precisely to such requirements will not invalidate their action, unless it appears, or may be reasonably inferred from the circumstances, that the complaining party has been prejudiced, or that injury has been sustained by reason of neglect or omissions charged."

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In support of this statement of the rule by the Encyclopædia from the supreme appellate courts of 21 states of the Union a large number of authorities are cited. Indeed, the necessity of showing prejudice to invalidate a criminal proceeding is a distinctive feature of the laws both of the state and of the United States. In Doyle v. U. S. (C. C.) 10 Fed. 269, it was held that the irregularity, even, of a judge communicating privately with one of the jurors while they are deliberating on their verdict, furnishes no sufficient ground for reversal, where it is not claimed that it worked of necessity a prejudice to the accused. In the absence of any sufficient showing to the contrary, the presumption is that the jury was selected and drawn according to law. Kie v. U. S. (C. C.) 27 Fed. 351. In the absence of any sufficient showing to the contrary, it is presumed that the clerk did his duty as jury commissioner, and that the other jury commissioner performed his duty also. This is an ancient principle of law, as old as Coke upon Littleton. "Omnia præsumuntur rite et solemniter esse acta." Broom, Leg. Max. Justice Story, in the case of Bank v. Dandridge, 12 Wheat. 68, 6 L. Ed. 554, declares that the law "presumes that every man in his private and official character does his duty, until the contrary is proved. It will presume that all things are rightly done unless the circumstances of the case overturn this presumption."

Starting, therefore, with the presumption in favor of the regularity of the jury and of the proper performance of duty on the part of the clerk, what is there alleged in this plea to avoid that presumption? Merely this: That Mr. King, the clerk, did not place the names of the jurors in the box, but that they were placed in the box by the jury commissioner and a deputy clerk. The name of the deputy clerk is not mentioned in the plea. It is not alleged that this action of the deputy clerk was not done in the presence of the clerk, nor is it alleged that the deputy was of the same political party with the jury commissioner, or that any bad or evil purpose moved either one of these parties, or that any incompetent or partial juror was selected. Yet this plea must be certain to every intent, and leave nothing to be drawn by inference. It must anticipate and include all such supposable matter as would, if alleged by the opposite party, defeat the plea. 1 Enc. Pl. & Prac. p. 24, and authorities cited. It is therefore entirely compatible with this plea that every judicial and discretionary function on the part of the clerk as a jury commissioner, all of which is necessarily included in the power to "place in the box," was done, and the plea, while literally true as far as it goes, is bad. It does not negative the presumptions I have mentioned, nor is it averred with that strictness as to essentials under the rules stated which will defeat the solemn indictment of a grand jury. Nor does it matter if the names of the jurors were bunched before they were put in the box, if they were lawfully chosen by the jury commissioners of opposing political faiths, and this it is presumed was done.

The second ground or plea is that the jury box was not kept, as required by law, continuously in the custody of the clerk; that during the month of November, 1899, it was delivered by him, or some

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one connected with his office, and without authority of law, into the hands of strangers, which gave opportunity to outsiders to violate the sanctity of said jury box. This is wholly uncertain, and is, besides, contradictory of the well-known proceedings in this case, which are in the knowledge of the presiding judge, and of which he must take judicial notice. It has been the uniform and invariable practice of the judge to lock the jury boxes after drawing a jury, and to seal the same with wax, imprinting his personal seal, and deliver the keys to the marshal and the box to the clerk. Whenever it has been necessary at the official residence of the judge to draw a jury for another division of the district, suitable order is issued to the clerk to transmit the jury boxes by a reliable express company. No safer method of transmission is obtainable. They are received by the officials of the court, receipted for to the express company with the unbroken seal of the court thereon. That was true in the instance referred to in this plea. It is impossible, therefore, that any person could have tampered with the jury box from which these jurors were drawn.

The contention in the third plea, that the grand jury was not publicly drawn, is likewise known to the court to be untrue. This grand jury was publicly drawn in the United States court house in Macon, Ga., in the presence of all the officers who were by law required to be present; and of this fact the court takes judicial notice. It is, indeed, alleged in the fourth ground of the plea that the jurors were drawn in the city of Macon in a court house other than that of the Eastern division. It is said in this plea that no venire facias was issued by the clerk of this court, nor any filed in the clerk's office of the said Eastern division, until after the persons whose names were drawn had been summoned. It does not deny—what the court judicially knows to be true—that a venire facias was issued by the deputy clerk of this court, who has his residence at Macon. It is alleged that instructions had been given by "those in authority" that the marshal and his deputies serving said summons should keep secret the names of such persons so drawn, and should enjoin on each person so summoned the necessity of keeping secret the fact that he had been summoned to serve as a grand juror at said term; but who were "those in authority" who gave such instruction is not alleged, and, since no such instructions were issued by the court, it is wholly unimportant and irrelevant to the validity of the grand jury. Nor were such instructions, if given, in any sense prejudicial to the rights of the defendants.

The fifth ground or plea is that the indictment should be quashed because there were not, as required by law, 300 names of qualified jurors in the box, but in fact that there were less than 200 names of qualified jurors therein, on November 22, 1899. This is also contradictory of the record. There were in the district court jury box at the time of the drawing, as appears by the jury list, 562 names, and in the circuit court box there were 578 names. The order of the court required that the jury should be drawn from the "jury boxes" of the district, and under the act of congress, which authorizes the use interchangeably of district and circuit court jurors when both

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courts are in session, although this particular grand jury was drawn from the district court box, all of the names in both boxes may be regarded as the jury body from whom the grand jury was selected. It is said, however, that because the court, by its order, upon representations made by the district attorney, directed a jury to be drawn from certain counties of the district exclusive of Chatham and Glynn, this disqualified the jurors from those counties, and that their names e to be regarded as taken from the jury box to the injury and ejudice of the defendants, in that there remained less than 300 mes in the district court box. The fact, however, that for a parcular emergency the court, in the exercise of the power vested it by section 802, Rev. St., thought proper to draw jurors from rticular counties, does not disqualify other jurors, whose names are the box, who are from other counties. Their names are none the ss in the jury box, and must none the less be counted. They are erely not among those jurors from whom the grand jury in a parcular case is to be selected. But, even if the order of the court had e effect to disqualify and destroy the juror-acting capacity of jurors om Chatham and Glynn, this could not be prejudicial to the accused. ll that they have the right to demand is a grand jury of which every ember shall possess the legal qualifications of a juror, and unquesnably such a grand jury could be and was selected from the names maining in the box after jurors from Chatham and Glynn were iminated. The requirement as to the number of jurors fixed by e statute is merely to facilitate the convenient selection of an imrtial jury. Nor is the court restricted to the use of the jury box signated and provided for by the statute, as, in its discretion, it ay hold a stated term of its court in any locality in the district, , in its discretion, it may draw a jury from the jury box of a state urt in any county within its jurisdiction. It would have been mpetent, therefore, for the court in this case to have drawn this and jury from the jury box of the state court, to which none of ese statutory provisions applied, and might even now, if it thinks oper, order this case to trial at Valdosta, or Thomasville, or any her point in this division of the district, and before a jury not one whose names may appear on the circuit or district court jury ts of this court.

It is, however, insisted in another ground or plea that jurors from natham and Glynn were peculiarly qualified to act in this case beuse of their familiarity with river and harbor improvements, and it as said, in substance, in argument,—no doubt humorously,—that e jurors who were summoned from the interior counties were so familiar with such matters that they would be startled, and their inds frighted from their propriety, by the bare mention of such ms as it is alleged were fraudulently obtained from the government r the alleged transactions described in the indictment. Such conderations, if justifiable, even, have no weight when contrasted with the motive of the court to obtain a grand jury entirely impartial for the investigation of the tremendous averments of fraud and peculation set forth in this indictment. It was represented to the court by the district attorney that ex-Captain Oberlin M. Carter, charged as

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a co-conspirator here, had been tried by court-martial in this county with regard to criminal charges relating to enormous expenditure of government funds in this and in Glynn county. Multitudes of people here heard the testimony delivered on oath; newspapers published in the communities gave graphic accounts of the trial, which itself, conducted with all of the paraphernalia and impressiveness of a military court-martial, had produced a profound effect upon the public mind. Men had taken sides. In view of these facts, partly brought to the attention of the court by the district attorney and partly within the knowledge of the presiding judge, it was determined to choose from that great body of merchants, bankers, manufacturers, and farmers from a number of the law-respecting interior counties of the district a high-minded jury which had neither formed nor expressed an opinion, who were without bias or prejudice, who were perfectly impartial, who would, in the language of their oath, "diligently inquire and true presentment make" as to these momentous issues now before the court. That the court had the right to draw the jury in Macon in open court, although the court was in vacation here, we have no doubt. The jury was drawn there as a matter of course, as has been the practice of the court, whenever necessary, for many years, and no prejudice to the defendants, or either of them, resulted therefrom.

After exhaustive argument by the eminent counsel and careful consideration by the court, I am finally convinced that the pleas are each and all bad. There is pleading defective in substance and in form. This I avoid to discuss further. The pleas set up no violation of any substantial right of these defendants. They do not allege or intimate that there was any unfairness on the part of anybody. They do not specify as an incompetent juror a single man on the grand jury who found this true bill as one not in a position to do them full justice, and who was not in all respects such a man as a grand juror of this court ought to have been. To quash this indictment, in view of the character of this pleading and the character of the indictment against the parties accused, would be, to my mind, abhorrent to the principles of public justice. But, if these pleas were all good in form and substance, they have been waived by these defendants, who, by unnecessarily resisting the processes of the court, and resorting to dilatory expedients of one sort and another, have delayed trial for more than two years, and who, not only refusing to come before the court as they ought to have done, but by exhausting every expedient to prevent the government from bringing them here, now come two years after the indictment was filed, and seek to have it denounced upon technical averments contradicted by the record and the law, but which, if true, would be in no sense prejudicial to them. Said Dr. Wharton, in his well-known work on Criminal Pleading and Practice (paragraph 344), with regard to pleas in abatement to indictments:

"The defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, for, if he lies by until a bill is found, the exception may be too late. But,

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where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash or by plea in abatement; the latter, in all cases of contested fact, being the proper remedy."

This language is quoted with approval by the supreme court of the United States in a case where the venire issued November 18th, the court opened December 3d, the indictment was returned December 12th, the plea in abatement was filed December 17th, five days later; and that great court held that it was too late. How obvious it is that after two years the defendants are estopped. Subsequently to the decision in the Agnew Case, as late as April 10, 1900, the circuit court of appeals of this (the Fifth) circuit, quoting from the Agnew Case, and reiterating its principle, held that a plea in abatement filed two months after the indictment was too late. These authorities will suffice, but there are many others to the same effect. It is idle to contend that the accused can avoid the legal effect of their conduct on this plea because they were advised by their counsel that they could not be removed here for trial. It is equally futile to contend because they were under bond to appear before the district judge in New York. All the judicial tribunals from the commissioner in New York to the supreme court in Washington have finally adjudicated that the law commanded and compelled their appearance to answer this indictment. To excuse their failure to plead because of their abortive efforts to resist the process of the court would give them an advantage of their own wrong, for in the long interval between the filing of the indictment and the filing of this plea the bar of the statute may have intervened. Any advice to resist the process of this court given by their own counsel in New York is therefore wholly immaterial. And the bond given to the judge in New York had the purpose to make sure not that they should stay there, but that they should come here. If, at any time, they had surrendered to the marshal of this district, or appeared in court, eo instante they and their sureties would, by operation of law, have been exonerated from the obligation of that bond. The long delay in filing this plea is thus clearly seen to be due to their voluntary action, and they cannot now be heard to attack the indictment by this plea, as they might have done had they promptly respected the law, and made their appearance in obedience to its mandate.

For these reasons judgment will be entered overruling the pleas and ordering the defendants to respond to the indictment.

CONSOLIDATED FASTENER CO. v. TOPPEN et al.

(Circuit Court, S. D. New York. December 21, 1901.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where infringement is clearly shown, so as to entitle complainant to a preliminary injunction, and the infringing article is manufactured abroad and imported into this country, complainant has the right to the issuance of the injunction, and to use or publish it for legitimate purposes, notwithstanding the promise of defendant not to purchase or use any more of the articles.

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In Equity. Suit for infringement of patent. On motion for preliminary injunction.

John R. Bennett, for the motion.
Stephen J. Coxe, opposed.

LACOMBE, Circuit Judge. Construing the patent as it has been construed in the former opinions of circuit court and circuit court of appeals, infringement seems quite clear. Were the manufacturer in this country, there might be more force in defendants' suggestion that their promise not to purchase or use any more infringing articles be accepted as sufficient. As it is, however, complainant has made out a case for the relief now prayed, and, if defendants do not intend to import any more of this form of fastener, the latter will not be injured in any way by granting it. This, of course, is on the assumption that complainant is applying in good faith, and with no intention of using this decision improperly.

The motion for preliminary injunction is granted, with leave to defendants to move to set it aside should this decision be advertised or published by complainant, or any one in its behalf or in its interest, without such a statement as will clearly show that such decision affects only the particular device now before the court, and not the one set out in United States letters patent No. 662,844, of November 27, 1900.

CIMIOTTI UNHAIRING CO. et al. v. BOWSKY.

(Circuit Court, S. D. New York. January 7, 1902.)

1. PATENTS—SUITS FOR INFRINGEMENT—REFERENCE TO ASCERTAIN PROFITS.
Upon a reference to ascertain the profits realized by a defendant from the use of infringing machines, his testimony in another suit as to such profits is admissible against him as an admission.

2. SAME—EVIDENCE TO SUSTAIN FINDINGS.
Where a defendant testified as to the profits realized from the infringing machines used by him, without stating that any part of such profits arose from anything but the infringement, the master is justified in assuming that no part of such profits were to be distinguished as arising from the noninfringing parts of the machine, and in finding accordingly.

In Equity. Suit for infringement of patent. On exceptions to report of master.

See 95 Fed. 474.

Louis C. Raegener, for plaintiffs.
Henry Schreiter, for defendant.

WHEELER, District Judge. The master has found the defendant's profits from his admission on the stand that he testified in another proceeding that his profits for unhairing skins on the infringing machines were 75 cents per dozen, all expenses deducted.

One exception of defendant to the report is that the findings are "based upon irrelevant, incompetent, and inadmissible evidence"; another is that only a part of each machine infringed, and that there

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is no evidence of what part of the profits "resulted from the use in the defendant's machines of this infringing device." The defendant's testimony in the other case, reproduced by his admission in this, related to this infringement, and to the profits realized from it, and there is no fair question but that it was admissible as evidence of the facts stated in it against him. It stated the profits as resulting from the use of the infringing machines, and did not state that any part of them resulted from anything but the infringement, and in reproducing it he did not so state voluntarily, nor on cross-examination by his counsel. Although profits arising from infringement must be distinguished by proof, the failure to claim that any of those testified to by the defendant arose from anything else than the infringement in question, at either time, seems to be evidence from which the master might find that there were none to be distinguished as arising from anything but the infringement.

Exceptions overruled.

CIMIOTTI UNHAIRING CO. et al. v. BOWSKY.

(Circuit Court, S. D. New York. January 18, 1902.)

EQUITY—REFERENCE—REOPENING HEARING BEFORE MASTER.

Upon a reference to ascertain the damages for infringement of a patent complainant introduced before the master testimony given by defendant in another suit as to the profits made by him by the use of the infringing machines. Defendant's counsel made no effort to correct such testimony, but elected to rely on his exception to the master's report on the ground that the testimony was incompetent. *Held* that, after the court had overruled such exception, it would not reopen the hearing before the master to permit defendant to show that his testimony in the previous suit was inaccurate.

In Equity. Suit for infringement of patent. On motion to reopen hearing before master. See 95 Fed. 474.

Henry Schreiter, for motion.

Louis C. Raegener, opposed.

LACOMBE, Circuit Judge. Upon the hearing before the master defendant was examined, and admitted that he had testified in another suit that he made profits on unhairing skins at the rate of 75 cents per dozen. He now says that the statement he made in the former trial was inaccurate, and that he knew it to be inaccurate when on the second trial he admitted that he had made it. The excuse given for not correcting it is that counsel supposed the master would give no weight to the admission of the witness. That excuse terminated when the master filed his report, which was based mainly upon this very admission. Defendant made no effort, by motion before the master, to have the case opened, and to be given the opportunity to show that his statement in the former trial was inaccurate. On the contrary, he elected to except to the report, saying nothing of any inaccuracy, and assuming that he would succeed in convincing this court that the master was in error. He failed to convince the court, and the master's report was confirmed. Defendant now

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moves to reopen the case, and to be allowed to put in before the master testimony of which he knew, and which was available to him when the hearing before the master was going on. Such practice is unheard of, and would be intolerable.

The motion is denied.

THE JAMES TURPIE.

(District Court, D. New Jersey. February 4, 1902.)

1. SALVAGE—COMPENSATION—RESCUE OF STRANDED SHIP.

Salvage services performed by a wrecking tug and barge equipped expressly for the service, and having a crew of 30 men, by which a steamship stranded in a dangerous position on the coast was promptly and skillfully rescued without injury to herself or cargo, *held* to entitle the salvors to an award of 5 per cent. on the amount salved, the value of ship and cargo being $153,000 and pending freight about $4,000.[1]

2. SAME—SUIT IN REM TO RECOVER FOR SERVICES—COLLATERAL ISSUES BETWEEN SHIP AND CARGO.

In a suit by a salvor against a ship and cargo to recover for salvage services the court cannot determine issues which may incidentally or collaterally arise between the parties libeled. The ship cannot be required in such suit to answer to a claim of the cargo owners of negligent navigation as affecting the question of liability between ship and cargo, having been brought into court for a different purpose, and service of process on her proctor on behalf of the cargo is ineffective to raise such an issue.

In Admiralty. Suit to recover for salvage services.

Black & Kneeland, for libelant.

Convers & Kirlin, for the James Turpie and freight moneys.

Butler, Notman, Joline & Mynderse, for cargo.

KIRKPATRICK, District Judge. The libel in this case is for salvage, filed on behalf of the North America Wrecking Company against the steamship James Turpie and a cargo of sulphur, fruits, nuts, and other merchandise on board of her, and against the freight moneys for the carriage of said cargo. It appears from the record in the case that on October 25, 1898, the steamer James Turpie, bound from a port in Sicily to the port of New York, laden with a cargo of sulphur, fruits, nuts, and other merchandise, during a dense fog, was stranded on the Brigantine Shoals off the coast of New Jersey. The captain communicated with the owners of the cargo in the city of New York, and telegraphic notice of the accident was sent to the Delaware Breakwater, where the wrecking tug North America, was lying, and thereupon the said tug North America, which is a vessel provided with all the necessary appliances for rendering prompt and efficient assistance to vessels in distress, proceeded at once to the aid of the said Turpie. In the forenoon of the 26th of October, upon her arrival, the North America offered her services to the Turpie, but her aid was declined; and thereafter the Turpie endeavored with her own power to

[1] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

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back off the shoals upon which she had stranded, but failed in the attempt, so that at the conclusion of her efforts she lay broadside to the beach. In the meanwhile the North America lay by for the purpose of rendering aid if the same should be necessary. After the ineffectual attempt of the Turpie to relieve herself, her captain requested assistance from the North America, and such efforts were made that soon thereafter the Turpie was floated uninjured, and proceeded upon her voyage under her own steam. It is stipulated in the case that the value of the Turpie was $50,000, that the value of the freight was $4,150, and that the value of the cargo was $103,083. It also appears that the libelants are engaged in maintaining other appliances than the North America for rendering prompt assistance to vessels in distress, and that they sent to the aid of the North America a wrecking barge, equipped with steam winches, anchors, and hawsers such as are used for that purpose, and also furnished a crew of 30 men, who aided in performing the services necessary to float the Turpie. It is not denied that the services rendered were meritorious, nor that they were performed promptly and in a skillful manner. I cannot doubt that, lying broadside to the beach, and exposed to the open sea, the situation of the Turpie was a dangerous one, and that, in the event of an easterly storm, such as is liable to occur at that season of the year, the peril of a ship so situated would be extreme. The danger and risk to the salvors were not great. Nevertheless, I am of opinion that for its prompt and efficient aid the libelants are entitled to fair and reasonable compensation, and that such compensation should be 5 per cent. on the whole amount salved.

It is insisted on the part of the cargo that the court should at this time consider the question of negligent navigation on the part of the steamer as affecting the question of liability between the ship and cargo. It is alleged that no soundings were taken and no lookout kept, but that, notwithstanding the fog, she proceeded with undiminished speed. But this question of negligence is an issue which the ship has had no opportunity to traverse, and one which cannot be determined in this case. The only matter in dispute is how much the salvor is entitled to for its services. The question of whether the cargo shall be relieved of its proportionate part of the burden must be settled in a suit between the ship and cargo, brought for that purpose. It is urged that notice was given that such negligence would be insisted upon before the court at this time. But the ship was not in court for the purpose of receiving any such notice. An attempt was made on the part of the cargo to serve process upon the proctor of the ship to answer to such charge of negligence, but this court held that service upon the proctor, employed to defend as against a claim for salvage, was not sufficient to compel the ship to appear and answer to such charge. Neither the charter party nor the bill of lading under which the ship assumed the risk of carriage is before the court. The ship is in court to have determined the amount due for salvage, and not to answer to negligence to the cargo or a breach of contract of carriage. If the cargo has any claim against the ship for relief on account of its negligence, it cannot be presented here at this time. The court cannot, in a suit between the salvor and those who were benefited by his

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services, determine any issues which may incidentally or collaterally arise between the parties libeled therefor.

Let a decree be drawn in accordance with these views.

THE INDEPENDENT (two cases).

(District Court, D. Rhode Island. February 7, 1902.)

Nos. 1,086, 1,087.

SALVAGE—EXTINGUISHING FIRE IN BARGE—AMOUNT OF AWARD.

A wooden barge, valued at from $40,000 to $50,000, laden with a cargo of coal worth about $10,000, took fire while lying in harbor, near a pier. There was no fire boat in the harbor, and the barge could not use her own fire apparatus, owing to the location of the fire. In response to her signal, four tugs, which were all that were within reach, each fully equipped with fire apparatus, came to her assistance, and rendered prompt and efficient service. After three or four hours work, the barge was scuttled on orders from the master of one of the tugs, and lay aground, with a free board of five to six feet amidships at high tide. The tugs continued to throw water into her for some 30 hours before the fire was extinguished, and then two of them pumped her out, one of them working for over three days in all. Through their efforts there was a saving of damage on barge and cargo of from $20,000 to $25,000. *Held*, that they were entitled to an award for salvage services of $4,000.[1]

In Admiralty. Suits to recover for salvage services.

E. D. Barrett, for A. M. Miles.

Matteson & Healy, for Providence Steamboat Co.

Peter S. Carter, for the Independent.

BROWN, District Judge. These are consolidated libels for salvage services rendered by the steam tugs Carrie A. Ramsey, Gaspee, and Reliance, owned by the Providence Steamboat Company, and by the steam tug Mars, owned by Bartlett & Shepard, of Philadelphia, Pa., in extinguishing a fire on the barge Independent. The Independent, a wooden barge 252 feet long, 52 feet beam, and 24 feet draught, with a cargo of 3,957 tons of bituminous coal, was anchored in the Providence Harbor, on the easterly side of the channel, nearly abreast of the Wilkesbarre Pier. About 8:30 a. m., on Thursday, March 7, 1901, fire broke out on the barge, and flames came up the forward companion way. The master blew the steam whistle, and put his flag in the rigging, Union down. The tug Carrie A. Ramsey, Walter E. Sutton master, came immediately in response to the signals, and within 10 minutes, at 8:40 a. m., was alongside, with her fire hose already coupled on, and almost immediately had a stream of water down the forward companion way. Though the barge was provided with engine and pumps, the forward part of the barge near the engine room was so full of smoke and flame that it was impossible to use them, and the barge herself was practically powerless to fight the fire. The Gaspee

[1] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

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and the Mars arrived at about 10 o'clock, and the Reliance some time later, probably not far from 10:30. Sutton, master of the Ramsey, who had taken charge of extinguishing the fire, found that the efforts of the four tugs with five or six streams of water were insufficient, and determined that it was necessary to scuttle the barge. He sent for additional hose, and for a carpenter, who arrived at about 11 o'clock, and immediately began to cut a hole in the side. Water began to run in through this hole at about 11:30, and the carpenter worked until about 1 o'clock, when the tide water was entering the side freely. The barge, drawing some 24 feet of water, was aground the greater part of the tide. She had a free board of five or six feet amidships at high tide, and considerably more than this at low tide. High water was at 9:20 a. m. The cargo of coal did not catch fire, and this was probably prevented by the scuttling of the barge. The tugs continued to throw water into the barge during the remainder of the day and night of March 7th, and on the morning of the 8th. At about 1:30 p. m., on March 8th, they had the fire practically under control, and it was probably extinguished some time that afternoon, though there is a controversy as to the exact time. On Friday afternoon the barge was pumped practically full, and the water was two or three feet deep on her decks. Shortly after 5 o'clock the Reliance started to pump out the barge, and the Gaspee began soon afterwards. The Gaspee and Reliance continued pumping until 4 a. m., March 9th, when the Gaspee ceased, the Reliance continuing until 3:30 a. m., March 10th. The barge's own pumps had been rigged in the meantime, and she was then able to take care of herself. There is some evidence that the barge was in danger of straining, though this is in dispute.

The claimant, to reduce the salvage award, criticizes in about every particular the conduct of the salvors, and makes charges of bad faith upon the part of the Providence Steamboat Company, which, in my opinion, are entirely unfounded and unjustified. Nor do I consider that these contentions need to be dealt with in any detail.

The main contention is that the efforts of the tugs were useless; that the fire was actually extinguished by the scuttling of the barge; and that this might have been done by the master and crew of the barge without assistance. While it is true that the scuttling of the barge did undoubtedly protect the cargo, I am of the opinion that the service rendered by these tugs was an important and valuable service to the barge. Despite the efforts of the tugs, the damage to the barge is variously estimated at from $8,000 to $12,000, and I think, in view of the fact that the barge was absolutely powerless and could not use her own engine and pumps, that without the arrival of the Ramsey, and the subsequent arrival of the other tugs, it is highly probable that the barge would have been burned to the water's edge. During the early part of the fire the tide was falling, increasing the free board of the barge, which was between 5 and 6 feet amidships, 12 or 15 feet at the bow, and about 10 feet at the stern, at high water. Her free board was considerably more than this during a large part of the fire.

It is contended that the fire burned itself out without the assistance of the tugs; but I think that the only reasonable conclusion is that the fire was prevented from extending to and destroying the deck and

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upper works of the barge by the efforts of the salvors. These tugs comprised all the available tugs, there being no public fire boats in the harbor. They were well equipped with fire hose; their services were rendered promptly and diligently; and Sutton, master of the Ramsey, who took charge, advised and ordered the immediate scuttling of the barge, and, by procuring a carpenter without delay, got a hole through her very much quicker than would have been the case had the master and crew of the barge undertaken it. This was important, as the tide was dropping, and the barge was aground.

In considering what was the value of the property saved to the owners, I encounter great disparity in evidence as to the value of the barge before the fire. I do not find it necessary to determine exactly the value of the barge upon this disputed evidence. It is sufficient, for the purposes of this case, to say that I am satisfied that she was worth anywhere from $40,000 to $50,000, and a variation of a few thousand dollars one way or the other would not affect substantially the amount which seems to me to be a fair compensation and reward to these salvors. Her cargo was sold alongside, after the fire, for $10,511.22. Upon the present argument, it does not seem necessary to consider the freight as a separate item, and we may take the cargo itself, as enhanced in value by carriage from Norfolk, Va., to Providence. I think, however, that the cargo of this barge was not in very serious peril. It was saved by the scuttling, at a place near the Wilkesbarre Pier, where it could be easily handled, even with the barge sunk, and salvage on 25 per cent. would be probably an outside figure.

No evidence has been called to my attention as to what would have been the value of the barge had she burned to the water's edge, and I have difficulty, therefore, in determining, or even approximating, the actual amount which was saved to the barge owners through the efforts of the tugs. Assuming, however, that her actual damage was $10,000, it would seem that, at the same rate, it could not have been far from $30,000 or $35,000 but for the efforts of the salvors. I think it fair to say that these barge owners were saved $20,000 to $25,000 by the efforts of the salvors. This is a rough estimate; but as I do not propose to award a definite percentage, and as the evidence is insufficient to enable me to do so, it is sufficient for the purposes of this case.

Considering, on the one hand, that this service was entirely without risk to the salvors, or without any serious inconvenience; on the other hand, that there was no public fire boat; that these tugs were equipped for fire service; the prompt action of Sutton, master of the Ramsey; and that there has been a considerable saving of valuable property,—I award the sum of $4,000 for total salvage.

As to the apportionment of the salvage among the salvors, I shall ask for further assistance of counsel. I am of the opinion that Walter E. Sutton is entitled as master to rather a larger portion than the other masters, and request counsel to agree or to submit proofs as to a proper apportionment.

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BOARD OF COM'RS OF STANLY COUNTY et al. v. COLER et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 290.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF STATUTES.
A decision of the supreme court of a state construing a valid statute, and holding invalid bonds of a county which had been previously issued thereunder and placed in the market, and had been sold to bona fide purchasers, where none of the bondholders were parties to the action, is not binding on a federal court in an action subsequently brought by bondholders against the county, but it is the duty of such court to determine the question independently.[1]

2. COUNTIES—POWER TO AID RAILROADS—NORTH CAROLINA STATUTE.
Code N. C. 1883, § 1996, first enacted in 1869, and re-enacted in the Code in 1883, provides that "the boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." The succeeding sections require the submission of the question of the proposed subscription to the voters of the county. The constitution of 1868 (article 5, § 4) expressly provides that the state shall give aid to railroads only when authorized by a direct vote of the people, or "to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a direct pecuniary interest." *Held*, that in view of the difference in the language of the two provisions, as well as of the plain and ordinary meaning of the words of the statute relating to counties, it could not be construed as limited in application to cases where railroads had been commenced and were unfinished at the time the constitution was adopted, and in which the counties, as such, had a direct pecuniary interest, but that it conferred power on counties to subscribe for stock, in the manner prescribed, in any railroad company which had been duly incorporated to build a projected road in which the citizens of the county, as a body, have a general interest because of the supposed benefits to be derived from it.

3. SAME—VALIDITY OF BONDS—EFFECT OF RECITALS.
Where a county issued negotiable bonds, as authorized by such statute, in payment for stock subscribed in a railroad company which built its road into the county as agreed, and the county received and continued to hold the stock, taxed the road, and for a number of years paid the interest on the bonds, it is estopped by recitals therein that they were issued by authority of such statute, as against a bona fide holder for value, to deny that the subscription was necessary to aid in the completion of the road, or that the citizens of the county had an interest therein, both of which were facts precedent to the right to exercise the power conferred by the statute.

Goff, Circuit Judge, dissenting.

On Rehearing. For former opinion, see 37 C. C. A. 484, and 96 Fed. 284.

A. C. Avery and James E. Shepherd (Avery & Avery, Schenck & Schenck, and Shepherd & Busbee, on the briefs), for appellants.

Charles Price (John F. Dillon and Harry Hubbard, on the briefs), for appellees.

[1] State laws as rules of decision in federal courts, see notes to Griffin v. Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

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Before GOFF, Circuit Judge, and MORRIS and BOYD, District Judges.

MORRIS, District Judge. The opinion expressing the conclusions of this court on the first hearing of this case was filed August 1, 1899. 37 C. C. A. 484, 96 Fed. 284. Upon the appellees' petition for a rehearing the whole case has been fully reargued in connection with the appeal in Wilkes Co. v. Coler, decided at this term, 113 Fed. 725, and in connection with the answers of the supreme court of the United States to the questions certified in that case. 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642.

The bonds in question are as follows:

"County of Stanly Six Per Cent. Bond.

"Stanly county, state of North Carolina, is indebted to the bearer in the sum of five hundred dollars payable, * * *" etc. "This bond is one of a series of eighty of the denomination of one thousand dollars each, and forty of the denomination of five hundred, making a total of one hundred thousand dollars, issued by authority of an act of the general assembly of North Carolina ratified the third day of March, A. D. 1887, entitled 'An act to amend the charter of the Yadkin Railroad Company,' and of sections 1996, 1997, 1998, and 1999 of the Code of North Carolina, and authorized by a majority of the qualified voters of Stanly county at an election regularly held for that purpose on the 15th day of August, A. D. 1889, duly ordered by the commissioners of Stanly county. This series of bonds is issued to pay the subscription of one hundred thousand dollars made by Stanly county to the capital stock of the said railroad, known as the Yadkin Railroad Company. * * *" etc. "In testimony whereof, the chairman of the board of county commissioners of Stanly county hath hereunto subscribed his name for and on behalf of said board, and the clerk of the superior court of Stanly county hath countersigned the same and affixed thereto the seal of said superior court this fourth day of July, A. D. 1890."

The recitals of present interest are (1) that the bonds are issued by authority of the act of March 3, 1887; and (2) of sections 1996, 1997, 1998, and 1999 of the Code; and (3) are authorized by a majority of the votes of the county.

The act of March 3, 1887, the supreme court of North Carolina has decided, never became a law of North Carolina, so far as it undertook to give authority to issue the county bonds, for the reason that it was not passed with the special formality required by section 14 of article 2 of the North Carolina constitution of 1868, which declares that no law shall pass, authorizing a county to raise money on its credit, or impose a tax, unless the bill be read three several times in each house of the general assembly, and pass three several readings on different days, and the yeas and nays on the second and third reading of the bill are entered on the journals. The recital of the invalid enactment of March 3, 1887, however, does not invalidate the bonds, if there was in force at the time the bonds were issued other valid legislation which gave power to Stanly county to issue them; and it is urged upon us by counsel for the bondholders that the recited sections of the Code, reasonably construed, and applied as understood at the time the bonds were issued, gave sufficient power and authority. County Com'rs v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; Commissioners v. January, 94 U. S. 202, 24 L. Ed. 110; City of Evansville v. Den-

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nett, 161 U. S. 434, 443, 444, 16 Sup. Ct. 613, 40 L. Ed. 760; Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; Wilkes Co. v. Coler, 180 U. S. 506–524, 21 Sup. Ct. 458, 45 L. Ed. 642. These sections of the Code were originally enacted as chapter 171 of the laws of North Carolina of 1868–69, and were re-enacted as sections 1996, 1997, 1998, 1999, and 2000 of the Code of 1883, with all the formality required by section 14 of article 2 of the constitution with regard to a law allowing counties to pledge their credit and impose a tax for that purpose. Commissioners v. Snuggs, 121 N. C. 394–401, 28 S. E. 539, 39 L. R. A. 439.

The following are sections 1996 and 1997:

Section 1996 of the Code of North Carolina: "The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

Section 1997 of the Code of North Carolina: "The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

The bonds were duly authorized by a majority of the qualified voters of Stanly county, and were dated July ———, 1890, and were issued from time to time as the railroad was built, and were placed on the market and sold; and for four years a tax was levied and collected by the county, and the interest coupons paid. When the tax for the fifth year had been collected, the superior court of Stanly county, in 1897, at the instance of the commissioners of the county and certain taxpayers, held the bonds to be invalid, and enjoined the treasurer of the county from paying the interest; and on appeal the supreme court of North Carolina affirmed the ruling. Commissioners v. Snuggs (1897) 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439. The supreme court of North Carolina (Chief Justice Faircloth dissenting) held that Stanly county had no power or authority, under the above-recited sections of the Code, even with an affirmative vote of the qualified voters of the county, to issue bonds, and levy a tax for their payment, in aid of a railroad not begun before the adoption of the state constitution of 1868.

When this case was first heard in this court the argument of the counsel for the bondholders was largely devoted to the effort to show that the decision of the supreme court of North Carolina against the validity of the act of March 3, 1887, amending the charter of the Yadkin Railroad Company, and authorizing Stanly county to subscribe for its stock and issue these bonds, and declaring that act invalid

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because not passed as required by the state constitution, was a ruling which this court ought not to follow. That question has been settled in favor of the county by the supreme court of the United States. Wilkes Co. v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642. The other question,—how far this court was bound to follow the rulings of the supreme court of North Carolina in its construction of the sections of the Code recited in the bonds, was not fully discussed, and this is the question we are urged to re-examine upon this rehearing.

The articles of the Code, first enacted in 1868–69 (chapter 171), and re-enacted as part of the Code in 1883, before the Stanly county bonds were authorized or issued, does, in the broadest terms, by section 1996, declare that "the boards of commissioners of the several counties shall have power to subscribe stock to any railroad company when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." The supreme court of North Carolina declared in Commissioners v. Snuggs (1897) that this language was to be held to mean that the railroad must be an unfinished one, which had been begun before the subscription was made, and that it must also be a railroad in which the county had a direct pecuniary interest. The question now to be re-examined is whether that construction is one to which, as a proposition of law, we can assent; and, if not, are we bound to follow the decision of the supreme court of North Carolina?

The case of Commissioners v. Snuggs was not a case to which any bondholder was a party. The county commissioners and certain taxpayers of the county were the plaintiffs, and the defendant was the county treasurer, who was the appointee of the county commissioners, had no personal interest to resist the plaintiffs, and represented no bondholder. The bonds had been sold as negotiable securities, and had been over four years on the market, and had been purchased by widely scattered investors. The railroad into Stanly county had been built and was in operation, and for over four years the authorities of the county had recognized the bonds as valid obligations of the county, and had paid the interest. The case was, in effect, a direct attack upon the property of bona fide holders of the bonds, in which they had no hearing. It seems, therefore, to be a case in which it is our duty to examine the question independently, with, however, an earnest disposition to lean towards the conclusion arrived at by the supreme court of North Carolina. Folsom v. Township Ninety-Six, 159 U. S. 611, 627, 16 Sup. Ct. 174, 40 L. Ed. 278; Burgess v. Seligman, 107 U. S. 20, 33, 34, 2 Sup. Ct. 10, 27 L. Ed. 359; Loeb v. Columbia Tp., 179 U. S. 472–493, 21 Sup. Ct. 174, 45 L. Ed. 280.

Was there anything in the constitution, laws, or decisions of North Carolina which should have given warning to purchasers of the bonds that the power given to counties by section 1996 of the Code was not applicable to the Yadkin Railroad Company in Stanly county? As to state aid, the constitution clearly said (article 5, § 4) that it should only be given, unless submitted to a direct vote of the people of the state, "to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a direct pecuniary interest." The language used by the framers of the

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constitution when dealing with the aid which might be given, not by the state, but, by counties, to railroads, is quite different, and it was to be presumed that the difference in language was significant of a corresponding difference in meaning, intention, and policy. With regard to counties, the language of the constitution is simply (article 7, § 7) that no county shall loan its credit, nor shall any tax be levied, except for necessary expenses thereof, unless by a vote of the qualified voters therein. With regard to section 1996 of the Code, there had not been, prior to the issuing of the bonds in suit, any decision of the supreme court of North Carolina construing its meaning. The import of its words, "The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest," was to be understood by those whose rights might be affected by them in their natural, ordinary, generally received sense. In the first place, there is nothing in the words or their context to indicate that when enacted in the Code, in 1883, they were not intended to be a guide for the future, and not for the past. The office of laws is to operate upon future actions, and the universal rule is that statutes are prospective in their operation, unless the statute itself declares it to be retrospective. It would seem, therefore, that while the Code remained unaltered whenever the case arose in which the citizens of a county might have an interest in a railroad, and county aid was necessary to its completion, section 1996 gave power to the board of commissioners to subscribe to its stock. James v. City of Milwaukee, 16 Wall. 159, 21 L. Ed. 267. Then follows section 1997, which prescribes how the board of commissioners shall by vote determine the amount, and whether the subscriptions shall be in bonds, money, or property, and how they shall, when they have so determined, submit the proposition to a vote of the people, and reiterates the provision that "the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper." Section 1998 provides how the election shall be had. Section 1999 declares that in case the county shall subscribe the amount proposed, in bonds, the county commissioners shall have power to fix the rate of interest, and when and where it shall be payable, and to raise by taxation from year to year the amount necessary to meet the interest on said bonds. Section 2000 provides that the taxes to be raised for the payment of interest and principal shall be collected in like manner as other state taxes, and paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners "as directed by this chapter." It would seem that the fair import of this valid legislation would be to give to the county commissioners of Stanly county power to do the very thing they have done in issuing these bonds. It is true that the supreme court of North Carolina has decided to the contrary, and has invalidated the bonds by its decision in 1897 in Commissioners v. Snuggs; but that was a case instituted five years after the bonds were put on the market, and in which the bondholders were not parties or represented. The supreme court of North Carolina was led to the conclusion that, when

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the act of 1868–69 was re-enacted in the Code, section 1996 and the four succeeding sections, could have had reference to no case except where the county had a direct pecuniary interest in a railroad which had been begun and was unfinished at the time of the adoption of the constitution, in 1868, and could not apply to the Yadkin Railroad, which was begun in 1889. With this conclusion, after the most careful consideration, and having now heard the matter reargued, a majority of the judges composing this court are unable to agree. The framers of the constitution of the state, when intending to express such restriction, used such entirely different language that it is difficult to suppose that the legislature in 1868–69 and in 1883, with that language in the state constitution, intended the same thing when they used the language now found in the Code.

The words "in which the citizens of the county may have an interest" would seem to be the appropriate words to express the general interest which the whole body of the people of a county have in a railroad which they believe will benefit them, as distinguished from a direct pecuniary interest of the county as a corporation. When the framers of the constitution intended to limit and restrict the state in lending its credit to railroads, they said, "except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a direct pecuniary interest, unless by a direct vote of a majority of the people of the state who should vote thereon." How natural and to be expected it would be that, if the legislature had intended to restrict county aid to the same class of railroads, they would have used somewhat similar language! Finding that section 1996 gives power to the county to subscribe to stock in any railroad "when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest," is it not reasonable to read it as meaning to complete the raising of the money necessary to build the road? When the route is surveyed and determined upon, and the charter for a private corporation obtained, and part of the stock subscribed, but not sufficient to complete the road, is it not most natural, with regard to such a projected road, that the authority to the county to subscribe stock should be spoken of as aiding in the completion of the road? To complete a projected railroad for which a charter has been obtained, and for constructing which part of the stock has been subscribed, the thing needed is more subscriptions of stock. And when the subject in hand is aiding in the completion of the road by subscription of stock, those aid in its completion who make the additional subscriptions to the stock. The language of Mr. Justice Brewer in Town of Andes v. Ely, 158 U. S. 312–321, 15 Sup. Ct. 954, 39 L. Ed. 996, is pertinent:

"While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requirements of a statute, in order that no burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed or limited as to make them a snare to those who are encouraged to invest in the securities of the municipality."

Cited, also, in Provident Life & Trust Co. v. Mercer Co., 170 U. S. 593–600, 18 Sup. Ct. 788, 42 L. Ed. 1156.

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In the resolution adopted by the board of county commissioners in June, 1889, ordering an election to be held in Stanly county to ascertain whether a majority of the voters favored the subscription, it was stated, "It appearing that the citizens of said county have an interest in said railroad," and it was provided:

"If the proposition to vote said subscription shall be ratified by a majority of the qualified voters of said county at said election, then said bonds shall be delivered to said Yadkin Railroad Company as follows: Twenty-five thousand dollars when ten miles of said road is constructed and in operation from Rowan county line into said county of Stanly, twenty-five thousand when said road is constructed and in operation from the town of Salisbury to the town of Albemarle, and the remaining fifty thousand dollars when said road is constructed and in operation from the town of Salisbury to the village of Norwood, in Stanly county: provided, that the said railroad company shall be required to begin the construction of said road at Salisbury within ninety days from and after the first day of October, 1889, and to complete the same to Norwood within 18 months thereafter, and, if not so begun and completed, then said bonds shall not be delivered to said company: provided, however, that the board of commissioners of Stanly county shall have full power and discretion to extend the time for the performance of the conditions and limitations hereinbefore mentioned."

Thus it would seem that the board of commissioners and the voters of the county, a majority of whom voted in favor of this proposition, understood very intelligently what was meant by aiding in the completion of a railroad in which the citizens of the county might have an interest. The meaning given to the language of the Code after the rights of the holders of the bonds had vested is too strained, unnatural, and unwarranted to be accepted, to the destruction of property rights acquired in good faith, based upon the ordinary meaning of the language. Reluctant as we have been, in deference to the opinion announced in Commissioners v. Snuggs, to come to this conclusion, we think there is no escape from it. Moreover, is not the legal effect of the recital in the bonds stating that they were issued by authority of sections 1996, 1997, 1998, and 1999 of the Code of North Carolina equivalent to a statement that the facts existed which authorized their issue under those sections, viz., that they were issued to aid in the completion of a railroad in which the citizens of the county had an interest, and is not the county now estopped from denying that recital? It seems to us that many cases have so held. Chaffee Co. v. Potter, 142 U. S. 355, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; City of Evansville v. Dennett, 161 U. S. 434–442, 16 Sup. Ct. 613, 40 L. Ed. 760; Board of Com'rs v. National Life Ins. Co., 32 C. C. A. 591, 90 Fed. 230, 231; Hughes Co. v. Livingston, 43 C. C. A. 541, 104 Fed. 306–316; School Dist. v. Rew (C. C. A.) 111 Fed. 1, 7, 8; Belo v. Commissioners, 76 N. C. 489, 493, 494, 495.

It is urged in behalf of the county that legislation substantially the same, in terms, as sections 1996 to 2000 of the Code, had been held to be unconstitutional in 1885 by the supreme court of North Carolina in Barksdale v. Commissioners (1885) 93 N. C. 472. In that case the question was as to the legality of the tax assessed by the county for the support of schools under a general law giving power to all counties. The objection made was that the tax was in

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excess of the limit prescribed by the constitution, and that the act allowing the commissioners to exceed the limit was unconstitutional, because in disregard of article 5, § 1. The tax in that case was levied without being submitted to a vote of the people of the county, and was therefore inhibited by section 7, article 7, of the constitution. The further objection also prevailed that the tax about to be levied exceeded the limit restriction of section 6 of article 5, viz:

"The taxes levied by commissioners of the several counties shall be levied in like manner with the state taxes, and shall never exceed the double of the state tax, except for a special purpose and with the special approval of the general assembly."

There is no allegation or evidence in this case that the payment of interest on these bonds requires a tax exceeding that limit, or that the tax collected and in the hands of the county treasurer, levied for the purpose of paying the coupons due at the institution of this suit, had exceeded that limit.

The case of Galloway v. Jenkins (1869) 63 N. C. 147, cited by counsel for the county, deals exclusively with the constitutional provision restricting the state from aiding railroads without a vote of the people, and has no relevancy to cases of county subscriptions. We find nothing in the decisions of the supreme court of North Carolina prior to the issue of these Stanly county bonds that pointed to any defect of power to issue them under the Code sections recited in the bonds. On the contrary, the opinion of that court in Belo v. Commissioners (1877) 76 N. C. 494, 495, is to the effect that as to bona fide holders the records of the proceedings of the commissioners affirming the existence of particular facts are conclusive, as well as the recitals in the bonds that they have been issued in pursuance of the law which authorized their issue.

The majority of the judges constituting the court on this rehearing are of opinion that the decree of the circuit court should be affirmed.

BOYD, District Judge. I concur with Judge MORRIS in his opinion filed in this case, and will give my reasons therefor:

The county of Stanly issued its bonds, in the sum of $100,000, in the years 1890, 1891, etc., for the purpose of paying its subscription to the stock of the Yadkin Railroad, running from Salisbury to a point in Stanly (Norwood),—a distance of 44 miles. It is alleged in the bill that this road runs through the best and most fertile portion of Stanly county for a distance of 30 miles. It is also alleged that the county of Stanly "has received benefits from the same, in the greatly increased value of the lands of the county, in the increased and improved transportation within the limits of the same, and, further, by reason of the taxes paid into the treasury of the county by the company in each and every year." It is also alleged "that in return for, and in consideration of, said subscription, the Yadkin Railroad Company issued to said county of Stanly stock in and to the said amount of one hundred thousand dollars, which stock the county holds now, and has held since the date of the issue of the same, to wit, the year 1891." It appears, also, that the interest on the bonds so issued

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by the county of Stanly was paid regularly to complainants and others holding the bonds until 1897,—some time before the commencement of this suit. It is alleged in the bill that complainants "bought, for valuable consideration, a large sum (the market price), a great number" of these bonds (48), of the denomination of $1,000 each; "that the purchase of the bonds was for value, in good faith, and without any notice, expressed or implied, that there was any suggestion of their being void, invalid, or fraudulent, or otherwise than perfectly legal in their issue and sale." It appears that the payment of the interest on these bonds was stopped by reason of a judgment of the superior court of Stanly county, affirmed by the supreme court of North Carolina, in 1897, in the case of Commissioners v. Snuggs, 121 N. C. 394, 401, 28 S. E. 539, 39 L. R. A. 439. In that action the bonds in question were adjudged void. It is to be noted, in the first place, that there was no bondholder party to the suit of Commissioners v. Snuggs; it being an action brought against the defendant, Snuggs, to restrain him from paying the interest on the bonds to the holders of the same; the interest, in the amount of $6,000, being in his hands, as treasurer, having been paid to him by the sheriff of the county for that purpose, and only that. It was held by him—set apart from all other funds—solely for the purpose of the payment of the interest due July 1, 1897.

The contention upon the part of the defendants, as appears from the complaint filed in May, 1897, in the superior court of Stanly, in the action against Snuggs, in which they were plaintiffs, was that the bonds sued on here were void because the acts of 1870 and 1887 were not passed in accordance with the requirements of section 14, art. 2, "of the constitution of North Carolina, in that neither of the said acts passed its several readings in the house of representatives, on three different days," and that the yeas and nays, if taken at all, were not entered upon the journal, as required, etc. In this contention the plaintiffs in this action in the state court were sustained. In the supreme court, however, it was insisted that, in addition to the power conferred by the statutes to issue the bonds, it was also conferred by sections 1996, 1997, 1998, and 1999 of the Code of North Carolina, recited in the body of the bond. The court, as appears from the opinion of Justice Montgomery, failed to uphold this contention, also, upon the sole ground, however, that the road was not shown to be an "unfinished road," and that the "citizens of the county had an interest in the same."

Section 1996 of the Code of North Carolina is as follows:

"The board of commissioners of the several counties shall have power to subscribe stock to any railroad company, or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

In the case of Commissioners v. Snuggs the sections of the Code were upheld by the court as valid statutes, and in this case were for the first time construed by the supreme court of North Carolina. They were passed regularly, and in accordance with the requirements of the constitution of the state. The court put its decision upon the ground that the sections of the Code did not apply. It was a con-

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struction of a valid statute by the court six years after the bonds in question came into the hands of complainants, innocent purchasers for value. In the case of Wilkes Co. v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642, it was decided that the decisions of the highest court of a state upon the question whether a particular act was passed in such manner as to become, under the state constitution, a law, should be accepted and followed by the federal courts. This decision was rendered in a case certified to the supreme court from this court,—Wilkes Co. v. Coler; one of the cases in which Judge MORRIS has filed the opinions suggested in the outset of this argument, and of a similar nature to this.

The question, then, is, in the case under consideration, whether the bonds are valid and legal bonds. It was contended in the argument that this court is bound by the decisions of the state court in the case of Commissioners v. Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439. I think not, and, however much we may regret it,—and we do regret it,—it is still our duty to decide this case in accordance with the principles, as we understand them, laid down by the supreme court of the United States and by this court. In Burgess v. Seligman (the leading case upon this subject), the supreme court of the United States (Justice Bradley delivering the opinion of the court) says:

"Where contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights were accrued."

Says Justice Bradley further:

"Federal courts exercise their own judgment always in reference to the doctrines of commercial law."

The rights of these parties here are to be determined according to the doctrines of commercial law; it being well settled that the bonds in question are commercial securities,—negotiable instruments.

Pine Grove Tp. v. Talcott, 19 Wall. 666, 667, 22 L. Ed. 227, was an action in the United States circuit court upon coupons cut from bonds issued by that township in aid of a railroad under an act of the general assembly of Michigan. The plaintiff in error insisted that several decisions of the supreme court of the state holding that the construction of railroads was not a public corporate purpose, such as townships were authorized by the constitution of Michigan to aid, and that such statute and the bonds issued in pursuance of it were void, were controlling. The supreme court of the United States, in declining to be bound by those decisions, said:

"It is insisted that the invalidity of the statute has been determined by the two judgments of the supreme court of Michigan, and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one states. In all of them but two it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of

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reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The national constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

Justice Harlan, in Wilkes Co. v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642, before referred to, shows that it is only in cases where the state court has held an enactment is not passed in accordance with the requirements of the constitution that its decision is controlling.

Here is a construction of a valid statute, recited in the bond, which this court is asked to follow. We are not bound by it, and, while we regret it in this case, we cannot follow it. Says Justice Harlan, in Wilkes Co. v. Coler (page 519, 180 U. S., and page 463, 21 Sup. Ct., and 45 L. Ed. 642):

"Observe that the issue is not as to the construction, meaning, or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose."

This paragraph from the opinion of Justice Harlan draws the distinction clearly and expressly between "the issue as to the construction, meaning, and scope of a statute," and the issue as to "whether that which purports to be a legislative enactment ever became a law for any purpose." The court holds that the decisions of the highest court of the state upon the question as to whether "an enactment in the form of a statute was ever passed, so as to become, under the state constitution, a law," or not, are not to be disregarded. The question here is not whether the sections of the Code relied on were ever passed as required by the constitution, so as to become valid laws (statutes of the state), but whether the circuit court of the United States is bound by the "construction, meaning, and scope of a statute" passed as required by the constitution, placed upon such statute by the highest court of a state after the issue of the bonds, which holds invalid and void bonds (negotiable instruments, commercial securities) issued by Stanly county "in good faith, put upon the market in due course of trade, purchased in open market for value"; the purchaser being unaware of any defect of authority or other irregularity on the part of the county, and there being nothing to excite suspicion of any defect or irregularity.

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In the leading case of Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 573, 574, 19 Sup. Ct. 825, 43 L. Ed. 1081, Justice Gray says:

"In Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008, this court stated, as an axiomatic principle in the law of corporations, this proposition: 'Where a party deals with a corporation in good faith, the transaction is not ultra vires, and he is unaware of any defect of authority or any other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.' 10 Wall. 644, 645; Board v. Sutliff, 38 C. C. A. 167, 97 Fed. 270. The proposition was supported by citations of many English and American cases, and among them Bank v. Turquand (1856) 6 El. & Bl. 327; and the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated Bank v. Turquand as well decided upon its facts. Knox Co. v. Aspinwall, 21 How. 539, 545, 16 L. Ed. 208; Moran v. Miami Co., 2 Black, 722, 724, 17 L. Ed. 342; Gelpcke v. City of Dubuque, 1 Wall. 175, 203, 17 L. Ed. 520; St. Joseph Tp. v. Rogers, 16 Wall. 644, 666, 21 L. Ed. 328; Humboldt Tp. v. Long, 92 U. S. 642, 650, 23 L. Ed. 752. And see Zabriskie v. Railroad Co., 23 How. 381, 16 L. Ed. 488, above cited."

The cases cited by Justice Gray in the above paragraph are decided upon municipal bonds, and show that the principle he states applies to contracts municipal as well as to other corporations; and the late Justice Miller, in his dissenting opinion in the case of Humboldt Tp. v. Long, 92 U. S. 650, 651, 23 L. Ed. 752, says:

"The case of Knox Co. v. Aspinwall, 21 How. 539, 16 L. Ed. 208, the original case, on which the rule and principles are based, is itself based upon Bank v. Turquand."

In 1890, 1891, etc., Stanly county, for the purpose already shown, put the bonds in question upon the market for sale. They were in due form, and contained the usual recitals. These bonds were purchased in due course of trade by the complainants, unaware of any defect of authority or other irregularity in their issue. There was nothing to excite suspicion of any defect or irregularity in their issue. The railroad was constructed; the county had its stock in the same, and had for years paid the interest on the bonds. The county was, each and every year, collecting from the railroad company taxes levied upon the property of the same. Under conditions like these, I consider it the duty of this court, as said by Justice Gray in the case above cited, to uphold the bonds,—to declare them valid,—if, under any circumstances, the court can do so.

I have shown that this court is not bound by the construction put upon these valid statutes by the supreme court of North Carolina in the Snuggs Case, years after the issue and sale of the bonds. It becomes necessary, then, to inquire as to what construction the court will put upon the statutes. In construing these sections of the Code, we must do it in the light of the rule laid down by Justice Gray in the Louisville, N. A. & C. R. Co. Case. This is an easy thing to do, when we consider the decision of Belo v. Commissioners, 76 N. C. 489. Indeed, it seems to us that if the principles laid down in that case had been called to the attention of the court in the case of Com-

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missioners v. Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439, the decision would have been different. As I have already said, no bondholder was a party to that suit. It seems to have been argued, however, but there is no reference to the Belo Case in the opinion, and, from that, I take it, there was none in the argument. In addition to the leading opinion of the court, written by Justice Montgomery, there were two concurring opinions, and in none of them is there any mention of the Belo Case. This, to us, is remarkable, when we consider the fact that it is the leading case in North Carolina upon the subject of municipal bonds; and the more remarkable when we consider the principles there laid down, decisive of the case here in favor of the bonds and their validity. What are these principles? The supreme court, in 1877, in Belo v. Commissioners, 76 N. C. 489,—the leading case upon the subject of municipal bonds, and the effect of recitals in the bonds,—lays down the law as follows:

"While the decisions are very uniform that the records of the justice's court, affirming the fact of compliance with the conditions precedent to the subscription of stock, are conclusive and estop the county from denying the validity of the bonds in the hands of a bona fide holder before maturity, they are equally uniform in giving the same effect to the recitals in the bonds themselves that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has a right to rely on it. Town of Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; Knox Co. v. Aspinwall, 21 How. 539, 16 L. Ed. 208. Mr. Justice Gray says: 'In the leading case of Knox Co. v. Aspinwall, the decision was rested upon two grounds. One of them was that the mere issue of bonds, containing a recital that they were issued in pursuance of the legislative act, was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. The position was supported by reference to the Royal British Bank v. Turquand, 6 El. & Bl. 327, in a case in the exchequer chamber, which fully sustains it.'"

Here the court in 1877 approved of the doctrine in the Royal British Bank Case, upon which Knox Co. v. Aspinwall was based,—the case Mr. Justice Gray bases his decision upon in the case of Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 573, 574, 19 Sup. Ct. 817, 43 L. Ed. 1081. The above are the words of Justice Gray,—the same used in the Belo Case by Justice Bynum; the leading case on municipal bonds in North Carolina.

To apply these rules to this case, what were the conditions on which the county of Stanly was authorized to issue the bonds? One was, "when necessary to aid in the completion of any railroad"; and another was, "of any railroad in which the citizens of the county may have an interest." Here was a power, legislative in its character, recited in the bond, to be exercised under certain conditions. By whom? The act says, the "board of commissioners." In June, 1889, an order was entered upon the record of the board of commissioners of Stanly county, when they came to consider the proposition to subscribe to the capital stock of the Yadkin Railroad, a part of which was as follows: "It appearing that the citizens of said county have an interest in said railroad," etc. In this same order, reference time and again was made to the Yadkin Railroad and its construction, and

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to the conditions upon which it was to be constructed. Among others, it was ordered that "said railroad shall be of standard gauge." It appeared then to the board, and they (the commissioners) acted upon it, that there was a railroad to be completed,—constructed,—and that the citizens of the county had an interest in it. These were the conditions to be complied with, and some authority had to pass upon the same. It was not for the innocent purchaser of the bond to inquire as to whether the conditions were complied with, but for the municipal authorities who put it upon the market, and the recital in the bond that it was issued in pursuance of the power conferred by the sections of the Code "was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue it had been complied with." Belo's Case, supra. The proceedings had before the board of commissioners of Stanly county, printed in the record, show that the corporate authorities acted with the sections of the Code recited in the face of the bond before them, and that they passed upon all questions left for their determination, as said by Justice Brewer in his opinion in the Mercer Co. Case, 170 U. S. 601, 18 Sup. Ct. 791, 42 L. Ed. 1156. It shows these corporate authorities were acting in good faith, and wanted to perform their duty, according to law. On page 660, 30 C. C. A., and page 307, 87 Fed., in the case of Township Ninety-Six v. Folsom, the circuit court of appeals, speaking through Judge Jackson, says:

"It will be observed from the inspection of these bonds that their recitals show upon the face of the bond a compliance with the law under which they were issued. The purchaser had a right to assume that all the conditions of the law were complied with, authorizing the issue of the bonds. The question whether they were issued in compliance with the law was a question that properly belonged to the authorities who were authorized by the acts of the legislature to issue the bonds."

Purchasing these bonds with the recitals they contained, was it required of the purchasers to find out whether the citizens of the county of Stanly had an interest in the railroad? Was it required of them to find out whether the railroad was completed or uncompleted? These are matters for the corporate authorities, and for them alone. Says Justice Brewer in Provident Life & Trust Co. v. Mercer Co., 170 U. S. 601, 18 Sup. Ct. 791, 42 L. Ed. 1156:

"By a long series of decisions, such recitals are held conclusive, in favor of a bona fide holder of bonds, that precedent conditions prescribed by statute, and subject to the determination of those county officers, have been fully complied with."

In the case of Provident Life & Trust Co. v. Mercer Co., 170 U S. 601, 18 Sup. Ct. 788, 42 L. Ed. 1156, it will be seen that the recitals in the bond, which are printed in the volume, are similar to those in the Stanly bonds. See, also, the recent case of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689, as to recitals in bonds; also School Dist. v. Rew (C. C. A.) 111 Fed. 1.

We understand the rule to be that the purchaser has to look no further than to ascertain if a power has been granted to issue the bonds. If there is a power, then he can depend upon the recitals in the bonds for the proper exercise of that power.

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The above are the rules which have obtained in North Carolina since 1877,—the first time they were considered. They are to be found in the case of Belo v. Commissioners, 76 N. C. 489; and in the light of the same, so clearly and forcibly stated by Justice Bynum, we must assume, if that case had been called to the attention of the court when the Snuggs Case was argued, as suggested by Judge MORRIS, the decision might have been different. In Union Bank v. Commissioners of Town of Oxford, 116 N. C. 368, 21 S. E. 419, the court says:

"The purchaser of such coupons as those sued upon must so far act upon the notice contained in the recitals, as a general rule, as to examine the statutes referred to, and ascertain at his peril whether the essential prerequisites to the validity of the bonds have been met both by legislative and popular action. We hold that upon a fair construction of the organic law and pertinent statutes, and their application to the facts of this case, there has been a sufficient compliance with the essential requirements of the law to render the election valid. We think, therefore, that the court erred in holding that the plaintiff was not entitled to recover, and the judgment of nonsuit must be set aside and a new trial granted."

The recitals in the bonds in question, as they appear in the record, are:

"This bond is one of a series of eighty of the denomination of one thousand dollars each, and forty of the denomination of five hundred, issued by authority of an act of the general assembly of North Carolina ratified the third day of March, 1887, entitled 'An act to amend the charter of the Yadkin Railroad Company,' and of sections 1996, 1997, 1998, and 1999 of the Code of North Carolina, and authorized by a majority of the qualified voters of Stanly county at an election held for that purpose on the 15th day of August, 1889, duly ordered by the board of commissioners of Stanly county."

Under the decision in the Belo Case, and the rule to which the court calls attention in Union Bank v. Commissioners of Town of Oxford, both referred to above, the purchaser of the bonds "had only to examine the statutes referred to, and ascertain, at his peril, whether the essential prerequisites to the validity of the bonds have been met both by legislative and popular action." These sections of the Code recited in the bond as authority for their issue were passed by the legislature according to the constitution, and there is no doubt but that there was a large majority of the voters of the county of Stanly in favor of the issue of the bonds. These things are admitted. So that the bondholder had to look no further than to see if there was a power conferred to issue the bonds. The performance of the conditions was a matter to be determined by the corporate authorities. The bondholders had the right to rely on the recitals for that. They did rely on them. They did all that was required of them.

It was contended by the appellants in the argument that the provisions of section 1996 of the Code refer only to those roads that were unfinished in April, 1868, the time of the adoption of the constitution; and in support of this the attention of the court is called to the following:

"This reasoning leads us to the still further conclusion that, at the time when the act of 1868–69 was brought forward, in the Code (section 1996 and the four succeeding sections), it could have had reference to no cases

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except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the constitution of 1868." Commissioners v. Snuggs (1897) 121 N. C. 403, 28 S. E. 542, 39 L. R. A. 439.

This case was decided in 1897. The statute of April 10, 1869 (section 1996 of Code), made no reference to the constitution of 1868, nor to any other point of time in the past. Every word in section 1996 denoting tense is in the future tense, and the Code went into effect November 1, 1883. It is a universal rule of construction that all statutes are prospective in their operation, unless the statute itself says to the contrary. "No statute should be given a retrospective operation unless its words expressly require such construction." State v. Littlefield, 93 N. C. 614. What words in section 1996 require that its operation be referred to April, 1868,—15 years before it was re-enacted in the Code, and one year before it was ever put in any shape on the statute books of North Carolina? "Upon the same principle of construction, if section 1996 should be re-enacted in the Code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868,—thirty-two years before its enactment." This principle has been passed on by the supreme court of the United States in James v. City of Milwaukee, 16 Wall. 159, 21 L. Ed. 267. In that case a statute authorized a city to lend its credit to any railroad company incorporated and organized, and the court held that companies thereafter organized were intended to be included, and the statute was applicable to them as well as those in existence. The court said (16 Wall. 160, 161, and 21 L. Ed. 267):

"The defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion."

In that case there was no word denoting the future tense,—no "shall," as in section 1996,—but the only words used were "incorporated" and "organized."

In this connection we observe that the supreme court of North Carolina, in the Snuggs Case, has construed the words of section 1996 of the Code, "the citizens of the county may have an interest," not to mean what the language imports. The court holds that these words require the county, as a county, to have a pecuniary interest in the railroad, in order that the section may apply. In answer to this, it is only necessary to say no such words are to be found in section 1996 of the Code. This construction takes out the words "the citizens," and inserts the word "pecuniary," and thus it holds that the words "any railroad in which the citizens of the county may have an interest" are to be construed as follows, to wit: "any railroad in which the county has a pecuniary interest." A mere statement of such a construction is enough to refute it. Here we may call attention to the language of article 5, § 6, of the constitution of the state, when it was dealing with the question of the right of the state to issue railroad aid bonds. There it refers to a railroad "in which the state has a direct pecuniary interest." This section 1996 of the Code was adopted about one year after article 5, § 6, of the constitution. Doubtless the legislators had be-

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fore them this provision of the constitution, or at least were familiar with it. The difference in the language was obviously intentional and significant.

The history of the adoption of this provision of the state constitution as to state railroad aid bonds shows that it had a different purpose from that of the Code (sections 1996–2000). The report of the treasurer shows that prior to the meeting of the convention the state had undertaken to issue its bonds in aid of certain railroads, and that under the statutes then existing the state was liable to be called upon for the issue of additional bonds, or for the guaranty and payment of additional bonds; and the state owned stocks in certain railroads, thus having a direct pecuniary interest in them. The amendment made to section 5, article 5, of the constitution, above quoted, was designed to enable the state, without a vote of the people, to carry out its contracts already entered into on railroads, etc., already begun, and to protect its interest in the railroads, etc., already begun. With a vote of the people, the state was allowed to aid railroads, without restriction. As the constitution (article 7, § 7) did not allow counties to incur any debt in any case, except for necessary expenses, without a vote of the people, the reason for the provision as to unfinished railroads in case of state aid did not apply to counties, and was purposely omitted in the act of April 10, 1869 (now sections 1996–2000 of the Code). This view is supported by the following decision rendered by the North Carolina supreme court in 1869,—the year following the constitutional convention. In Galloway v. Jenkins, 63 N. C. 147, the suit was to enjoin an issue of state bonds in aid of the railroad company. The court held that the bonds were unauthorized, under the provisions of the constitution. In the course of the opinion (Pearson, C. J., writing the same) the court says with respect to the restriction of the power of the state to incur debt,—speaking of the debt existing at the time of the adoption of the constitution of 1868 (page 153):

"It will be found that most of the public debt was incurred in three modes: (1) By subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock; the state becoming a member of the corporation. This is the heaviest item, and amounts to, say, eight million dollars. (2) By issuing bonds of the state, and exchanging such bonds for a like amount of the bonds of the corporation; the state not becoming a stockholder, and taking the collateral security, of more or less value. This is the next heaviest item, and amounts to about three millions of dollars. (3) By indorsing the bonds of corporations, and taking a mortgage or some other collateral security. This item amounts to two millions. These are the three modes by which, judging from the past, it was apprehended the public debt might be so run up as to ruin the credit of the state, and tarnish her honor and her reputation for good faith. [Page 155.] The suggestion that the credit of the state was given by this statute to aid in the completion of an unfinished railroad was not strongly urged on the argument, and, indeed, it could not be. An unfinished road is one that has been begun and partly worked on, and such a road is made an exception on the ground that it might be proper to finish it, in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road. The other suggestion, that the state has a direct pecuniary interest in this road, was properly abandoned. The word 'has' is in the present tense. The exception is obviously confined to roads in which the

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state had a direct pecuniary interest at the time of the adoption of the constitution; otherwise the state might, by a subscription for stock, become directly interested in every railroad or navigation scheme that should thereafter be projected, and thus the restrictions of the constitution would be of no effect whatever."

Note the difference of the language of the constitution as to state aid bonds and the language of the Code as to county aid bonds. The constitution says "has," and note the comments of the court on the present tense. The Code says "may have," etc. The words used are different, and the purposes are different.

Such of these decisions of the supreme court of North Carolina as were rendered after the bonds in question were issued are not binding upon this court, and it is both the right and duty of this court to construe this language of sections 1996–2000 according to the natural and proper meaning. Within the meaning of section 1996 of the Code, the citizens of a county have an interest in any railroad running into or through the county.

It is insisted by appellants that there was a policy of the state of North Carolina, as evidenced in the constitution of the state adopted in 1868, against issuing railroad aid bonds, by either the state or counties, except in aid of roads which were unfinished at the time of the adoption of the constitution. There was no such policy. The only policy was this: that no state bonds should be issued to aid any new railroads unless there should be a vote of the people, but with such a vote the state could aid any railroad, whether it had been begun or not at the time of the adoption of the constitution. If the railroad had been begun and was unfinished at the time of the adoption of the constitution, state bonds might be issued in aid thereof without any vote of the people. As to counties, there was no distinction made as to whether the road was finished or unfinished at the time of the adoption of the constitution. A vote of the people of the county was required for the issuance of railroad aid bonds of a county in either case, whether a road had been begun or was a new railroad; and there was absolutely no distinction whatever made in the constitution between new roads and unfinished roads, so far as respects county aid, and no such distinction existed in the Code or in any other provisions of the statute. The definition given the word "completion," as it appears in section 1996 of the Code of North Carolina, by the supreme court in Commissioners v. Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439, we think, with great respect, is too narrow, too refined. The court says it is not used in the sections of the Code suggested as synonymous with "construction," but the language here requires that there must have been an unfinished road. The court went further, and, as I say, held that there must have been a road unfinished at the time of the adoption of the constitution of April 24, 1868, in order that these sections of the Code might have application. This interpretation of the word "completion" is not the correct one, as it seems to me. It is used as synonymous with "construction." This view is, we think, supported by the obvious difference between this language and the language used in the state constitution, as respects the is-

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sue of state railroad aid bonds. Article 5, § 4, of the constitution, prohibits the issue of state railroad bonds, "except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution." Section 1996 of the Code, adopted April 10, 1869, about one year after the framing of this provision of the state constitution, omits the significant words, namely, "unfinished at the time of the adoption of this constitution." "On no possible theory can these words be read into the statute. The legislature did not put them there, and the courts cannot put them there." The legislature, as before said, with the constitution before it, wrote the act of April 10, 1869, in the light of the words of the constitution; and, if it was its purpose in that enactment to make both the same, the same words would have been used. Different words were used, as the purposes were different. In this interpretation of the word "completion," it is well to observe the rule as laid down by Justice Brewer, in Provident Life & Trust Co. v. Mercer Co., 170 U. S. 602, 18 Sup. Ct. 788, 42 L. Ed. 1156. In that case the justice says the meaning of a word "is often qualified by the context." He illustrates this by a reference to what is said in Bunyan's Pilgrim's Progress: "As I walked through the wilderness of this world, I lighted on a certain place, where there was a den, and laid me down in that place, to sleep." The writer does not mean that he passed from one end of the wilderness to the other, but "simply, that as he traveled in the wilderness he lighted on the den." So we must look at the context in this interpretation. In the foregoing I have kept in mind the rule laid down by Mr. Justice Gray in Louisville, N. A. & C. R. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, already quoted in this opinion, that if, under any circumstances, the court can uphold bonds issued as the bonds in question were, it will do it.

To proceed further in the argument, already longer than intended, it is admitted that the board of commissioners of Stanly county was proceeding under the provisions of sections 1996, 1997, et seq., of the Code, as well as under the act of March, 1887. If this be true, then the bonds are valid, notwithstanding the recitals, provided the Code provisions conferred the power to issue them on the board. Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; City of Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; Anderson Co. v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966. The defendants contend that these sections did not authorize the issue of the bonds, for the following reasons, also: Because said statutes are not local and special, as required by sections 1, 6, and 7 of article 5 of the constitution of North Carolina. In this connection there is no evidence in the record that the payment of the interest or principal of these bonds will require a county tax to exceed the double of the state tax. And further, under the decisions of the supreme court of North Carolina, this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing, and binding obligation paid. "The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal author-

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ity to levy special taxes beyond the assigned limits, though, if given after the levy, it would doubtless be equally effectual." Cromartie v. Commissioners, 87 N. C. 140. In Herring v. Dixon, 122 N. C. 423, 29 S. E. 369, the supreme court again distinguishes between the power to confer a valid indebtedness without special legislative sanction, and the power to levy a tax to pay said indebtedness, when it says:

"In Vaughn v. Commissioners, 117 N. C. 429, 23 S. E. 354, while it was held that the commissioners could incur a debt for necessary expenses without a vote of the people, it was not held that they could levy a tax in excess of the constitutional limit to pay it, without special approval of the legislature."

So, under the rulings of Cromartie v. Commissioners and of Herring v. Dixon, the commissioners have the right to contract a valid debt without a special act. Here the money is in the hands of the trustee of the complainants, and no levy of any tax is necessary or asked. When a state law confers a general power on a county to subscribe to the stock of any railroad in the state for any amount, not exceeding $100,000, the county may subscribe to the stock of two railroads, $100,000 each. Chicot Co. v. Lewis, 103 U. S. 164, 26 L. Ed. 495. In Daviess Co. v. Huidekoper, 98 U. S. 104, 25 L. Ed. 112, the court upholds a subscription under a general statute of Missouri, almost identical in language with section 1996:

"Where an innocent purchaser buys bonds (negotiable securities) which recite that they were issued to fund a debt of the municipal corporation, the question of excessive indebtedness does not arise, and the purchaser is not required to consider or inquire concerning it." School Dist. v. Rew (C. C. A.) 111 Fed. 1.

The supreme court of North Carolina, in a late case (City of Charlotte v. Shephard, 122 N. C. 603, 29 S. E. 842), says that:

"Where such a corporation [speaking of a municipal corporation] has thus acquired the right to create a debt and issue the bonds, this power carries with it the power to levy the taxes necessary to pay said bonds and the accruing interest thereon."

Ralls Co. Ct. v. U. S., 105 U. S. 733, 26 L. Ed. 1220; U. S. v. City of New Orleans, 98 U. S. 381, 25 L. Ed. 225.

This doctrine of the North Carolina court is supported fully by the two decisions cited above.

The importance to all parties in interest, the amount involved, and the care with which the case has been presented to the court by counsel, seemed to demand a full discussion of its principles; and on that account I have gone over the entire record and the briefs filed, giving to them the best consideration in my power. The conclusion reached is that these bonds are valid bonds.

It follows that the decree entered in the circuit court in the Stanly Case, 89 Fed. 257, should be affirmed.

GOFF, Circuit Judge. I dissent from the opinion of the court, as well as from the judgment entered in this case.

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BOARD OF COM'RS OF WILKES COUNTY et al. v. COLER et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 319.

1. MUNICIPAL BONDS—AUTHORITY TO ISSUE—EFFECT OF RECITALS.
The recital in municipal bonds that they were issued under an act which is invalid does not preclude inquiry as to whether there was other valid legislative authority under which the power to issue them can be upheld.

2. SAME—ESTOPPEL BY RECITALS.
A recital in county bonds of facts precedent to their issuance, which it was the province of the county officers to determine, is conclusive upon the county in favor of a bona fide holder.[1]

3. STATUTE—CONSTITUTIONALITY OF ENACTMENT—PARTIAL INVALIDITY.
The fact that a statute, among other things authorizing a county to issue bonds, was not enacted in conformity to the mandatory requirements of the state constitution relating to that class of legislation, does not render it invalid as to its other provisions, to which such constitutional requirement does not apply.

4. MUNICIPAL BONDS—AUTHORITY TO ISSUE—CONSTRUCTION OF STATUTE.
The constitutional convention of North Carolina on March 9, 1868, passed an ordinance chartering a railroad company to construct a railroad from a point on another road "to some point in the northwestern boundary line of the state to be hereafter determined." It located the western terminus of the eastern portion of the line, which, when completed, should constitute "its first division." It further provided that all counties or towns subscribing to the stock of the company should do so "in the same manner and under the same rules, regulations and restrictions" as prescribed in the charter of another company previously incorporated, and such charter authorized "any town or county near or through which" the road might pass to subscribe for stock on a vote of the inhabitants, and to issue bonds in payment therefor. Such ordinance was held by the supreme court of the state to be valid, to continue in force after the adoption of the constitution, and to authorize the issuance of bonds in payment for stock of the company by a county into which the first division of the road extended as located by the ordinance. *Held*, that it conferred like power upon another county into which the road was extended under a subsequent act of the legislature, and that bonds voted and issued by such county in conformity to its requirements were valid obligations, although they purported to have been issued under the subsequent act, which, in so far as it attempted to authorize their issuance, was void.

Goff, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

A. C. Avery and James E. Shepherd, for appellants.

Charles Price (John F. Dillon, Harry Hubbard, and John M. Dillon, on the brief), for appellees.

Before GOFF, Circuit Judge, and MORRIS and BOYD, District Judges.

MORRIS, District Judge. This is a suit to determine the validity of certain bonds issued by Wilkes county, N. C., in aid of the con-

[1] Bona fide purchasers of municipal bonds, see note to Pickens Tp. v. Post, 41 C. C. A. 6.

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struction of the second division of the railroad constructed by the Northwestern North Carolina Railroad Company, incorporated in 1868; the second division being from the towns of Winston and Salem, up the valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell. After hearing argument in this appeal at the November term, 1899, this court certified to the supreme court of the United States three questions: First, whether this court was controlled in dealing with the case by certain decisions of the supreme court of North Carolina in connection with article 2, §§ 14, 16, article 5, §§ 1, 4, 6, 7, and article 7, § 7, of the constitution of North Carolina, adopted April 24, 1868; second, whether, if there was no decision of the supreme court of North Carolina adverse to the validity of the bonds at the time when the appellees acquired them for a valuable consideration without notice, they were valid in the hands of the appellees; third, whether when the appellees acquired the bonds any decision then announced by the supreme court of North Carolina was adverse to the validity of the bonds which affected them in the hands of the appellees. The bonds were dated October 21, 1889, and each one contained the following recital:

"This bond is one of a series of one hundred issued by authority of an act of the general assembly of North Carolina ratified on the 20th day of February, A. D. 1879, entitled 'An act to amend the charter of the Northwestern North Carolina Railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's Factory, Caldwell county,' and authorized by a vote of the majority of the qualified voters of Wilkes county, by an election regularly held for that purpose, on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars, made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes."

Article 2, § 16, of the constitution of North Carolina, adopted April 24, 1868, provided that no law should be passed authorizing a county to raise money on its credit, or impose a tax, unless the bill for the purpose was read three several times in each house of the general assembly, and passed three several readings on different days in each house, and unless the yeas and nays on the second and third readings of the bill were entered on the journals. The supreme court of North Carolina in Commissioners v. Call, 123 N. C. 308, 31 S. E. 481, 44 L. R. A. 252; Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; Commissioners v. Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439; Rodman v. Town of Washington, 122 N. C. 39, 30 S. E. 118; Commissioners v. Payne, 123 N. C. 432, 31 S. E. 711,—all cases involving the validity of county bonds,—has held that the provisions of the constitution of North Carolina requiring the entry of the yeas and nays on the journals was imperative, and the failure of such entry was absolutely fatal to the validity of the legislation, so far as it undertook to authorize the county to issue bonds in aid of a railroad. In Commissioners v. Call (1898) the validity of the bonds of the issue now in suit was called in question, and the supreme court of North Carolina

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declared that the act of February 20, 1879, under which these bonds are recited to have been issued, was never legally passed so as to become a law giving authority to issue the bonds, for the reason that the yeas and nays were not entered upon the journals. To the questions certified by this court the supreme court of the United States gave the most thorough consideration, and held, Mr. Justice Harlan speaking for the court (Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642), that the circuit court was bound by the decisions of the supreme court of North Carolina construing their own state constitution, and holding that the legislative enactments of 1868, 1879, and 1881 were not validly enacted, so as to give Wilkes county power to issue these bonds. But the supreme court of the United States further ruled that notwithstanding the invalidity of the act of February 20, 1879, the bona fide holders of the bonds might look to any valid legislation giving power to issue them, and that whether or not there was such power was to be determined by the law of North Carolina, as declared by the supreme court at the time the bonds were put upon the market. Mr. Justice Harlan, speaking for the court, said:

"But the Belo Case, 76 N. C. 489, involved other considerations. Forsyth county (whose liability on the bonds in suit in that case was directly involved) made the point that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the Northwestern North Carolina Railroad Company were upheld as valid under that ordinance, which was recognized as part of the law of the state and as conferring authority on the county of Forsyth to do what it did. It results that when the bonds here in question were issued, in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the Northwestern North Carolina Railroad Company, was not superseded by the constitution of 1868, but was in force, and, therefore, gave power to the counties embraced by its provisions to take stock in that company and pay for it in county bonds, just as Forsyth county had done."

Mr. Justice Harlan then calls attention (page 531) to the rule that as in 1877 in the Belo Case the supreme court of North Carolina had recognized the power of the counties embraced within the provisions of the convention ordinance of 1868 to issue bonds to pay for stock in this same railroad, when the power was exercised by a county under the restrictions imposed by the constitution of 1868, that is to say, "not unless by a vote of a majority of the qualified voters therein," that no subsequent decision of the supreme court of North Carolina, made after county bonds had been put upon the market, could alter vested rights by holding that the constitution of 1868 abrogated the power given by the convention ordinance, and by holding that no subscription in aid of a railroad could be made except by virtue of a new statute passed in conformity to the requirements of section 14 of article 2, and thus invalidate bonds issued before the rendering of such a decision. The supreme court of the United States, while recognizing that the Belo Case (76 N. C. 489) and the Hill Case (67 N. C. 367) had held that the convention ordinance of 1868 gave power to the counties embraced within its terms to issue bonds such as those now in suit, declined to consider, under the questions certified by this court, whether Wilkes

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county was embraced within the general powers of that ordinance, and suggested the following as some of the various questions which might arise in considering whether Wilkes county had the power under that ordinance, unassisted by any of the subsequent enactments, to issue the bonds sued on in the present case, viz.:

"Did the general power given by that ordinance to the Northwestern North Carolina Railroad Company to construct a railroad from its eastern terminus, 'running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state to be hereafter determined,' invest Wilkes county with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes county in the same category with Forsyth county? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the state to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879, which has been adjudged never to have become a law of the state? Did Wilkes county have authority, under the ordinance of 1868 alone, to aid by a subscription of stock and bonds the construction of the second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell?"

The supreme court said:

"These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the circuit court of appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of sections 1996-1999 of the Code of North Carolina."

The recitals of the bonds in suit are as follows: (1) That the bond is issued by authority of an act of the general assembly of North Carolina ratified the 20th day of February, A. D. 1879. This act being an invalid enactment, and not a law, so far as it undertakes to give power to issue bonds, this recital does not preclude inquiry as to whether or not there was such a law, and the existence of legislative authority. Northern Nat. Bank v. Trustees of Porter Tp., 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258. But the recital of an invalid act does not preclude inquiry as to whether there was in existence any other valid legislative authority under which power to issue the bond could be upheld. Wilkes Co. v. Coler, 180 U. S. 506, 524, 21 Sup. Ct. 458, 45 L. Ed. 642; Board of Commissioners v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; Commissioners v. January, 94 U. S. 202, 24 L. Ed. 110; City of Evansville v. Dennett, 161 U. S. 434, 443, 444, 16 Sup. Ct. 613, 40 L. Ed. 760; Knox County v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93. (2) The second clause of the recital is to the effect that the bond is authorized by a vote of the majority of the qualified voters of Wilkes county by an election regularly held for that purpose on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the 1st day of April, A. D. 1899. This is a recital of facts which it was for the board of commissioners of Wilkes county to ascertain and decide, and which, therefore, the county is estopped from denying as against a bona fide holder. Board of Commissioners v. Beal, 113 U. S. 227, 229, 5 Sup. Ct. 433, 28 L. Ed. 966; Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43

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L. Ed. 689. (3) The bond further recites that, "This series of bonds is issued to pay the subscription of $100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes." This recital is in the same way conclusive of the facts therein stated.

The question now to be passed upon, therefore, is whether, independent of the invalid legislative enactments attempted to be passed subsequent to the convention ordinance of March 9, 1868, Wilkes county had the power under that ordinance to submit the stock subscription to the vote of the qualified voters, and upon authorization by a majority of the votes to issue the bonds and levy taxes to pay the interest and principal. If Wilkes county was in the same category with Forsyth county, the supreme court of North Carolina adjudged in the case of Belo v. Commissioners (1877) 76 N. C. 489, that the power was conferred by the ordinance of the convention, and this ruling remained undisturbed by any subsequent adjudication of the supreme court of North Carolina, and until after these bonds were issued. The power thus held to be sufficient to authorize Forsyth county to subscribe to the stock of this railroad and issue bonds in payment is to be found in the following sections of the ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868:

"Section 1. That for the purpose of constructing a railroad of one or more tracks from some point on the North Carolina railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, etc."

"Sec. 2. Be it further enacted that the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties in shares of one hundred dollars."

Section 5 provides that the president and directors shall proceed to locate the eastern terminus of the road and proceed at once to construct said road in five mile sections to the towns of Winston and Salem, in Forsyth county, which portion of the railroad when completed "shall constitute its first division."

Sections 8 and 9 provide that the state should loan its bonds to the railroad company as each five miles is graded and ready for its superstructure to the amount of $10,000 per mile upon the security of a first mortgage of the entire road and its property.

Section 12 is as follows:

"Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or materials for constructing said road as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

"Section 13. Be it further enacted that the company shall have the power to construct branches of said road, one of which shall run from the towns of Winston and Salem, by way of Mount Airy, in Surry county, to the line of the State of Virginia."

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Section 33 of the charter of the North Carolina & Atlantic Railroad Company, passed in 1852, c. 136, is as follows:

"Sec. 33. Be it further enacted that it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county in manner and form as hereafter provided."

Sections 34, 35, 36, and 37 provide the manner in which the vote of the qualified voters of the counties shall be taken and, if a majority of the qualified voters voting upon the question are in favor of the subscription, provide how the subscription shall be made, and that the county shall negotiate a loan or loans, and shall levy taxes to pay the principal and interest.

It will be seen by reading the sections of the charter of the North Carolina & Atlantic railroad into the charter of the Northwestern North Carolina Railroad, as required by its section 12, that every county near or through which the railroad may pass is authorized to subscribe for its stock to an amount authorized by a majority of the qualified voters of the county, and to issue bonds in payment, and to levy taxes to pay the principal and interest. The first question therefore now is, was the railroad which was constructed into Wilkes county by the Northwestern North Carolina Railroad Company a part of the railroad authorized to be built by its charter? If it was, then it would seem that the powers conferred by the charter operated to validate the action of Wilkes county, just as the same powers in the same charter were held by the supreme court of North Carolina in Belo v. Commissioners to have done in the case of Forsyth county. The convention ordinance authorizes counties to subscribe to the stock of the railroad company, and it provides that all counties subscribing shall do so in the manner and under the same rules, regulations, and restrictions set forth in the charter of 1852, c. 136. The only restriction in that charter which is drawn in question is the provision that the subscription shall be by counties near or through which the railroad may pass. The railroad in aid of which the bonds in suit were issued does pass through Wilkes county. It appears to us that it is the same railroad authorized by the convention ordinance. That ordinance authorizes a railroad running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be thereafter determined, and contemplated and provided for its being built by divisions, and enacted that the portion to Salem and Winston should constitute its first division. The piece of railroad for which the bonds in suit were issued does run from Salem and Winston in the general direction of the northwestern boundary line of the state, and, indeed, it seems evident that such a railroad to a point in the northwestern boundary line of the state must pass near or through Wilkes county. The act of Feb. 20, 1879, which is recited in the bonds as the authority for issuing them, definitely located this road running into Wilkes county. It does it by enacting that section 13 of the convention ordinance shall be amended by adding certain words which make it read, when so amended, as follows:

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Sec. 13. Be it further ordained that the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the state of Virginia (amendment), "and one of which shall be constructed from the towns of Winston and Salem, up the Valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell, which branch shall be known as second division."

Section 2 of the act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this second division; and section 4 provides for bond subscriptions by any county in the state. This act was invalid so far as it attempted to give power to the counties to create a debt, because it was not passed as laws for that purpose are required by the constitution of North Carolina to be passed, but that invalidity does not affect the sections of the law which deal with other matters. Rodman v. Town of Washington, 122 N. C. 39, 42, 30 S. E. 118; Russell v. Ayer, 120 N. C. 180, 189, 27 S. E. 133, 37 L. R. A. 246; Gamble v. McCrady, 75 N. C. 509; Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487. So far as now appears, the amendment locating the road into Wilkes county was validly passed, and became a valid law of North Carolina. If section 13 had been originaliy enacted as it now reads as amended, it would seem clear that as when built this piece of road was declared to be the second division of said road, and as power was given to all counties "near or through which said railroad may pass" to subscribe for stock, that Wilkes county would be in the same category with Forsyth county, which is mentioned in the section locating the first division. Wilkes would be one of the counties through which the second division of the road was authorized to be constructed, just as Forsyth was a county into which the first division of the road was to be built. Has the supreme court of North Carolina ever interpreted this amendment and declared its meaning? We do not find that it has. In Commissioners v. Call, the majority opinion does not place the decision upon the contention that Wilkes county is not in the same category with Forsyth county, but upon a want of power affecting both alike, and upon the fact that an invalid enactment is recited on the face of the Wilkes county bonds as authority to issue them.

The original charter ordinance of 1868 having given authority to construct a railroad by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the state, and to construct branches, and the legislature having afterwards validly enacted that one of these branches running towards the northwestern boundary line of the state, to be called the second division, should be constructed by way of Wilkes county, there would seem no sound reason for construing the legislation so as to deny to Wilkes county that power to issue bonds which the supreme court of North Carolina had in 1877 held that Forsyth county had.

It is urged in argument that the policy of North Carolina was declared by the constitution of 1868 to be hostile to permitting counties to bond themselves in order to subscribe to railroads which passed near or through them. We do not think this anywhere appears.

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The constitution does not, as it might easily have done, if such had been the policy of its framers, declare that no county should have the power to create a debt for such a purpose; it merely provided that new laws for that purpose should be enacted with a special formality tending to insure their careful consideration by the legislature. The only inhibition which the constitution enacts against counties is by article 7, § 7, which is that no county shall loan its credit unless by a vote of the majority of the qualified voters, and the constitutional convention itself passed the charter of the Northwestern North Carolina Railroad with the power to the counties near or through which it should pass to issue bonds for subscription to its stock, and the constitution did not inhibit the execution of any powers previously given to counties to make subscriptions to railroad stock and issue bonds therefor. 180 U. S. 531, 21 Sup. Ct. 458, 45 L. Ed. 642. Nor does section 1996 of the Code of North Carolina, prescribing that counties shall have power to subscribe to aid in the completion of railroads in which their citizens may have an interest, nor the many enactments of the state legislature conferring upon counties the power to aid railroads, indicate such a policy, but, rather, a contrary one.

We think that Wilkes county when the bonds in suit were issued was in the same category with Forsyth county, and that the purchasers of the bonds had a right to rely and rest upon the decisions in the cases of Hill v. Commissioners (1870) 67 N. C. 367, and Belo v. Commissioners (1877) 76 N. C. 489, as to the power conferred by the ordinance of March 9, 1868, and that the different conclusion as to the power conferred by that ordinance arrived at and declared by a majority of the supreme court of North Carolina, long after the date of the issuing of the bonds in suit, cannot destroy the validity of the bonds in the hands of bona fide holders. Loeb v. Trustees, 179 U. S. 472, 492, 21 Sup. Ct. 174, 45 L. Ed. 280.

It is, of course, with great reluctance that we feel constrained to differ from the conclusion arrived at by the supreme court of North Carolina as announced in the majority opinion in Commissioners v. Call (1898), and it may be that the difference would not have arisen had the contentions in support of the validity of the bonds been as fully presented in that case in behalf of holders as deeply interested in them as they have since been in the supreme court of the United States and in this court in the litigation over their validity.

Having reached the conclusions herein expressed, it does not appear necessary to consider the effect of sections 1996–1999 of the Code of North Carolina giving power to counties to aid in the completion of railroads in which the citizens of the county have an interest.

The majority of the judges sitting in this appeal are of opinion that the decree of the circuit court should be affirmed.

BOYD, District Judge. In concurring with Judge MORRIS in his opinion in this case, I desire to say: This cause was argued upon the whole record, it being on appeal from a decree entered in the circuit court for the Western district of North Carolina at Greensboro, April

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14, 1899, by Judge Purnell, designated to preside in that district by the circuit judge. The rights of the parties are to be determined upon the whole record, including the answers by the supreme court to the certified questions. The decision is reported in 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642. The answers to the questions certified are, in substance, as follows: (1) That the circuit court should have regarded the decisions set out in the questions as controlling upon the inquiry whether the legislative enactments of 1868, 1879, and 1881 were passed in such manner as to become, under the constitution, laws of the state. (2) That the rights of the parties in this case are determinable by the law of the state as it was declared by the state court to be at the time the bonds here involved were made in the name of the county and put upon the market. The questions certified by this court to the supreme court involved the validity of an issue of bonds in the sum of $100,000 by the county of Wilkes, in the state of North Carolina, in the year 1889, in payment of its subscription in this sum to the capital stock of the Northwestern North Carolina Railroad Company, a corporation constructing and owning a railroad running from Greensboro via Winston-Salem, in Forsyth county, to Wilkesboro, in Wilkes county. The power relied on by the complainants in the bill for the issue of the bonds was the ordinance of 1868, the charter of the company, and an act of assembly of the 11th of August, 1868, the sections 1996, 1997, etc., of the Code of North Carolina, an act of assembly of February 20, 1879, and an act of March 2, 1881, all referred to in paragraph 21 of the bill, page 7 of the record, etc. After the issue of these bonds, in due course of trade, there came into the hands of complainants 55 of the same, of the denomination of $1,000 each. The purchase of the same was for value, the highest market price, in good faith, and without notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent, or otherwise than legal bonds in their issue and sale. It is alleged that the interest on these bonds was paid regularly for eight years by the county, and that such payment was enjoined by a judgment of the superior court of Wilkes county, affirmed by the supreme court, rendered in an action by the board of commissioners of the county against the treasurer, one Call, who, as such, held in his hands a fund for that purpose. It is alleged in the bill that this railroad runs over 20 miles in the county of Wilkes, and is the only railroad in that county. It is contended upon the part of the appellants that the decision of the supreme court of North Carolina in the action above set out should be followed by the circuit court. The supreme court, in answering the questions certified, disposed of that contention. Therefore I will not discuss it further than I have already in the Stanly Co. Case (No. 290, at this term) 113 Fed. 705. By reference to the decision of the supreme court, it is to be noted one thing decided was that the ordinance of 1868 was valid, and was in force after the constitution was adopted; and, further, that the supreme court of North Carolina had so held in the cases of Hill v. Commissioners, 67 N. C. 367 (June term, 1870), and in Belo v. Commissioners, 76 N. C. 489 (Aug. term, 1877). Further, it was held expressly that the Belo Case decided the ordinance of 1868, March 9th, conferred the power upon Forsyth county to make the subscription

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made by the county, and that this was so independently of any other legislation. As to Wilkes county, the court states the question to be as follows: "Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county." Mr. Justice Harlan, delivering the opinion of the court, says: "Was Wilkes county in the same category as Forsyth county?" In short, if Wilkes county was in the same category with Forsyth county, then it stands decided by the supreme court of the United States that the ordinance of 1868 did give to Wilkes county the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879, and 1881; so that the only question now is, whether Wilkes county was in the same category with Forsyth county. If so, the answer of the supreme court to the second question applies, which is that the rights of the parties in the Wilkes county case, this case, are determinable by the law of the state as it was decided by the state court to be at the time when the Wilkes county bonds were put upon the market. It results, therefore, that if Wilkes county was in the same category with Forsyth county the question is conclusively decided in favor of the validity of the bonds by the supreme court of the United States, without anything more, and the circuit court of appeals should affirm the judgment of the circuit court in this case. The supreme court of North Carolina, in Commissioners v. Call (1898) 123 N. C. 308, 317, 31 S. E. 481, 484, 44 L. R. A. 252, undertakes to distinguish the case of Belo v. Commissioners, 76 N. C. 489, as follows:

"We have not overlooked the fact that in Belo v. Commissioners, 76 N. C. 489, this court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the act of 1852. [Section 2 of the ordinance of the constitutional convention gave the power, and section 12 prescribed the manner of its exercise], but it does so incidentally, and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497, that 'as the case is presented to us, that question does not arise, and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise in the pleadings. The court stated that the 'principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel in pais upon the county of Forsyth."

There can be no estoppel by recitals in bonds in the absence of absolute legislative authority—power—to issue the same.

The whole discussion of the supreme court of North Carolina in Belo v. Commissioners, which, as stated by the court in the case of Commissioners v. Call, occupied four pages, proceeded upon the only possible ground,—that there was legislative authority in the ordinance of 1868, but that perhaps that authority had not been strictly followed. The question which the court on page 497 says "does not arise" is this question, stated in the very words of the opinion of the court, in Belo v. Commissioners, to wit:

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"When the subscription was voted there is authority and reason for asserting that the justices could have been compelled, by process of law, to make the subscription, unless in defense they could have shown that the election was not fairly conducted, but was influenced by the fraud of the railroad company. People v. Board of Sup'rs of City and County of San Francisco, 27 Cal. 655. As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the court said distinctly:

"The county was clothed with the power to issue them, and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds."

Again, the court said:

"It has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act;" that is, the act of August 11, 1868, the only other authority being the said ordinance.

The case of Belo v. Commissioners was decided in 1877, many years before the issue of these bonds, and, as before said, is the great leading case upon this subject in North Carolina. This decision, and the impression it made upon the supreme court of the United States, as shown by the importance attached to it by Justice Harlan, has left but little for this court to decide. As said by Bynum, J., the author of the Belo decision—opinion—there was but one purpose he had in mind: To show the ordinance of the convention of 1868, the original charter of the company, gave the power to Forsyth county to issue the bonds, and was not, and did not become, ineffective upon the ratification of the constitution. No recital in any bond ever did confer power to issue it. There must, in every case, first, be shown a power to issue, after which the recitals may be relied on by an innocent purchaser as assurance of the proper exercise of the power, and of the performance of the conditions precedent to the issue by the corporate authorities, putting the bonds upon the market. This rule—this principle—is axiomatic, universal, and has no exception.

Judge MORRIS has shown clearly that Wilkes county was in the same category with Forsyth county,—the only question left open by the supreme court of the United States. The importance, however, of the interests involved demands that I should add something to what he has said upon this question. In the case of Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487, the act is expressly held valid as a charter, and for all purposes except as a taxing act. For that purpose it was void, because not passed as required by the constitution. Section 1 of the act of 1879, directing that the road should run "up the valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes," etc., is valid, and an amendment to the charter, the ordinance of 1868. This puts Wilkes county in the same category as Forsyth county, in the sense suggested by Justice Harlan. The route of the road was determined by the legislature, and by the company also. Justice Harlan was not advertent

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to the fact that the act of 1879 was only adjudged void as a taxing act by the court, not for all purposes, but for this purpose only. In the case of Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487, the act is expressly declared valid as a railroad charter, because the certification cannot be impeached by the journals, but void as a taxing act, because, for that purpose, under the constitution, it can be impeached by the same journals. It is well settled in all courts that an act may be unconstitutional in part and constitutional in other respects. So section 1 of the act of 1879 is valid, because passed in all respects and certified as required by the constitution. See act of 1879, and especially section 5, etc., where, upon its face, it is shown to have been read three times and ratified. The case of Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487, is decisive of this, being directly in point, and, indeed, is the case out of which all this litigation has sprung. And, further, if the route was not a proper one, it was acquiesced in by the county when the company could have been forced, by mandamus, to have selected the proper one; or it could have been enjoined anyhow from constructing the road on the route determined upon if not the proper one. Rodman v. Town of Washington, 122 N. C. 39, 42, 30 S. E. 118; Russell v. Ayer, 120 N. C. 180, 189, 27 S. E. 133, 37 L. R. A. 246; Gamble v. McCrady, 75 N. C. 509,—all cited by Judge MORRIS. So it appears the route was determined by the legislature, by the company, and, at last, acquiesced in by the county. I say by the company, because this legislation,—that is to say, the ordinance,—conferred the power upon the county of Forsyth and a privilege upon the company. Wilkes county is in the same category with Forsyth, so far as these powers are concerned, and it was one of the privileges of the company conferred also to determine the route of the road. These powers are not only conferred upon the counties, but are privileges of the company, the Northwestern North Carolina Railroad Corporation. It follows, therefore, that Wilkes county was in "the same category" with Forsyth county.

The route of the road was determined by both the legislature and the corporation. This was one of the privileges conferred upon the company. And, besides, as before said, it is not for the county of Wilkes, which participated in the determination of the route, to be heard to say, in a suit by an innocent bondholder, years after it was determined, there was no power to do it. In the case of the Scotland Co. v. Thomas, 94 U. S., on page 689, 24 L. Ed. 219, Justice Bradley says:

"The specific question in the present case, therefore, is whether the authority given the counties and towns, in 1847, to subscribe to the capital stock of the Alexandria and Bloomfield Railroad Company has become extinguished by the subsequent consolidation of that company with other companies."

Justice Bradley says, also, on page 688, 94 U. S., 24 L. Ed. 219, after quoting the words of the constitution of Missouri similar to the words of the North Carolina constitution of 1868, that:

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"This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations. It does not purport to take away any authority already granted."

On page 693, 94 U. S., 24 L. Ed. 221, Justice Bradley goes on to say:

"But the case has other aspects which it is necessary to take into consideration. * * * The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. The power was sought at the hands of the legislature, and was given."

It was relied on by those who subscribed their private funds to the enterprise. Speaking of this power, he says:

"Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see. * * * Subscription to the stock was not only a power of the county, but a privilege of the company."

I have not discussed the sections of the Code in this connection, because I do not consider it necessary, having already done so in the Stanly Case (at this term), before referred to. The supreme court, in answer to the certified questions, has narrowed the issues between the parties to a small compass in this case. It is clear that the two counties, Forsyth and Wilkes, were in the same category, as I say, in the sense expressed by Justice Harlan. Having determined that, our duty seems to me plain. The decree entered upon the circuit should, in my opinion, be affirmed.

GOFF, Circuit Judge. I dissent from the opinion of the court, as well as from the judgment entered in this case.

WEST v. EAST COAST CEDAR CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 426.

1. APPEAL—REVIEW—ACTIONS TRIED TO COURT.
Where a cause is tried by a circuit court without a jury, by stipulation, and no special finding of facts is made, the general finding must be accepted by the appellate court as conclusive upon all matters of fact, the same as the verdict of a jury, and the only questions reviewable are the rulings of law on the trial and the sufficiency of the pleadings to support the judgment.

2. SAME.
Under the rule that a plaintiff in ejectment can only recover on the strength of his own title, a judgment for defendant in such an action, tried in a circuit court without a jury, based on a general finding in defendant's favor, cannot be disturbed by the appellate court, where the validity of plaintiff's title was put in issue by the pleadings, and under the evidence such issues depended on questions of fact.

3. EJECTMENT—DEFENSES—PROOF OF PARAMOUNT TITLE.
A defendant in ejectment may prove an outstanding paramount title to defeat plaintiff's recovery without connecting himself with such title.

4. APPEAL—REVIEW—HARMLESS ERROR.
On the trial of an action to the court, the reception of irrelevant evidence, which does not appear to have influenced the court's decision, is not ground for reversal.

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5. FEDERAL COURTS—FOLLOWING STATE PRACTICE—PROCEEDINGS FOR REVIEW.
In the federal courts, the practice, after judgment in an action at law, relating to proceedings for review in an appellate court, is regulated solely by act of congress, and is in no way affected or controlled by the state practice.[1]

6. APPEAL—UNNECESSARY MATTER IN RECORD—HARMLESS ERROR.
A circuit court has no power to determine what shall be incorporated in a transcript of the record sent up on a writ of error to the circuit court of appeals, and its action in directing the incorporation therein of testimony which it excluded as incompetent on the trial, and which is not contained in the bill of exceptions, is erroneous; but the error is harmless, and is not ground for a reversal of its judgment.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

For opinion below, see 110 Fed. 725. See, also, Id. 727.

Thomas B. Womack, for plaintiff in error.

F. H. Busbee (E. F. Aydlett, on the brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the circuit court of the United States for the Eastern district of North Carolina. The action below was to try the title to certain lands in the state of North Carolina. By stipulation between counsel, duly made part of the record, the case was submitted to the court without the intervention of a jury. At the conclusion of the testimony for plaintiff and defendant the plaintiff asked the court to hold, on all the facts of the case, that the plaintiff is entitled to recover the one undivided third part in the land sued for, less two-sixteenths thereof. This the court declined to do, and plaintiff excepted. The court then held that upon the evidence the plaintiff was not entitled to recover, answering the issue on this point, "No." To this ruling plaintiff formally excepted. Judgment was entered for defendant. Petition for writ of error was allowed, and the case is here on assignment of errors.

The plaintiff, in his complaint, alleges that he is the owner and entitled to the immediate possession of one undivided third part of a tract of land in the county of Dare, state of North Carolina, being a portion of a tract of land known as the "Northern Half of the McRae Patent," which tract is then described by metes and bounds; that the defendant is in possession of the whole of said tract, and withholds unlawfully the possession of one undivided third part from plaintiff; that the defendant claims title to the whole tract from certain heirs at law of one Bannister H. Jarvis and one Levi Walker. The complaint then goes on and recites that Bannister H. Jarvis and Levi Walker, on April 22, 1851, received conveyance by deed of a tract of land, of which the lands described in the complaint constitute a part and portion, from one John Sikes, Sr.; that on January 28, 1813, John Sikes, Jr., received a conveyance of this tract of

[1] Conformity of practice in common-law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Insurance Co. v. Hall, 27 C. C. A. 592.

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land in fee from John Sikes, Sr.; that John Sikes, Sr., had acquired an undivided interest in said lands with one Joseph Spence from Daniel Sawyer; that on May 6, 1812, Joseph Spence conveyed an undivided third to one Samuel Spruill, and that plaintiff holds this undivided third by sundry conveyances from the heirs of Samuel Spruill. So plaintiff and defendant claim title from the same person, Daniel Sawyer, who claimed under the McRae patent. The complaint then alleges that on information and belief defendant also claimed title under Samuel Spruill, which claim, however, is insufficient in law to establish title, yet it estops defendant from denying the title of Samuel Spruill. The answer sets up a claim of title by adverse possession under color of title by Jarvis and Walker, admits the Sikes deed to Jarvis and Walker, but denies that any other claim was made under it, except as color of title. Its claim of title is set out in these words:

"Answering the allegations of section 15 of the complaint, defendant denies that it claims any title by virtue of any conveyance from Samuel Spruill, but that Bannister H. Jarvis and Levi Walker owned, were in possession of, and claimed the land known as the 'Northern Half of the McRae Patent,' which includes the land described in section 2 of the complaint, and claimed the same under color of title from Joshua T. McCoy and John Sykes; that they claimed title to the entire northern half of the McRae patent; that they had adverse possession of it, which was of sufficient length to ripen their title into a perfect title; and the plaintiff and the defendant both claim under Bannister H. Jarvis and Levi Walker, whose title had ripened under color from John Sykes and McCoy to said Jarvis and Walker. And the defendant avers that the plaintiff is estopped to deny the title of the said Bannister H. Jarvis and Levi Walker to the said northern half of the McRae patent, and also to the lands described in section 2 of the complaint."

In the testimony was produced a grant or patent of all these lands to John Gray Blount, dated September 17, 1795. The McRae patent or grant is dated April 8, 1796. So the issues between the parties appear. His honor the trial judge did not make any special finding of facts with his conclusions of law. So the inquiry in this court must be limited to the sufficiency of the complaint and the rulings of law on the trial. Lehnen v. Dickson, 148 U. S. 72, 13 Sup. Ct. 481, 37 L. Ed. 373.

The cause having been tried by the court without a jury, this court cannot review the weight of the evidence, and can look only to see whether there was error in not directing a verdict for plaintiff, or whether there was no evidence to sustain the verdict as rendered. Lancaster v. Collins, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373. If there be no special findings of fact, there can be no inquiry as to whether the judgment is supported. We must accept the general findings as conclusive upon all matters of fact, precisely as the verdict of a jury. Lehnen v. Dickson, supra. The trial court did not state separately its finding of facts and then its conclusions of law. This renders it difficult to consider this cause. But there can be found in the opinion of the court and in the exceptions the main facts in issue. These were: (1) The claim of the plaintiff that he holds a valid title, traced up to the McRae patent. This is denied by the defendant. (2) That the defendant holds title under the same patent. This the defendant also denies. (3) The existence of the

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patent to John Gray Blount as older than the McRae patent. This does not seem to be denied. In seeking to establish his claim under the McRae patent, the plaintiff introduced conveyances from the heirs at law of Samuel Spruill. Defendant introduced a conveyance, dated May 22, 1832, purporting to convey, in the lifetime of H. G. Spruill, all his interest in the land. The deed is signed "Samuel Spruill, by H. G. Spruill." With the deed is this certificate: "This deed from Samuel Spruill to W. Foreman was exhibited in open court, and H. G. Spruill acknowledged that he signed it for Samuel Spruill, and by and with his direction and consent,"—certified by the clerk. One of the questions of fact was whether this deed was executed by H. G. Spruill as attorney for Samuel Spruill, or whether he signed it in the presence of, and for and instead of, Samuel Spruill. The deed was over 40 years old. The trial judge passed upon the facts, and held on the evidence that plaintiff was not entitled to recover. This would seem to end the case. "It is well settled that when a trial court, to which a cause has been submitted, makes a special finding of fact, this court has no authority to inquire whether the evidence supports the finding, but only whether the facts found support the judgment." Syracuse Tp. v. Rollins, 104 Fed. 961, 44 C. C. A. 277. In ejectment the plaintiff must recover on the strength of his own title, not on the weakness of his adversary. McNitt v. Turner, 16 Wall. 362, 21 L. Ed. 341. In the case at bar he rests his claim on the McRae patent, and seeks to trace his chain of title to it. The trial judge found that there existed a grant older and paramount to the McRae patent. He found also a defect in plaintiff's chain of title. To meet the paramount title, the plaintiff insists that the defendant and plaintiff claim under a common grantor. This defendant denies in its pleading and in the evidence. The trial judge so finds the fact in defendant's favor. The claim of defendant is an undivided estate in the whole tract, and this is so stated by the plaintiff himself, and the plaintiff insists that this claim is based on a paper title. Yet his whole case proceeds on the proposition that defendant cannot maintain this claim because of broken links in the chain of title. On the other hand, the defendant repudiates this, and stakes its case on possession under color of title adverse to and in contradiction of any claim behind Jarvis and Walker. It may be that it does this because of the defects in the paper title. It may be that, if called upon to prove its possession under color of title, it may fail. But under no rule of law can the defendant be called upon to prove any title until the plaintiff has first established prima facie his own title. Until this is done, "potior est conditio defendentis."

The plaintiff in error has filed six assignments of error. What has been said meets the fourth and fifth of these assignments. The first assignment of error is to the admission in evidence of the patent to John Gray Blount. There are two reasons given to sustain this assignment. The first is that plaintiff and defendant claim under the junior grant, and so defendant is estopped. As has been seen, the decision of the trial judge has overruled this. The second reason is that it was incompetent for the defendant to show a paramount outstanding title, without connecting himself with that title. But the

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plaintiff must stand on his own title, not on the weakness of his adversary. In Marsh v. Brooks, 8 How. 223, 12 L. Ed. 1056, the court says:

"Where the same land has been twice granted, the elder patent may be set up as a defense by a trespasser, when sued in ejectment by a claimant under the younger patent, without giving further proof as to present ownership."

The second assignment of error objects to the introduction in evidence of a part of the record of the circuit court of appeals in a cause in which the present defendant in error, the Richmond Cedar Works, and the plaintiff in error here are parties, and insists that this record works no estoppel against the plaintiff in error. There is no way of discovering from the record the purpose of introducing that record. If it was introduced for the purpose of showing that defendant in error always based his claim on possession under color of title, it was relevant. If for any other purpose, it was irrelevant. But it does not seem to have influenced the judgment of the court, and so it is not a sufficient ground for reversal. Mining Co. v. Taylor, 100 U. S. 37, 25 L. Ed. 541; Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527, 23 L. Ed. 868; Railroad Co. v. Pratt, 22 Wall. 123, 22 L. Ed. 827.

For the same reason the third assignment of error, respecting the introduction in evidence of the judgment in Hawkins v. Richmond Cedar Works, 122 N. C. 87, 30 S. E. 13, is overruled.

The only remaining assignment of error is that the court erred in permitting evidence ruled out and excluded by the court as incompetent to be incorporated in the transcript of the record to this court. Of course, this was error, but not reversible error. This court will not consider this part of the record at all. No doubt this was incorporated in the record under misapprehension of the practice in writs of error from this court, or some confusion of our practice with the practice in the state court. In cases at law the practice of the federal court follows as nearly as may be the practice in the courts of the state, and in which they exercise jurisdiction (Rev. St. § 914), up to and including the judgment. Everything after judgment, looking to its review in an appellate court, is regulated solely by act of congress, and is in no way affected or controlled by state practice. Muller v. Ehlers, 91 U. S. 251, 23 L. Ed. 319; Whalen v. Sheridan (C. C.) 5 Fed. 494; U. S. v. Train (C. C.) 12 Fed. 853; Fleitas v. Richardson, 147 U. S. 538, 13 Sup. Ct. 429, 37 L. Ed. 272. In order to obtain relief from supposed errors in a trial at law, a writ of error must be sued out of the appellate court. With this writ of error the record must go up,—the whole record, unless the parties by stipulation agree to except unnecessary parts of it. With the record go up such portions of the testimony as are needed to elucidate the exceptions taken at the trial. This record is prepared by the clerk, aided by the counsel in the case. With it the trial court has no concern, and over it no control. If a difference of opinion arises between counsel as to the preparation of the bill of exceptions as to what and what character of exceptions were taken at the trial, this difference the trial judge settles. Beyond this he does not concern himself. If the record sent up is too meager, the appellate court,

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upon proper application, settles it by a certiorari. Redfield v. Parks, 130 U. S. 625, 9 Sup. Ct. 642, 32 L. Ed. 1053; Hoskin v. Fisher, 125 U. S. 217, 8 Sup. Ct. 834, 31 L. Ed. 759. If it contain unnecessary matter, the appellate court can rectify this in fixing the costs of the case. In no event can the mere existence in the record of testimony excluded by the court, and not considered by it, and not brought up by bill of exception, work a reversal here.

The decree of the circuit court is affirmed.

WEST v. EAST COAST CEDAR CO.*

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 427.

1. APPEAL—QUESTIONS REVIEWABLE—ALLOWANCE OF COSTS IN EQUITY.
   The awarding of costs in equity is discretionary with the court, and no appeal lies from its action in the matter.
2. SAME—APPEALABLE ORDERS—FINALITY OF DECREE.
   A decree dismissing a bill, upon which an injunction pendente lite has been issued, conditioned on the giving of a bond by complainant, is final and appealable, notwithstanding it orders a reference to a master to ascertain what, if any, damages have been sustained by defendant by reason of the injunction, since such order does not relate to a matter within the pleadings, but is made simply in execution of the decree.
3. INJUNCTIONS—ANCILLARY SUITS—DISMISSAL.
   A suit for an injunction against waste, ancillary to an action in ejectment by complainant against defendant, is properly dismissed on the entry of judgment for defendant in the law action.
4. SAME—DAMAGES FOR BREACH OF BOND—POWER OF COURT TO ALLOW.
   Whether or not a court of equity, which has, in the exercise of its discretion, required a bond to be given as a condition to the issuance of an injunction, has jurisdiction to assess damages for the breach of such bond on dissolving the injunction, it has power to decide whether damages shall be allowed; and a reference to ascertain what, if any, damages have been sustained by defendant, is within its discretion.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh.

For opinion below, see 110 Fed. 727.

T. B. Womack, for appellant.

E. F. Aydlett and F. H. Busbee, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the Eastern district of North Carolina. An action at law to recover possession of an interest in a large tract of land was pending on the law side of the court. The plaintiff at law, William A. West, filed a bill on the equity side of the court, praying an injunction against the East Coast Cedar Company, the defendant, restraining it from cutting timber on the land in dispute pending the action at law. An injunction was issued, and as a condition thereto an injunction bond was required from complainant. The

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case at law having terminated in favor of the defendant in this suit, the bill was dismissed, the injunction was dissolved, costs and disbursements were awarded the defendant, and the court adds:

"That defendant recover of the complainant and the sureties on the injunction bond such damages as defendant has suffered by reason of the issuing of such injunction. It is further ordered by the court that this cause be referred to Wm. M. Bond, Esq., of Edenton, N. C., who is hereby appointed special master for that purpose, to ascertain and report to this court what damages, if any, defendant has suffered by reason of the injunction aforesaid."

Leave was granted to appeal from this judgment. The cause is here on several assignments of error, to wit: (1) Error in dismissing the bill; (2) error in dissolving the injunction before a final hearing, and at such final hearing dismissing at the cost of defendant; (3) in that costs were to be taxed against complainant, and not against the defendant; (4) in that it was adjudged that defendant recover of complainant and his sureties on the injunction bond such damages as the defendant may have suffered by reason of the issuing of the injunction and referring the case to a special master to ascertain and report the same, whereas his honor should have decreed that the complainant was not liable for any damages upon the injunction bond in this case.

The second and third assignments of error cannot be entertained in this court. They complain that costs are taxed against complainant. Costs in equity are within the discretion of the court, and hence no appeal lies to this court in the matter of costs. Stuart v. Boulware, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568; Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Mining Co. v. Sweeney, 24 C. C. A. 578, 79 Fed. 277. No abuse of this discretion is shown. Clarke v. Warehouse Co., 10 C. C. A. 393, 62 Fed. 328.

With regard to the first and fourth assignments of error, there is doubt at the threshold whether the decree below is final. If it had stopped at the dismissal of the bill, of course it would have been final. But continuing, the court below ordered a reference to inquire and report what damages, if any, defendant has suffered. So the bill is dismissed in words, but it is retained in effect, for the purpose of ascertaining the damages. The test of the finality of a decree is that, if it be affirmed in the appellate court, nothing will be required of the court below but to execute its own decree. Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73. Or as it is put in Mower v. Fletcher, 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed. 117:

"A judgment of a superior court remanding a case to an inferior court for entry of judgment, and leaving no judicial discretion to the latter as to further proceedings, is final."

In the case at bar the order relating to the injunction bond, and damages thereunder, cannot be said to be within the pleadings. It is ordered simply in execution of the decree.

In McGourkey v. Railroad Co., 146 U. S. 545, 546, 13 Sup. Ct. 172, 36 L. Ed. 1076, the law is thus stated:

"It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final. But if it refer the case to him as a sub-

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ordinate court, and for a judicial purpose,—as to state an account between the parties, upon which a further decree is to be entered,—the decree is not final. But even if an account be ordered taken, if such accounting be not asked for in the bill, and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final."

The provision in the order of the court below with reference to the damages is simply in execution of the decree, and imposes no judicial duties on the special master. He is to decide nothing. We are of the opinion that this decree, under this case, is final. This being the case, we see no error in the court below in dismissing the bill. It was filed only as ancillary to the suit at law, in order that matters should remain in statu quo pending the result of that case. The case at law has ended in favor of the defendant. The case in equity has served its purpose, and should be dismissed.

The complainant, however, appeals, and assigns for error the order respecting the damages secured by the injunction bond. The requirement of a bond from complainant in granting an injunction is a matter within the discretion of the court. The amount of such a bond is also within its discretion. Even where a bond has been required, it is still within the discretion of the court whether it ought to be enforced. Russell v. Farley, 105 U. S. 442, 26 L. Ed. 1060. It has been doubted whether the court, when a bond has been taken, can assess the damages, or leave the defendant to his action at law on the bond. In Bein v. Heath, 12 How. 168, 13 L. Ed. 939, Chief Justice Taney said, in so many words, that in such a case the bond must be sued at law. And this opinion was followed by Mr. Justice Curtis, on circuit, in Merryfield v. Jones, 2 Curt. 306, Fed. Cas. No. 9,486. But Mr. Justice Bradley, speaking for the court in Russell v. Farley, supra, discussing these cases and others quoted to it, says:

"Upon a careful examination, we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the court of chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case, and, having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice and put an end to the litigation."

He also says, if it has this power, it is a matter of discretion. These remarks of Mr. Justice Bradley are obiter dicta. In Meyers v. Block, 120 U. S. 214, 7 Sup. Ct. 525, 30 L. Ed. 642, the power of the court of equity to impose any terms in its discretion in granting or continuing an injunction is stated as beyond question. In Coosaw Min. Co. v. Farmers' Min. Co. (C. C.) 51 Fed. 107, the circuit court, in a case of this character, assumed jurisdiction to assess the damages. The reasons given are that the suit, from its inception, was in that court; the conduct of the parties is always under its supervision; the character of the questions involved, and the ease or difficulty in reaching a conclusion upon them, can nowhere be as well known as in the court which heard, considered, and decided them. Be this as it

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may, it is clearly within the power of the court to decide whether or not damages be allowed in a case where an injunction bond has been given. This was the precise point decided in Russell v. Farley, supra. This is within its discretion. The order of the court below refers to a special master the duty of inquiring whether or not defendant has suffered damages, and to what extent. This was simply to furnish it with information as a guide to the exercise of its discretion. The report on the inquiry may induce the court to content itself with fixing the costs only on complainant. "On this point the judgment of the court approaches so near to an exercise of discretion that we would require a very clear case to be made in order to induce us to reverse it." Russell v. Farley, 105 U. S. 446, 26 L. Ed. 1060.

The decree of the circuit court is affirmed.

UNITED STATES GRAMOPHONE CO. v. SEAMAN.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 419.

APPEAL—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.

Under the settled rule that the granting or refusing of a preliminary injunction is not a matter of strict right, but rests largely in the discretion of the court, which will not be interfered with except where improvidently exercised, an order granting or continuing such an injunction will not be reversed on appeal, where it was made in an ancillary suit, and followed a similar order granted by another court in the principal case, and where the court acted after a careful consideration of the issues and facts, which were complicated.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

This case comes up by appeal from the circuit court of the United States for the district of West Virginia. The appeal is from an order granting and continuing a temporary injunction. The facts essential to a discussion of the questions involved in this appeal are these:

Emile Berliner was the inventor, patentee, and owner of a certain sound-producing machine, to which he gave the name of Gramophone. The United States Gramophone Company, a corporation of the state of West Virginia, became entitled to all the right, title, and interest of Berliner in these patents. Being so entitled, on 2d September, 1895, this corporation assigned and gave to one W. C. Jones, of New York City, the sole and exclusive right to manufacture, sell, lease, and deal in said inventions of Berliner in the United States. The consideration of this transfer is the payment of money and the performance of mutual covenants, all of which are carefully set out in detail. Jones is allowed to organize a company within 90 days from the date of the contract to take his place therein, enjoy all his rights thereunder, and assume and perform all contracts and obligations, and be bound by the conditions imposed on him in his contract with the United States Gramophone Company. One of the conditions of the contract is the right of forfeiture reserved to both parties upon the failure of the other party to perform its covenants thereunder. That Jones thereupon organized the Berliner Gramophone Company, and invested it with all his rights under this contract. The Berliner Gramophone Company, a corporation of the state of Virginia, on 18th October, 1896, entered into a contract with Frank Seaman, in which, styling itself the licensor, it declares itself to be in exclusive control, in the United States, of the inventions of Emile Berliner relating to the

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gramophone, and thereupon grants to Frank Seaman the exclusive license to buy, sell, and deal, throughout the United States of America (except in the District of Columbia), in gramophones and gramophone goods embodied in the said inventions, and all improvements therein that may come to the licensor's control, excepting recording apparatus. Among the provisions of this agreement is this: The price which the licensor shall receive from the licensee for gramophones and gramophone goods shall be the sum of the following items: (1) The actual manufacturing cost; (2) a margin of 40 per cent. of the said manufacturing cost; (3) a royalty which the licensor is required to pay to the United States Gramophone Company, to the amount of 10 per cent. of the retail price of the gramophone and gramophone goods. There is also provision for cancellation by the licensor of the agreement in case of breach of covenant by Seaman. Differences arose between Seaman and the Berliner Gramophone Company. These culminated in a suit by Seaman in the circuit court of the United States for the Western district of Virginia against the company, charging breaches of the covenants, and praying injunction; whereupon a temporary injunction was granted. The interest in, and certain actions of, the United States Gramophone Company, in connection with this contract, having been developed at the hearing, Seaman filed his bill against the Berliner Gramophone Company and the United States Gramophone Company in the Western district of Virginia. No service could be made of process under this bill on the United States Gramophone Company, inasmuch as it was a resident of West Virginia, and had no one in Virginia who could be served for it. Thereupon Seaman filed in the circuit court of West Virginia the bill the basis of this suit. The United States Gramophone Company is a corporation of West Virginia.

This bill recites the filing of the proceedings against the Berliner Gramophone Company in the Western district of Virginia; the granting of the temporary injunction upon it; the various proceedings thereupon; the filing of a bill against both the Berliner Gramophone Company and the United States Gramophone Company, seeking relief; the failure of this bill to effect its purpose, because the United States Gramophone Company was not a resident of that district. It was then charged that certain stockholders in these two Gramophone Companies had signed an agreement for the sale of a controlling interest in their stock to one Charles Adamson, whereby the two corporations are practically dissolved, and a new corporation created, called the Consolidated Talking Machine Company of America, the object, purpose, and effect of which is to enable the Berliner Gramophone Company, by colluding with the United States Gramophone Company, to avoid the result of its breach of contract, and to escape the effect of the decrees of the court. It then recites the transaction between the United States Gramophone Company and Jones; the confirmation of this transaction by Berliner, the patentee; the vesting of all Jones' rights in the contract in the Berliner Gramophone Company; the contract between this gramophone company and the complainant, by which complainant acquired the exclusive right to sell all the gramophones and gramophone goods manufactured by the said gramophone company; the active prosecution by complainant of his work under said contract, and the large expenditure of money by him in promoting it; the failure of the Berliner Gramophone Company to perform its contract, and the suit thereupon by the complainant. The bill then goes on to charge a conspiracy between these two gramophone companies and other persons for the purpose of injuring and defrauding complainant, of the refusal to deliver him the goods according to the contract, and of their forfeiture of the contract, and that to this end they have served him with notice of the cancellation of the contract, not only between him and the Berliner Gramophone Company, but also between these two companies, which notices, however, it is charged, are entirely insufficient, and not in conformance to or compliance with the contract, and in the case of the latter notice is collusive and fraudulent, not properly given, and not justified by the terms of the contract, and that the United States Gramophone Company has all along had full notice of the rights of complainant.

The bill prays an injunction restraining the cancellation of the contract made between the Berliner Gramophone Company and the complainant, and

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between the same company and the United States Gramophone Company; also an injunction against the United States Gramophone Company, and all persons acting under it, from assigning, transferring, or in any manner disposing of, alienating, or affecting, the right, title, and interest of the defendant in the patent rights transferred by and described in said contracts, and from dealing with them in any way by which they may go into the hands of any one, save subject to the rights of complainant therein; that the United States Gramophone Company be enjoined from effecting or carrying out any scheme of consolidation with the Consolidated Talking Machine Company of America or any other corporation; that it be required to produce and file with the clerk, pending the determination of the controversy in this case, all the originals of the said patents and improvements thereon, the subject of the contracts aforesaid; and for general relief.

On 4th October, 1900, upon filing the verified bill, a temporary injunction was issued, with leave to defendant, on 20 days' notice, to move to set it aside. On 5th November, 1900, the defendant gave notice of a motion to dissolve the temporary injunction, and on 6th November filed its answer to the bill. On 30th November, 1900, the motion came up for a hearing, and was postponed by the court until certain depositions could be taken by both sides. On 24th January leave was given to complainant to file a supplemental and amended bill, in which is set out in full the alleged agreement for consolidation of the two gramophone companies. It contains practically the same prayers as the original bill. To this supplemental amended bill the defendant demurred: (1) Because no cause is stated entitling complainant to the relief prayed therein. (2) Because the Consolidated Talking Machine Company of America and Charles Adamson and the Berliner Gramophone Company were necessary parties to the bill. (3) Because they are nonresidents of this district, and cannot be compelled to answer herein. (4) There seems to be a defect in this ground, which is in these words: "That there is not any person or persons or corporations who or which have or has a common interest with the said Consolidated Talking Machine Company of America, or the Berliner Gramophone Company, or Chas. Adamson, or the persons who signed the agreement of June 15, 1900, either collectively as a class or individually, whose interests in the said bill affect and who will be affected if the relief prayed for is granted." (5) Because by plaintiff's own admission he has a complete remedy against the Consolidated Talking Machine Company of America, and therefore his remedy is against that company, and not this defendant.

On 27th April, 1901, defendant moved to dissolve the injunction granted 4th October, 1900. The court did not pass on the motion, but on 15th May, 1901, entered this order: "(1) The plaintiff, Frank Seaman, shall, within fifteen days from this date, enter into a stipulation with the United States Gramophone Company, whereby he shall agree upon his part to carry out in good faith, and in all respects, all the terms, covenants, agreements, and stipulations contained in the contract of October 10, 1896, between him and the Berliner Gramophone Company; and the said United States Gramophone Company shall likewise stipulate within a like period of time to carry out and perform all the agreements, covenants, and stipulations contained in said contract, so far as the same were to be performed by the said Berliner Gramophone Company,—that is to say, the United States Gramophone Company shall take the place under said contract of the Berliner Gramophone Company, and perform the said contract just as it is provided therein to be performed by the Berliner Gramophone Company. (2) Should either the said Frank Seaman, plaintiff, or the United States Gramophone Company, defendant, within the time aforesaid, fail to enter into such stipulation, or, if entered into, fail to carry out the same in good faith, in all respects, then, and in that event, the motion to dissolve the injunction, awarded in this cause on October 10, 1900, is continued until June 12, 1901. Should said stipulation be entered into, however, this decree shall not be construed so as to relieve Frank Seaman, the plaintiff, of the performance and execution of any covenant and agreement to pay the United States Gramophone Company the royalties provided for under the contract of October 10, 1896; but, on the contrary, it is the intention of this decree to declare that said roy-

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alties shall be paid to the said United States Gramophone Company, if said stipulation be entered into, in the same way, and in the same amounts, as provided for in said contract. The said stipulation, if entered into, shall in no wise prejudice the rights of any of the parties to this or any other litigation, and it shall only be in force and effect until the further order of the court, and in no event longer than the end of the litigation now pending in Virginia between Frank Seaman and the Berliner Gramophone Company."

On 5th June, 1901, defendant filed its answer to the amended supplemental bill. Efforts were made to prepare the stipulations ordered by the court, but it appears by an order of 15th June, 1901, that the defendant had not signed the stipulation; whereupon the court on 15th June, 1901, directed that the United States Gramophone Company and the Berliner Gramophone Company should both sign the stipulation within 10 days. If they did not do so, the motion to dissolve the injunction would be overruled, and the same continued. On 15th June, 1901, defendant filed his petition for leave to appeal, with assignment of errors. The appeal was allowed, and the cause is here. There are 12 assignments of error, as follows: "(1) It was error to award the injunction of October 4, 1900, without notice to the defendant company. The order awarding said injunction is hereby referred to and made a part of this assignment. (2) It was error to make and enter the decree of November 30, 1900, instead of hearing the motion then submitted to dissolve the injunction, due notice of which had been given. (3) It was error to permit the plaintiff, without notice to the defendant, to file his amended and supplemental bill. (4) It was error to have overruled the demurrer of the defendant company to said amended and supplemental bill, as was done by the decree of May 15, 1901. (5) It was error to have rejected the stipulation tendered by the defendant company in pursuance of the requirements of decree of May 15, 1901, and to have required the defendant company to make another and new stipulation, as was done by the decree entered in this cause June 15, 1901. (6) It was error to make and enter the decree of May 15, 1901, and by that decree to require the parties, plaintiff and defendant, to enter into any stipulation whatsoever. (7) It was error in the decree of June 15, 1901, which put upon the defendant company the necessity of procuring the execution of the new proposed stipulation by the Berliner Gramophone Company, and it was error to enter the last order of June 15th, modifying previous orders and decrees. (8) It was error in the decree of June 15, 1901, in providing for a new stipulation, and further providing that, unless the new stipulation was executed within ten days from the date of said decree by the defendant company and the Berliner Gramophone Company, the motion to dissolve the injunction awarded October 4, 1900, should stand overruled, and the injunction continued. (9) It was error not to have sustained the motion of the defendant company to dissolve the said injunction awarded, as aforesaid, on October 4, 1900. (10) It was error to overrule the motion made by the defendant in the order of May 15, 1901, for an increase in the penalty of the injunction bond. (11) It was error to have entered any decree in this cause after the first regular term of the court held after October 4, 1900; the next regular term of the said court after October 4, 1900, being fixed by law to begin on the 10th day of January, 1901. (12) There are other errors apparent on the face of the record on account of which the appellate court will be asked to reverse the proceedings had in this cause."

Marshall McCormick (Isaac Nordlinger, on the brief), for appellant.
John T. Harris and Waldo G. Morse, for appellee.

Before SIMONTON, Circuit Judge, and PURNELL and WADDILL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). The record is large and confusing. It is essential, therefore, to keep in mind the question, and the only question, which presents itself to this

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court under this appeal at this term. It is an appeal from an interlocutory order; and the only order from which an appeal can be taken at this stage of the case is the order of 15th June, 1901, continuing the injunction. Under the act of congress of 1900 (31 Stat. 660) appeals lie from interlocutory orders granting or continuing an injunction, provided the appeal is taken within 30 days from the entry of the order. The first temporary injunction was granted October 4, 1900. The appeal in this case was 15th June, 1901. So the first and ninth assignments of error need not be regarded.

With regard to the other assignments of error, they are directed largely to the merits of the case, and bear incidentally on the question as to continuing the temporary injunction. Was this improvidently awarded? The rule upon this subject is clearly stated in Welsbach Light Co. v. Cosmopolitan Incandescent Light Co., 43 C. C. A. 419, 104 Fed. 84, and it applies as well to the granting as to the refusing to grant an injunction.

"In determining in a given case whether the circuit court erred in refusing an injunction pending litigation, it is to be remembered that such injunction in no case is a matter of strict right. The application for it must be addressed to the sound discretion of the court. It may be granted or refused unconditionally or on terms. Upon appeal ordinarily the question is simply whether the court acted improvidently. Only when clearly erroneous will the order be reversed."

See, also, Ritter v. Ulman, 24 C. C. A. 71, 78 Fed. 222, 42 U. S. App. 263.

In the case at bar the record presented grave questions requiring careful deliberation. There were charges and counter charges. The facts were complicated, and needed full investigation. Another court of co-ordinate jurisdiction was engaged in the same investigation and examination, and had issued its temporary injunction. The case was evidently auxiliary to the case referred to pending in the Western district of Virginia, and was brought in the district of West Virginia solely because the present defendant refused to waive its privilege of trial in the district of its residence. The court below clearly was impressed with the comity due to the court in Virginia. The learned judge, who had had the widest experience, gave the case his most careful and patient examination. He came to his conclusion slowly, and not improvidently. Under all these circumstances, it seemed to him desirable that the status quo should be maintained, certainly until the main issues should be passed upon and determined in the case before the circuit court of the Western district of Virginia.

We are not prepared to say that the action of the court below in continuing the temporary injunction was improvident. Its decree is affirmed.

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BERLINER GRAMOPHONE CO. v. SEAMAN.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 412.

1. EQUITY—DISMISSAL OF BILL BY APPELLATE COURT—EFFECT OF PRIOR AMENDMENT.
After the granting of a preliminary injunction by a circuit court, complainant, by leave of court, filed an amended and supplemental bill. Defendant afterwards appealed from the order granting the injunction, but the record on appeal did not show the amended bill, nor was it called to the attention of the circuit court of appeals. That court, on the hearing, ordered the dismissal of the bill. *Held*, that on the filing of the amended and supplemental bill such bill, together with the original bill, constituted one pleading and one record, and that the order of the appellate court, having been made upon a defective record, did not operate to dismiss the bill as amended.

2. APPEAL—REVIEW—ALLOWING AMENDMENT OF PLEADINGS.
The granting of leave to file an amended and supplemental bill is a matter within the discretion of the court, and its action will not be reviewed in an appellate court unless there has been a gross abuse of this discretion.

3. EQUITY—GROUNDS OF JURISDICTION—SUFFICIENCY OF BILL.
A bill in equity, which alleges that the parties entered into a contract, the performance of which was to extend over a term of years, and that defendant, which is a corporation, has conspired with others to take such action as will render it impossible to perform the contract on its part, and will also render it insolvent, for the purpose of defeating the rights of complainant, states grounds for equitable relief, and is not demurrable.

4. SAME—RETENTION OF JURISDICTION ACQUIRED—ENJOINING ACTION AT LAW.
A court of equity which has rightfully taken jurisdiction of a controversy and has all the parties before it will retain such jurisdiction to grant full relief, and may enjoin the institution and prosecution of an action at law by one of the parties in any other court involving the matters in controversy before it.

5. APPEAL—APPEALABLE ORDERS—REFUSING TO DISSOLVE INJUNCTION.
Under Act Cong. June 6, 1900 (31 Stat. 660), an interlocutory order of a federal court refusing to dissolve an injunction is not appealable.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

See 108 Fed. 714.

Wm. Gordon Robertson and Marshall McCormick (Albert B. Weimer and Frederick M. Leonard, on the briefs), for appellant.

John T. Harris and Waldo G. Morse, for appellee.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

SIMONTON, Circuit Judge. This case comes up again by appeal from an order of the circuit court of the United States for the Western district of Virginia granting a temporary injunction on the filing of an amended and supplemental bill. The case has been in this court on appeal from an order of the same court granting a temporary injunction upon an original bill. The appeal was heard May 18, 1901,

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opinion filed in July, 1901 (110 Fed. 30), and by the mandate the injunction was dissolved, and the case was remanded to the circuit court, with instructions to dismiss the bill. It seems, however, that pending this appeal, and before citation issued or served, before the record was filed in this court, the court below, on application of complainant, had permitted an amended supplemental bill to be filed. The petition for leave to file this amended supplemental bill was filed October 17, 1900, whilst the court had the question as to the injunction on the original bill under consideration. On December 3, 1900, leave was given to file the amended supplemental bill after argument by counsel on both sides. The supplemental bill was filed December 7th following. The defendant filed demurrer to the whole bill January 7, 1901. This was set down for argument, and in the order it was provided that, as soon as the demurrer shall have been passed upon, the defendant shall have leave to plead or answer thereto, as he may be advised, in accordance with the equity rules. On March 23, 1901, argument was had on the demurrer, and it was overruled. Thereupon, by leave of the court, the defendant filed its answer. The complainant thereupon moved the court for a temporary injunction on the prayers of his bill. The court on the same day granted the motion so far as the fifth prayer was concerned, to wit, restraining the defendant from prosecuting an action at law brought by it against the complainant in the circuit court of the United States for the Southern district of New York, praying damages against him for breach of the contract, the subject-matter of this suit in equity. A decision upon the other prayers of the complainant was reserved. Thereupon the defendant was allowed an appeal on May 4, 1901, on assignments of error filed that day, and the case is here.

In advance of the discussion of the assignments of error, the defendant in the court below (appellant here) contends that the dismissal of the original bill carries with it the dismissal of this amended and supplemental bill. As has been said, nothing appeared on the record, and no mention was made in the argument of the first case, of the leave to file a supplemental bill and the orders thereon immediately following the decree appealed from, all filed before that appeal was finally completed. If such facts had appeared, it is more than probable that this court would have postponed the hearing of the appeal. The question now is, does this dismissal of the original bill operate as a dismissal of all proceedings subsequent to the date of the order appealed from in the first case? The motion for leave to file an amended and supplemental bill was an admission by complainant that the original bill was defective in important particulars, and the action of the court in granting leave to file the amended and supplemental bill was a recognition of this position. So, when the cause was heard here, it was not the case made below, but on a condition of the case admitted on all sides to be defective, and with its defects cured so far as the court below was concerned. Apart from any authority, it would seem that on principle the decision of this court upon a defective presentation of the case should not be conclusive of it in all respects. An amended bill is a continuation of the original bill, and forms a part of it. The original and amended bills constitute one pleading and

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one record. 1 Daniell, Ch. Pl. & Prac. p. 402, c. 6, § 7. If they constitute one record, then everything in the amended bill and supplemental bill has as much claim upon the attention of the court as anything in the original bill. The real record is the amended and supplemental bill with the original bill, and they, amalgamated, constitute the case of complainant. In other words, the court no longer looks into the original bill to ascertain the character of relief sought, but to the new record, made up of the original and the amended and supplemental bills, and deals exclusively with that. This is shown by the illustration Mr. Daniell gives to the rule just quoted from him. "When," says he, "an original bill has been fully answered, and amendments are afterwards made, to which defendant does not answer, the whole record may be taken pro confesso generally, and an order to take the bill pro confesso as to the amendments only will be irregular." Daniell's doctrine on this subject is followed in French v. Hay, 22 Wall. 246, 22 L. Ed. 854; Phosphate Co. v. Brown, 20 C. C. A. 428, 74 Fed. 323, 42 U. S. App. 57; Miller v. McIntyre, 6 Pet. 62, 8 L. Ed. 320. It is clear that at the time these parties were heard in this court upon the original bill the controversy between them was no longer presented by the original bill, but was contained in a record made up of the original bill and the amended and supplemental bills. So the dismissal of the original bill did not work a dismissal of the controversy.

The case before this court now has not gone to final judgment. It comes up on an interlocutory order, the granting of an injunction. If the court below had jurisdiction of the cause appearing in this record, the only question which we can consider is, was the temporary injunction providently issued? The gravamen of the new record made in the amalgamation of the original and amended and supplemental bills is a contract between the complainant and the defendant, whereby the defendant, being in control of the manufacture and sale of all gramophones and gramophone goods under the Berliner patent, contracted with the complainant to give him the exclusive agency for the sale of such goods in nearly every part of the United States, he fulfilling certain covenants on his part; that, this agreement being in existence, the defendant had entered into a conspiracy with another corporation and certain persons, whereby all control of the patented articles was put out of its power, so that it could not fulfill any of the terms of its contract, and to this end it has served on complainant a notice of cancellation of the contract, which, however, is entirely insufficient both in law and equity, and not in conformance to or in compliance with the terms of the contract; and in pursuance of the same purpose, and carrying out its conspiracy with the United States Gramophone Company, from whom defendant derives its rights in said gramophone invention, the last-named company has declared its contract with defendant company canceled, which notice, however, is collusive and fraudulent, and intended to operate to the prejudice of complainant, not properly given and not justified by the terms of the contract; and that this United States Gramophone Company and the other parties in the conspiracy are without the jurisdiction of the court; that this action on the part of defendant renders it insolvent, and deprives the complainant of all hope of relief. It, in effect, delays, hinders, and defeats

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him. That portion of the bill with which this appeal is concerned is with respect to a suit instituted by the defendant against this complainant in the circuit court of the United States for the Southern district of New York, involving precisely the same issues as were made in the court below, and on precisely the same points which that court then had under advisement. As has been stated, the court below granted the temporary injunction on the fifth prayer for relief, reserving the others. This fifth prayer is in these words:

"That the said defendant, the Berliner Gramophone Company, its officers and attorneys, may be enjoined and restrained from in anywise prosecuting, conducting, or carrying forward in any manner whatsoever until after the final hearing and determination of the issues, matters, things, and questions whatsoever joined, raised, or presented in this action, said action at law, brought by it against your orator."

To this bill the defendant demurred, and, the demurrer being overruled, it at once filed an answer. The answer being in, and on the motion for a temporary injunction evidently being read as an affidavit, the court made this order:

"And thereupon the plaintiff, by counsel, moved the court for the injunction prayed for in the first, second, and fifth prayers of said amended and supplemental bill. Upon consideration whereof the court doth order, adjudge, and decree that the defendant, the Berliner Gramophone Company, its officers, agents, and attorneys, be, and the same are hereby, enjoined and restrained, until the further order of this court, and, preceding the determination of this cause, from in any wise further prosecuting, conducting, or carrying forward in any manner whatsoever any and all of the matters, things, and questions whatsoever joined in this suit in the action at law instituted by the defendant, the Berliner Gramophone Company, against the plaintiff, Frank Seaman, in the United States circuit court for the Southern district of New York, on the law side thereof, on the 23d day of October, 1900. But this injunction order shall not take effect unless and until the said plaintiff or some one for him shall execute bond, payable to the said defendant, conditioned according to law, to be approved by the court, in the penalty of fifteen hundred dollars. And as to the granting of the injunction prayed for in the first and second prayers of said bill the court takes time to consider. And thereupon the defendant moved the court to dissolve the said injunction herein awarded upon the record of this cause, which motion the court doth overrule."

The defendant files four assignments of error: (1) It is assigned as error that the court should not have granted leave to file the amended supplemental bill, upon which said decree was based. (2) It is assigned as error that the court overruled the demurrer of the defendant to said bill. (3) It is error on the part of the court to award the injunction contained in the decree of March 23, 1901, because the action mentioned in the proceedings as having been instituted in the state of New York was instituted for the purpose of obtaining from the plaintiff damages from an alleged breach of the contract between the parties, and was in the nature of a counterclaim or set-off, and was not being litigated in the above cause, no question being raised by the pleadings as to what damages the defendant suffered and none being claimed by it in this proceeding. (4) It is assigned as error that the court overruled the motion of the defendant to dissolve the injunction awarded by said decree of March 23, 1901, for the same reasons that are set forth in the foregoing assignment of error.

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1. The granting leave to file an amended and supplemental bill is within the discretion of the court. Railroad Co. v. Newman, 23 C. C. A. 459, 77 Fed. 791. The granting or refusing leave to file an amended bill or plea is a matter within the discretion of the trial court, and will not be reviewed in an appellate court unless there has been gross abuse of this discretion. Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; Gormley v. Bunyan, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086; Marco v. Hicklin, 6 C. C. A. 13, 56 Fed. 549. As a general rule, matters resting in the discretion of the court below cannot be re-examined in the appellate court. Cheang-Kee v. U. S., 3 Wall. 320, 18 L. Ed. 72. In the case at bar the court exercised its discretion after careful examination. A petition was filed asking leave to file the amended and supplemental bill. Notice was given. A day was fixed for the hearing, and full discussion was had. After this the decision of the court was made. We see no abuse of discretion in the court. "All that the court inquires into in such an application is whether probable cause exists for granting leave, and whether the application states facts and circumstances which, if properly pleaded, would sustain a supplemental bill or an original bill in the nature of a supplemental bill. The practice in the circuit courts touching applications under the rule for leave to file supplemental bills is liberal toward the applicant, and upon such application the court will not proceed to try the cause, nor to determine questions which may never appropriately be raised by demurrer to the bill when filed." Bates, Fed. Eq. Proc. § 637

2. Was it error to overrule the demurrer of defendant to the bill? The demurrer admits the facts stated in the bill. These facts complainant states were only discovered at the first hearing, and many of these have accrued since that hearing. These statements as to these facts have been set out above. If they be true, there is certainly ground for filing the bill and for an investigation of the facts as stated, and for relief therein. They are of an equitable character and go to sustain the jurisdiction of the court.

3. The third assignment of error goes to the injunction restraining the defendant from proceeding in its action at law in the Second circuit. The court below had taken jurisdiction of all matters in controversy between the complainant and defendant, and was proceeding to adjust the equities between them. It claimed to have entire jurisdiction over the whole controversy, and to afford relief. After this decision was made, and whilst it was still operative, the defendant went into a court of law, and, upon the same facts and circumstances set out in pleadings in the cause in the court below, sought relief in this law court. The complainant was thus compelled not only to go into another jurisdiction to try points at issue below, but also to go into the jurisdiction of a law court in which he could not avail himself of his equities. Under these circumstances the court below enjoined him. It is a familiar principle that when a court of equity has taken jurisdiction of a controversy and has all the parties before it, it proceeds to give full relief, and it can enjoin any proceedings in any other court touching the matters in controversy be-

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fore it. Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538.

4. The fourth assignment of error is that the court overruled the motion of defendant to dissolve the injunction awarded by the decree March 23, 1901, for the reasons set forth in the other assignments of error. Under Act Cong. June 6, 1900 (31 Stat. 660), this court no longer can entertain an appeal from an interlocutory decree refusing to dissolve an injunction. Westinghouse Air-Brake Co. v. Christensen Engineering Co., 44 C. C. A. 92, 104 Fed. 622; Wire Co. v. Boyce, 44 C. C. A. 588, 104 Fed. 173; National Automatic Mach. Co. v. Automatic Weighing, Lifting & Grip Mach. Co., 44 C. C. A. 664, 105 Fed. 670; Heinze v. Mining Co., 46 C. C. A. 219, 107 Fed. 165; Rowan v. Ide, 46 C. C. A. 214, 107 Fed. 161.

The decree of the circuit court granting the injunction is affirmed.

McMILLAN v. MORAN.

(Circuit Court of Appeals, Second Circuit. January 7, 1902.)

No. 60.

TOWAGE—INJURY OF TOW—NEGLIGENCE OF TUG.

The master of a tug did not exercise reasonable prudence in attempting to take a tow under the Brooklyn Bridge when it was high tide, or nearly so, knowing that at mean high tide there was a margin of safety not exceeding one foot between the mast of the tow and the bridge, and the tug is liable for the damages caused by the breaking of the mast against the bridge.

Appeal from the District Court of the United States for the Southern District of New York.

Chas. C. Burlingham, for appellant.

J. Parker Kirlin, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. While we do not agree with all the findings of fact in the opinion of Judge Brown in the court below (107 Fed. 149), we agree with him in the more essential facts in the case, and concur in his conclusion that the tug did not exercise due care under the particular circumstances in performing the towage service. Her master was informed that the mast of the tow was about 134 feet high. Assuming that he had a right to suppose that the bridge was 135 feet above the water at mean high tide, the margin of safety was too narrow in the condition of the tide at the time. He ought to have been aware, upon observation of the piers and slips, that it had receded but a little. In taking the chances when this was apparent or should have been, he disregarded reasonable prudence.

Decree affirmed, with interest and costs.

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GENERAL ELECTRIC CO. v. WEBSTER & D. ST. RY. CO.

WEBSTER & D. ST. RY. CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, First Circuit. January 22, 1902.)

Nos. 374, 375.

PATENTS—INFRINGEMENT—ARMATURE COILS OR WINDING.

The Eickemeyer patent, No. 377,996, for a coil or winding for dynamo-electric machines, describes, in claims 1 and 2, all of the patentee's invention, which consists of an armature coil for drum armatures, having a certain structural form, and a mode of operation by virtue of such form, the essential feature of which is that one side, or substantially one-half of the coil, is of lesser external dimensions than the internal dimensions of the other half, so that the short side of one coil may be passed into or through the long sides of other coils. Claim 4, which is for a winding composed of detachable counterpart coils, while broad in its terms, can only be sustained, in view of the prior art, when limited to the novel form of such coils described in the preceding claims. Claims 1, 2, and 4 considered, and *held* not infringed.

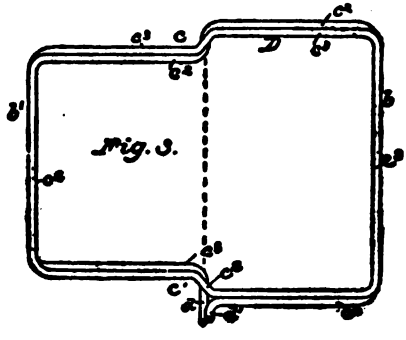
Appeals from the Circuit Court of the United States for the District of Massachusetts.

Frederick P. Fish and William K. Richardson (J. L. Stackpole, Jr., on the brief), for General Electric Co.

William H. Kenyon (George Harding and Richard Eyre, on the brief), for Webster & Dudley St. Ry. Co.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

COLT, Circuit Judge. The subject-matter of these cross appeals is the Eickemeyer coil or winding for dynamo-electric machines covered by letters patent No. 377,996, dated February 14, 1888. Claims 1, 2, and 4, of the patent are alone in issue; and the only question which arises is whether the defendant's coil infringes any of these claims. The circuit court held that claims 1 and 2 were not infringed, and that claim 4 was infringed. The form of the coil, with its axial line indicated, is illustrated in Fig. 3 of the drawings of the patent. Other coils shown in the drawings have more convolutions of wire, but all have essentially the same configuration.



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The two parts of the coil containing the offsets are called the "ends." They are the inactive portions outside of the magnetic field, and they lie alongside of or adjacent to the ends of the armature core. The two remaining parts opposite the axial line are called the "sides." They are the active portions, which rest on the periphery of the armature core. It will be noticed that the axial line splits the offsets in the center. It will also be noticed that the coil is divided by its axial line into two unequal halves, and that the relative dimensions of the two halves are such that the smaller half may pass into and through the larger half, or, what is the same thing, the short side through the long side. In describing this structural feature, the patentee uses several synonymous forms of expression: The coil "at one side of what may be termed its axial line is of lesser external dimensions than the internal dimensions of the opposite portion." Again: "Each [coil] having substantially one half thereof of lesser external dimensions than the internal dimensions of the other half." Again: "Thus making one side of the coil longer than the other side, so that the short side of any one coil may be passed into and through the long sides of other coils." Again: "In each coil there is a long side, b, and a short side, b′, and in each case the short side can be passed into or through the long side."

The claims in issue are as follows.

"(1) A dynamo-electric armature coil or winding, which at one side of what may be termed 'its axial line' is of lesser external dimensions than the internal dimensions of the opposite portion, both of said portions being alike in contour, substantially as described. (2) In a dynamo-electric armature-winding, a series of coils which are counterparts in contour, each complete and separable from the others, and each having substantially one half thereof of lesser external dimensions than the internal dimensions of the other half, substantially as described, whereby portions of each of said coils overlie and other portions underlie appropriate portions of other coils. (4) In a dynamo-electric armature, a winding composed of detachable counterpart coils, each of which is placed in immediate contact with the periphery of the armature core at one side only, substantially as described."

The first claim is for the novel coil. The second claim is for a winding composed of a series of such coils. The fourth claim is for a winding in which the coils are placed in a particular way on the periphery of the armature drum. These claims are carefully drawn. They are expressed in clear and unambiguous terms. The first two define with accuracy and exactness Eickemeyer's main invention. Read in connection with the specification and drawings of the patent, their meaning is plain, unmistakable, and certain. Eickemeyer had a problem to solve, and he solved it, as is common with real inventors, by the application of a simple principle. The problem was the construction of a practical form-wound drum-armature winding for dynamo-electric machines, especially of the bipolar type, composed of detachable, interchangeable, counterpart coils. This problem he solved by the simple method of making the two halves of the coil of such unequal dimensions that the smaller half of one coil may pass into and through the larger halves of other coils. In this conception lay the Eickemeyer invention. Where this construction and mode of opera-

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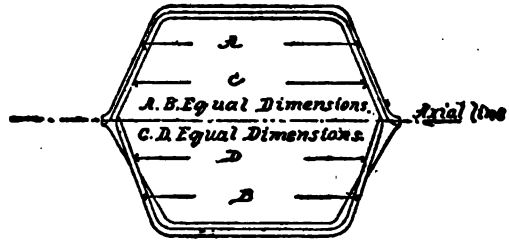
tion are present, there is present the Eickemeyer invention; and where this construction and mode of operation are absent, the Eickemeyer invention is absent. The lesser external and greater internal dimensions of the two halves of the Eickemeyer coil are made the sole test and criterion of the invention on every page of the drawings and specification of the patent, whether the coil be adapted to bipolar or multipolar machines, or to single or double layer windings. It is the one, fundamental, essential, fixed, and unvarying characteristic of the Eickemeyer coil. The first claim declares that the coil "at one side of what may be termed its 'axial line' is of lesser external dimensions than the internal dimensions of the opposite portion." The second claim declares that each coil has "substantially one half thereof of lesser external dimensions than the internal dimensions of the other half." Taking in the hand an Eickemeyer coil, we see at a glance the lesser external and greater internal dimensions of its two halves. Turning to the drawings of the patent, the same characteristic feature is always apparent. It is also stamped on every page of the specification, as sufficiently appears from the following extracts:

"Whether my coils or windings are adapted for use in bipolar or in multipolar machines, they are novel, in that each at one side of what may be termed its 'axial line' is of lesser external dimensions than the internal dimensions of its opposite portion, and both of said portions are substantially alike in contour, so that they can be symmetrically assembled upon a drum or core, and enable at the ends of said core one portion of each coil to overlie and the other portion to underlie appropriate portions of other coils." "In this armature [referring to Figs. 1 and 2] there are thirty-six counterpart coils, D, of conducting wire, and each coil at one side of its axial line (indicated in dotted lines in Fig. 3) is of lesser external dimensions than the internal dimensions of the opposite portion, and both of said portions are substantially alike in contour, and this characteristic feature is always maintained by me regardless of the number of windings in the coil and of variations in the form of the armature to be covered." "In each coil there is a long side, b, and a short side, b', and in each case the short side can be passed into or through the long side, because for the first time a portion of each coil which is at one side of its axial line is of lesser external dimensions than the internal dimensions of the opposite portion of the coil, although both portions are substantially alike in contour."

The inspection of an Eickemeyer coil, the examination of the drawings of the patent, and the reading of the specification, leave no room for doubt as to the meaning of the first two claims, and the novelty and scope of the invention therein described. The patentee expressly declares that his coil is "novel" in that one portion "at one side of what may be termed its 'axial line' is of lesser external dimensions than the internal dimensions of its opposite portion"; that "this characteristic feature is always maintained"; and that "for the first time, a portion of each coil which is at one side of its axial line is of lesser external dimensions than the internal dimensions of the opposite portion of the coil."

The defendant's coil, with its axial line corresponding to Fig. 3 of the Eickemeyer patent, is shown in the following cut:

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It is apparent that the two halves of this coil are equal and its two sides equal, and that consequently one half cannot pass into and through the other half. Manifestly this coil has neither the structural form nor the mode of operation of the Eickemeyer coil. It does not have the lesser external and greater internal dimensions of the two halves, nor the mode of operation whereby the smaller half of one coil may pass into and through the larger halves of other coils. There is absent from this coil the "novel" feature "always maintained" of the Eickemeyer coil, and hence the very essence of the Eickemeyer invention.

To hold that defendant's coil infringes claim 1, we must, by construction, add to the claim the following words:

"This claim is not limited to a coil in which one portion at one side of its axial line is of lesser external dimensions than the internal dimensions of the opposite portion, but includes a coil in which one portion, at one side of its axial line, is of the same dimensions as the opposite portion."

And to hold that defendant's coil infringes claim 2, we must, by construction, add to the claim the following words:

"This claim is not limited to a series of coils 'each having substantially one half thereof of lesser external dimensions than the internal dimensions of the other half,' but includes a series of coils in which the dimensions of each half of each coil are the same as the dimensions of the other half."

Further, to hold that defendant's coil infringes these claims we must ignore the express language of the specification, wherein the patentee defines the "novel" feature of his coil, and declares that "this characteristic feature is always maintained by me."

The most liberal rule of construction known to the patent law will not sanction such an interpretation of the specification and claims of a patent, or such an expansion of the invention. Such a construction and enlargement of the patent are manifestly a contradiction of its specific terms, and an attempt to read into the patent a structure never contemplated by the patentee, and entirely outside of his invention.

The complainant seeks to show infringement of these claims by two theories of construction, which are equally untenable. The first may be called the theory of the complainant's experts; and the second, the theory of the complainant's counsel, advanced during their closing argument in this court, and further supported by supplemental briefs. The first theory is founded upon the proposition that the two halves of the defendant's coil are to be measured, not by their own dimensions, but by their position on the armature drum, and that, when so measured, there are found the lesser external and greater internal

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dimensions of the Eickemeyer patent. Mr. Bentley, complainant's expert, says:

"When the coil is in place in the winding, one side lies close along the drum, and the other side is lifted up into an outer layer by means of the offset, to embrace the lower half of the next coil. The elevated half of the coil then has the larger dimensions, and the depressed portion the smaller dimensions, the former being on one side and the latter on the other side of the coil axis."

The difficulty with this theory is that it is purely hypothetical. There is no suggestion of any such method of measurement in the Eickemeyer patent, and, consequently, there is no warrant for applying such a method of measurement to defendant's coil. The halves of the Eickemeyer coil are measured by their own dimensions, and not by their dimensions when placed on the armature-core, or their dimensions relative to the axis of such core. The first claim of the patent is for a single coil of the specific form described. The second claim is for a series of these coils, each of the specific form described; and the only question is whether the defendant's coil has substantially the same structural form. We are dealing with the form of specific things, and not with their position relative to something else. We cannot alter the form of a thing by placing it upon another thing. The Eickemeyer coil does not change its form either by laying it on a table or by the collection of a series upon a drum armature. Nor can changes in position alter the relative dimensions of the halves of such coils. They cannot make unequal halves equal, or more equal, or less equal; and the same is true of defendant's coil. Its equal halves remain equal, and it is impossible to make them unequal by mere change of position. The measurement of the two halves of the defendant's coil relative to their positions on the armature is an attempt to prove infringement by an assumed and indefensible method. The adoption of this theory of measurement would make the halves of the Eickemeyer coil equal in some of the various forms of its use described in the patent. This theory illustrates that, as soon as we depart from the plain, simple, and unmistakable description and drawings of the Eickemeyer patent, we become involved in a maze of irrational and contradictory conclusions. The complainant's experts did not find the axial line of the Eickemeyer coil in any other position than as shown in Fig. 3 of the patent, or the axial line of defendant's coil in any other position than as indicated in the cut shown above; the line in each case splitting the offsets of the coils in their center. They undertook, however, to prove that the defendant's coil had, in fact, the unequal halves of the Eickemeyer coil, by measuring those halves with reference to their position on the armature core. This contention may be said to have been substantially abandoned at the argument, and the new theory advanced that the true axial line of the Eickemeyer coil is not the line indicated in Fig. 3, but another line which would include the whole of the offsets in the larger half or portion of the coil, and that the axial line of the defendant's coil is not the line which divides the coil into equal halves, but is a line which includes the whole of the offsets in one half. This theory may be illustrated by the following figures, taken from complainant's supplemental brief:

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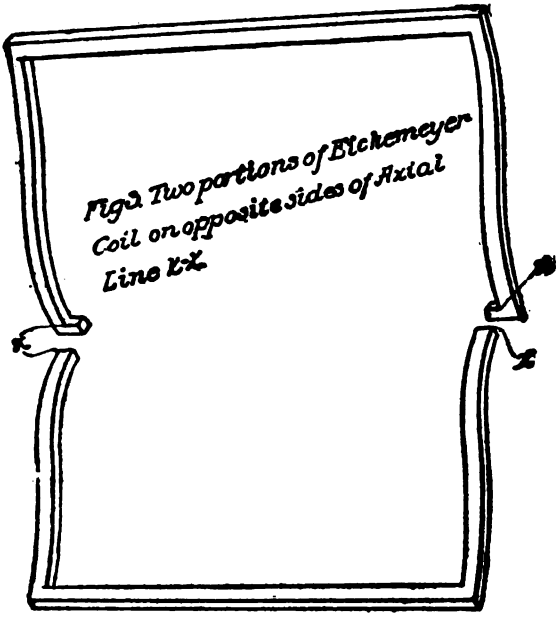
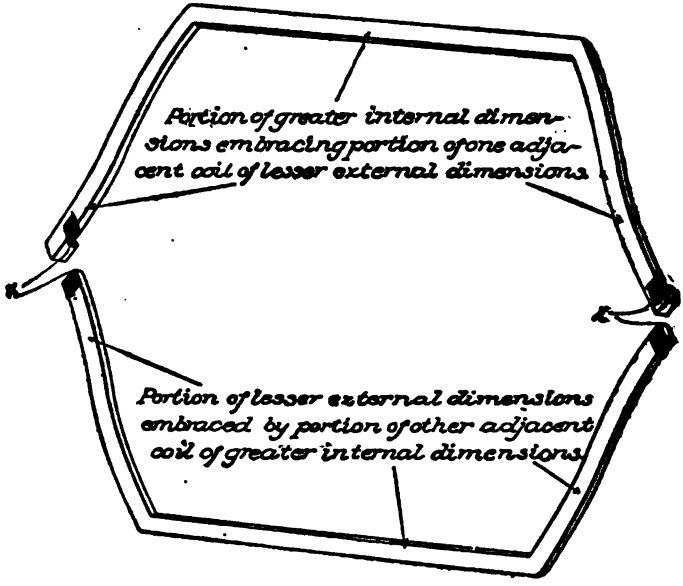


Fig 18.
Defendants coil with portions on opposite sides of axial line X X Separated.



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Here again we have a pure theory based upon false premises. The first false premise is the assumption of an axial line for the Eickemeyer coil which does not exist in fact, and the second false premise is the assumption of an axial line for defendant's coil which does not exist in fact. It can serve no good purpose to discuss the reasons why the axial line of the Eickemeyer coil should be or must be at one side of the offsets, or the consequences which flow from such an assumption, when the fact is otherwise. By arbitrarily changing the axial line of the Eickemeyer coil we can alter the relative dimensions of its two halves to suit our purpose, and by the same method we can make the two halves of the defendant's coil to conform therewith. By the same method also, or by making another arbitrary change in the axial lines, we might bring other coils within the Eickemeyer patent. But the question of infringement in this case is not to be determined by assumptions and hypotheses. We must keep within the region of facts and things. An Eickemeyer coil, on its face, by virtue of its configuration, has unequal halves, and there is no theory or hypothesis or reasoning which can make those two halves equal. The defendant's coil, on its face, by virtue of its configuration, has equal halves, and there is no theory or hypothesis or reasoning which can make these halves unequal. There is no justification in the Eickemeyer patent for the assumption that the axial line is not exactly where it is located in Fig. 3. The specification says that its position is indicated in Fig. 3, and this is further confirmed by the following description in the specification respecting the curves and offsets of each convolution of wire in the coil:

"In order that the crossing of the wire in each coil may be obviated, the wire at each end in each convolution is curved in evolute lines at both sides of what may be termed the 'axial line' of the coil, and at the center or inner ends of said evolute curves or bends the wire is offset and occupies lines which are parallel with the axis of the coil, thus making one side of the coil longer than the other side, so that the short side of any one coil may be passed into and through the long sides of other coils."

Each wire is curved in evolute lines on both sides of the "axial line," and at the center of the evolute curves the wire is offset and occupies lines parallel with the axis of the coil. This description locates the axial line exactly as shown in Fig. 3, where it splits the offsets in the center. The axial line of the Eickemeyer coil divides the coil into two unequal halves, so unequal that the lesser half must have the capacity of passing into and through the larger halves of other coils, for this is the function or mode of operation of this novel coil. The axial line in defendant's coil divides the coil into equal halves, having no such function or mode of operation. It follows, of necessity, that the defendant's coil is outside of the Eickemeyer invention disclosed in claims 1 and 2 of the patent, and therefore cannot infringe these claims.

The consideration of claim 4 remains:

"In a dynamo-electric armature, a winding composed of detachable counterpart coils, each of which is placed in immediate contact with the periphery of the armature core at one side only, substantially as described."

Upon its face, this claim covers every winding for a dynamo-electric machine composed of any form of detachable counterpart coils placed upon the periphery of the armature core in a double-layer winding,

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having one side only of each coil in contact with the armature drum.

Claims 1 and 2 cover the novel Eickemeyer coil, whether the winding on the armature core be a single-layer winding or a double-layer winding. Claim 4, in terms, is much broader, and includes coils in which the Eickemeyer invention is absent; in fact all forms of coils, provided they are detachable and counterpart when assembled on the armature core in a particular type of double winding. Two features are embraced in claim 4, namely, a winding composed of detachable counterpart coils, and a method of double-layer winding. This broad claim, according to its literal reading, can only be sustained on one of three grounds: First. That the Eickemeyer invention set forth in the first two claims of the patent covers all forms of drum-armature coils which are detachable and counterpart. If this be true, then this claim may be a valid claim for the Eickemeyer invention when used in the type of winding described. Second. That the Eickemeyer invention disclosed in his patent resides in the conception or discovery of the attachability and counterpartism of armature coils, rather than in the means by which such coils are made detachable and counterpart. If this be true, then this claim may be a valid claim for such coils when placed on the armature core in a particular kind of double-layer winding. Third. That the Eickemeyer patent covers two distinct inventions, (1) a particular form of armature coils, and (2) a new method of double-layer winding. If this be true, this claim may be a valid claim for this method of winding where detachable counterpart coils are employed. This broad claim cannot be sustained on the first ground, because we have already held that the Eickemeyer invention is limited to a coil having the essential structural characteristics set out in claims 1 and 2, and therefore does not cover other detachable counterpart coils in which these essential structural characteristics are absent. This broad claim cannot be sustained on the second ground, because, at the date of the Eickemeyer invention, there was nothing new in the mere conception of detachable counterpart armature coils apart from the means by which such coils are made detachable and counterpart. The desirability of having form-wound coils detachable and counterpart had long been recognized in the art, and the invention of Eickemeyer resides wholly in the means by which these results are attained. This broad claim cannot be sustained on the third ground, because the Eickemeyer patent is not for two distinct inventions,—a novel coil and a new method of double winding,—but is for a novel coil, or a series of such coils, which may be collected on the armature core in several types of winding. That the Eickemeyer patent is limited to the novel coil, and was not intended to cover, as a separate invention, and could not cover, if so intended, the method of double-layer winding described in claim 4, is shown (1) by the patent itself, (2) by the history of the patent in the patent office, and (3) by the prior art. The Eickemeyer patent contains a full, clear, and comprehensive statement of the patentee's invention, and a fairly comprehensive statement of the prior art; and in the consideration of the questions which arise in this case, it is a relief to turn from the conflicting and often insolvable opinions and explanations of experts respecting this patent and other patents in evidence,

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to the patent itself for light and guidance. As the meaning of claims 1 and 2 is made perfectly clear from the drawings and specification, so likewise is the meaning of claim 4. The general scheme of the patent is plain. The patentee points out his invention, and states its objects and advantages, and he then proceeds to describe, and illustrate by the drawings, the various arrangements in which his novel coils may be used. These show the capacity or adaptability of the patented coil, by virtue of its construction and mode of operation, for single-layer and double-layer windings. Most of the drawings of the patent illustrate single-layer windings, which the patentee evidently preferred. There are, however, two drawings which illustrate, as an alternative arrangement, the type of double-layer winding mentioned in claim 4. There is, however, no suggestion in the specification that Eickemeyer was the inventor of this method of double-layer winding. It only appears as one of the "arrangements" mentioned in the specification, and the patentee refers to it as follows:

"It is sometimes desirable that the wire at the sides of each coil should be in one layer, superimposed by the wires of another coil, to form additional layers, as illustrated in the coils D^2 of Figs. 12 and 13. * * * These coils have the same general characteristics of those previously described; but it will be seen that at each side of the core (indicated in dotted lines) each coil at its one side overlaps or overlies one side of another coil, and that at the opposite side this overlapping is reversed, thus placing all of the convolutions in both coils in a uniform position on the armature drum or core. This general arrangement can be carried out to any possibly desired extent."

The patentee states that "it is sometimes desirable" to make such a disposition of the two sides of the coil, and adds, "These coils have the same general characteristics of those previously described." There is no doubt, then, that all the patentee intended to cover by claim 4 was an alternative arrangement of his novel coils in a particular type of double-layer winding; and, if the claim is to be read in connection with the specification, or any significance is to be given to the words "substantially as described," it plainly must be limited to the coils of the patent. The proceedings in the patent office show that Eickemeyer attempted to claim this method of double winding and abandoned it. In the first application for his patent, there appears the following claim:

"7th. In a dynamo-electric armature, a 'winding' in which but one-half of the effective portion is placed in immediate contact with the armature core, substantially as described."

This claim was rejected on reference to the Freeman patent of July 29, 1884, and the Weston patent of June 13, 1882. Both of these patents describe the same method of double-layer winding with hand-wound coils. The prior art shows that this method of winding was well known. Not only is it disclosed in prior patents, but in one or more instances the patents state that it is a well-known method of winding. In the Hering patent of February 2, 1886, this method is mentioned as "a method heretofore employed" and "well known to those skilled in the art." The patentee further says: "Nor do I claim the disposition of the two halves of each coil alternately on the inner and outer layers of wire on the

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armature." The Freeman patent of July 29, 1884, and the Weston patent of June 13, 1882, as already stated, exhibit the same method of winding. In the Edison patent of August 22, 1882, there is found a similar type of winding, and the specification says: "The double winding is in effect a single winding with the alternate bars located in an outer layer." In the Jehl patent, dated January 10, 1888, one side of the coil is in one layer, and the other side in another layer. The Vincent English patent of May 18, 1882, describes two layers, with the sides of each coil in different layers. In the Hering, Freeman, and Weston patents, the coils on the armature core were hand-wound, or wound on the armature core by hand, as distinguished from form-wound, or wound on a former and then placed on the armature core. Assuming that Eickemeyer was the first to extend the use of this method to form-wound coils which are detachable and counterpart, this would not give him the right to a monopoly of all form-wound coils which are detachable and counterpart when placed on the armature core in this type of double-layer winding. But the prior art does not stop with the hand-wound coils. In the Jehl, Vincent, and Edison patents, form-wound detachable counterpart coils were arranged in this type of double winding on a disk armature; and the Vincent patent seems also to suggest the same arrangement for a drum armature. Without going further, it is manifest that the method of double-layer winding set out in claim 4 was old in the art.

These references to the patent, the proceedings in the patent office, and the prior art, demonstrate that Eickemeyer is not entitled to a broad claim covering the application to a drum armature of this type of double-layer winding when composed of any form of coils which are detachable and counterpart; and it follows that claim 4 must be held invalid unless it is limited to the detachable counterpart coils of the Eickemeyer patent. Assuming claim 4 to be valid when so limited, the defendant's coil does not infringe this claim, because, as we have already found, it lacks the essential structural characteristics of the Eickemeyer coil.

The complainant's counsel has sought to impress upon the court the importance, value, and broad scope of the Eickemeyer invention. It seems true, notwithstanding the disclosure in the obscure Rapieff British patent of 1879, that Eickemeyer made an important practical improvement in windings for dynamo-electric armatures; but we should not for this reason magnify his invention. Eickemeyer did not invent form-wound coils to take the place of hand-made coils, nor was he the inventor of detachable counterpart form-wound coils; but the most which he accomplished was the production of a form-wound detachable counterpart coil adapted for use on a drum armature, as distinct from a disk or ring armature. But, even as to drum armatures, the prior art admittedly shows form-wound detachable coils which were in a degree counterpart. Eickemeyer specially directed his attention to an improved winding for a bipolar drum armature. In a bipolar machine, the disposition of the ends of the coils is a serious problem, as the two sides of each coil occupy diametrically opposite positions on the periphery

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of the drum. This problem he solved by making a coil of such shape that the lesser half of one coil may pass into and through the larger halves of other coils. By this means, the ends were economically disposed of in a minimum space alongside the ends of the armature core, and other advantages obtained which are set out in the patent. In his specification Eickemeyer recognizes the state of the art and the scope of his invention. He says:

"In certain prior multipolar machines the armature coils have been capable of ready attachment to and removal from the armature drum or core, and several of the coils in each armature have been counterparts in size and form, but several different sizes and forms have been necessary in each machine; but I know of no prior multipolar or bipolar machines in which the several armature coils were counterparts in size and form, or any prior bipolar machine which has had coils capable of being applied to or removed from the drum or core without actually unwinding the wire, although, in certain prior machines having bar conductors, the bars could be readily applied to and detached from the drum or core by separating the bars from such disks or other radial conductors. * * * Regardless of the character of the armature with reference to its polar arrangement, I believe it to be broadly new to cover a drum or core with a series of coils which are counterparts in size and contour, and which are therefore interchangeable, one with another, with reference to their positions on the armature drum or core."

The defendant contends that the prior art was in advance of this statement, in that the Alioth German patent of 1885 and the Vincent British patent of 1882 disclose an armature drum with a series of coils which were counterpart and interchangeable. But it is unnecessary to enter into this field of controversy, for, taking Eickemeyer's statement of the prior art and of his invention as correct, we find that all he invented was an armature coil for drum armatures having a certain structural form and a mode of operation by virtue of such form; and, this being true, his invention cannot cover other armature coils of an essentially different form, and with a different mode of operation.

As all the coils used by the defendant (which we assume are like the exhibits in evidence) have equal halves, so that one half of one coil cannot pass into and through the halves of other coils, they do not contain the Eickemeyer invention, and therefore do not infringe either the first, second, or fourth claims of the patent in suit.

The decree of the circuit court is reversed, and the case is remanded to that court, with the direction to dismiss the bill of complaint with costs; and the costs of this court are awarded to the Webster & Dudley Street Railway Company.

In re SEABOLT et al.

(District Court, W. D. North Carolina. February 10, 1902.)

1. EXEMPTIONS—PARTNERSHIP—EXEMPTION FROM PARTNERSHIP PROPERTY.
One of two or more partners may have a portion of the partnership effects set apart to him as his personal exemption with the consent of the other partner or partners.

2. SAME—SURVIVING PARTNER.
A surviving partner can have his personal exemption set apart to him from the partnership effects, if he have the consent of the administrator of the deceased partner.

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3. SAME—BANKRUPTCY.
Const. N. C. art. 10, § 1, declares that the personal property of any resident, to the value of $500, shall be exempt from sale under execution or any other final processes of any court issued for the collection of any debt. *Held*, that a debtor's right to the exemption out of his property accrues to him when his creditors institute proceedings in bankruptcy against him; and, on the appointment of the trustee, the title of the property reserved by law as the exemption does not vest in the trustee, but remains in the debtor awaiting the formality of an appraisal and setting apart.

4. SAME—DEATH OF DEBTOR.
On the death of a debtor, property which would have been set apart to him under his exemption, had he lived, remains a part of his estate, and goes to his administrator.

5. SAME—WIDOW'S ALLOWANCE.
On the death of one against whom proceedings in bankruptcy have been instituted, the federal court has no power to administer the widow's right of allowance for a year, given under the laws of the state, which provide that a widow has the right to a year's support from the stock, crops, and provisions on hand; the matter being one exclusively within the state jurisdiction.

6. HOMESTEAD—UNBORN CHILD—ALLOTMENT.
Const. N. C. art. 10, § 3, declares that a homestead, after the death of the owner, shall be exempt from the payment of any debt during the minority of the children; and by Code N. C. § 514, if the owner of a homestead die without the same being set apart, the widow, or his child or children under the age of 21, may have the same laid off. Section 1328 enacts that a child unborn, but in esse, shall be deemed a person capable of taking any estate. *Held*, that a child in ventre sa mere at the time of its father's death is entitled to have a homestead allotted from the homestead of her father.

7. SAME—DOWER.
Where a widow is entitled to dower, and a child to a homestead right in the same lands, the dower will be assigned so as to include the homestead, and the right of children to enjoy the homestead during their minority must be taken subject to the paramount right of dower.

In Bankruptcy.

Swink & Swink, for creditors.
Glenn, Manly & Hendren, for bankrupts.

BOYD, District Judge. This matter is before the court upon exceptions to the report of Alexander, referee. The facts necessary to an understanding of the points involved are as follows: On the 1st of July, 1901, L. W. Seabolt Company, a partnership composed of L. W. Seabolt and W. M. Mosley, filed a general deed of assignment of partnership property for the payment of debts, reserving, each for himself, the homestead and personal property exemption allowed by the constitution and laws of North Carolina. A petition in involuntary bankruptcy was filed by the creditors against L. W. Seabolt and W. M. Mosley, trading as L. W. Seabolt Company, and L. W. Seabolt and W. M. Mosley individually, on the 25th of July, 1901, and on that day a receiver was appointed of both estates. In the meantime, to wit, on the 15th day of July, 1901, the entire assets of the firm, with the consent and approval of a large majority in amount of the creditors, was converted into cash by a sale, but the said bankrupts had no voice in the proceeding to sell, and did not participate in the same in any way. On the 25th of November, 1901, the said firm and individual partners were adjudged bankrupts, and shortly

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thereafter a trustee was appointed for both estates, who qualified and entered upon the performance of his duties. Subsequent to the filing of the petition in bankruptcy, and prior to the adjudication, the partners agreed in writing that each should reserve his personal property exemptions, such as are allowed by the constitution and laws of North Carolina, out of the partnership assets. After the filing of the petition and the agreement as to exemptions referred to, and before the adjudication, L. W. Seabolt died, leaving a widow, and since his death, to wit, on the 27th of October, 1901, his widow gave birth to a child, which is now living. W. M. Mosley has no estate except his interest in the partnership property, and L. W. Seabolt had no estate except his interest in the partnership property and certain real estate mentioned in his individual schedule, amounting to $2,326.25, subject to a mortgage of $700, and personal property to the value of $21.50. At the time of the filing of the petition in bankruptcy the firm and the individual members were insolvent. A demand has been made on the trustee by W. M. Mosley for his personal exemption out of the firm assets, and a demand has also been made by the administrator of Seabolt for an allotment of the personal exemption which he would have been entitled to were he living, to the end that this exemption may be administered as a part of Seabolt's estate, with a view of setting apart the year's allowance to his widow and posthumous child. Demand has also been made in behalf of said child for his homestead out of the individual real estate of the said Seabolt. The administrator of Seabolt was, on the 27th of November, 1901, made a party to the bankruptcy proceedings, and since Seabolt's death Mosley has given his consent again, in writing, that Seabolt's personal exemption may be allotted from the firm assets, and the administrator of Seabolt has given his consent that Mosley may take his exemption also out of the partnership funds. The trustee comes into court and asks to be advised as to the course he should pursue in the premises. The referee reports in favor of the allotment of the personal exemptions to Mosley and to the estate of Seabolt as demanded; also that the widow of Seabolt is entitled to her dower in his individual real property; and that the infant child, born after his death, is entitled to homestead, under the provisions of the North Carolina constitution; and to these conclusions of the referee the creditors have excepted.

The personal exemption in North Carolina is by virtue of section 1 of article 10 of the constitution of the state, which reads as follows:

"The personal property of any resident of the state, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any court issued for the collection of any debt."

There can be no question about the right of Mosley to have allotted to him from the partnership effects his personal property exemption to the amount of $500, for it is held in this state that one of two or more partners can have a portion of the partnership effects set apart to him as his personal exemption, with the consent of the other partner or partners (Burns v. Harris, 67 N. C. 140); and in the same case it is held that the partnership creditors cannot object to this exemption, for they no more have a lien on partnership effects for their debts

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than creditors of an individual have on his effects. The facts in this case show that after the proceeding in bankruptcy was begun, and before Seabolt's death, he and Mosley filed their consent in writing, each that the other might have his personal exemption allotted from the partnership property; and, if this were not true, the facts show that since the death of Seabolt his administrator has filed his consent that Mosley, the surviving partner, should have allotted to him his personal exemption from the partnership assets. A surviving partner can have his personal exemption from partnership effects with the consent of the administrator of the deceased partner. Richardson v. Redd, 118 N. C. 677, 24 S. E. 420.

The question then remaining in this regard is whether Seabolt having died after the proceedings in bankruptcy were commenced, and after the consent of the partners was had for exemptions from the partnership effects, the allotment which he would have taken had he lived vests in his administrator. It is my opinion that it does. A creditor pursuing a debtor by execution or other legal proceeding, for the purpose of subjecting his property to the payment of his debt, does not acquire a lien upon that part of the debtor's personalty which is exempted by the law. The exemption in North Carolina is in favor of a debtor against execution for debt.

The purpose of the law undoubtedly is to save the exempted property from sale at the hands of creditors, for the benefit of the debtor and his family. This is no doubt the humane object which the framers of our constitution and the makers of our exemption laws had in view. A statute of exemption is properly a remedial statute, evidently intended to prevent families from being stripped of their last means of support, and left to suffer, or cast as a burden upon the public, and to rescue them from the hands of unfeeling creditors. Leavitt v. Metcalf, 19 Am. Dec. 718. It would be a strange construction of the law, therefore, to hold that, whilst the exemption would obtain against what is known as an execution, or other final process issued for the collection of a debt, it could still be swept away by another proceeding on the part of creditors, and the debtor and his family thus be deprived of its benefits. The right to the exemption accrued to the debtor when the creditors instituted proceedings in bankruptcy to subject his property to the payment of his debts, and upon the appointment of a trustee in bankruptcy the title of the property reserved by the law as the debtor's exemption did not vest in such trustee, but remained in the debtor, awaiting the mere legal formality of having it appraised and set apart to him. This being the case, the exempted property which would have been set apart and allotted to Seabolt had he lived remained a part of his estate at his death, and belongs to his administrator, and not to the trustee in bankruptcy; and the only duty with respect thereto which rests upon the trustee is, upon application of the administrator, to proceed as in other cases to have it appraised and set apart. The exceptions of the creditors are therefore overruled, and the report and findings of the referee, in respect to the personal exemptions of both Mosley and the estate of Seabolt, are confirmed.

No difficulty can arise as to the manner of making the appraise-

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ment and allotting the personal exemptions in this case; the property of the firm having been sold, and the proceeds thereof in cash, more than sufficient to cover the amount of both exemptions, being now in the hands of the trustee. Under the laws of North Carolina, a debtor is allowed a personal exemption to the amount of $500, and he can take this in articles of personal property, or have it allotted in money, provided the money is on hand. The cash being on hand in this instance, there is nothing left for the trustee to do except to pay it over to the parties entitled; that is, $500 to W. M. Mosley, and $500 to the administrator of Seabolt.

So far as the right of allowance for year's support to the widow is concerned, this court has no power to administer it, it being exclusively within the state jurisdiction. Under the laws of North Carolina, upon the death of a husband a surviving widow has the right to have set apart to her from the crop, stock, and provisions on hand a year's support, not to exceed $300 in amount, and an additional amount of $100 for each member of her family under 14 years of age. In the absence of crop, stock, and provisions, the administrator is authorized to pay such allowance for year's support from the personal assets of the estate which may come to his hands. Therefore, when the administrator of Seabolt has in hand the money paid to him by the trustee for the personal exemption, so much of it as is necessary can be set apart as a year's support to the widow by a proceeding in the state court under the statute providing for such cases.

We come now to consider the right of homestead in the real property of which Seabolt died seised. He left surviving him his widow and a female child in ventre sa mere, which since and shortly after his death has been born, and is now living. The following are the provisions of the constitution of North Carolina relative to homestead (section 2, art. 10):

"Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwellings and buildings used thereon, owned and occupied by any resident of this state and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt."

Section 3, art. 10:

"The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children or any one of them."

And there is a further provision that if the owner of a homestead die, leaving a widow and no children, the rents and profits of such homestead shall inure to the benefit of the widow during her widowhood, unless she be the owner of a homestead in her own right. The only point involved here is as to whether Lena W. Seabolt, the posthumous child of L. W. Seabolt, deceased, is entitled to have a homestead allotted from the lands of her father, and to hold the same exempt from the payment of his debts during her minority.

Section 514 of the Code of North Carolina is as follows:

"If any person entitled to a homestead exemption die without having had the same set apart, his widow, if he leave no child, or his child or

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children under the age of twenty-one years, if he leave such, may proceed to have said homestead exemption laid off according to sections 511 and 512."

And it is held in Lambert v. Kinnery, 74 N. C. 348, that:

"The title to the homestead is vested in the owner by the constitution of the state, and the allotment by the sheriff is not necessary to vest the title thereto. The only object of the allotment is to ascertain if there be an excess over the one thousand dollars, which is subject to execution."

The law is well settled, therefore, that, although the owner of a homestead or a person entitled thereto die without having the same allotted in his lifetime, the same can be allotted at the instance of his minor child or children, if he leave such, or, in the absence of minor children, at the instance of his widow. The contention of the creditors in this case is that the infant Lena W. Seabolt is not entitled to the homestead of her father by reason of the fact that she was not born at the time of his death, and that, therefore, the right could not accrue to her. The court cannot sustain this view. "A child in ventre sa mere is a child while yet unborn. From the time of conception the infant is in esse for the purpose of taking any estate which is for his interest, whether by descent, devise, or under the statute of distributions." 10 Am. & Eng. Enc. Law (1st Ed.) p. 624. The early English doctrine that an unborn child is not to be regarded as in esse has been long ago exploded, and the decisions of the courts now are uniformly to the effect that children in ventre sa mere are included within the meaning of the word "children." This principle is so well established and so fully understood by the profession that it is not deemed necessary to cite authorities to support it. As bearing upon this point, however, we may call attention to section 1328 of the North Carolina Code, which reads as follows: "An infant unborn but in esse shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born;" and also cite Heath v. Heath, 114 N. C. 547, 19 S. E. 155.

In the argument before the court, the counsel for the creditors did not appear to seriously insist that the widow was not entitled to dower in the lands of her deceased husband. By the statute law of North Carolina widows are endowed as at common law, and every married woman, upon the death of her husband intestate, or who dissents from his will, is entitled to an estate for her life in one-third in value of all the lands whereof her husband was seised and possessed at any time during the coverture, in which one-third part shall be included the dwelling house in which her husband usually resided, together with other buildings thereunto belonging or appertaining; and, further, that the dower of a widow shall not be subject to the payment of debts due from the estate of her husband during the term of her life. It is true that in a case like this the dower and homestead will include, partly if not wholly, the same premises; but Chief Justice Pearson, in Watts v. Leggett, 66 N. C. 197, has clearly defined the relative rights of a widow having a dower and an infant child entitled to the benefit of homestead at the same time, in the same lands. He says:

"Thus the dower will be assigned so as to include the homestead or a part thereof, and the right of dower having attached at the time of marriage

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would have been paramount, and the right of the children to enjoy the homestead during the minority of any one of them must have been taken subject to this paramount right of dower, the effect being to postpone the enjoyment of the children as to so much of the homestead as is covered by the dower until the death of the widow, leaving them, of course, to the present enjoyment of such part of the homestead and the land appertaining thereto as is not covered by the dower."

It is therefore ordered by the court that the exceptions be overruled, not only as to the right of Mosley and the estate of Seabolt to have their personal exemptions, but also as to the rights of the widow to dower, and the infant child to a homestead, and the report of the referee in these respects is hereby confirmed, and judgment rendered accordingly.

The clerk will tax the costs of this proceeding against the excepting creditors.

THE LAKME.

THE TYEE.

THE QUEEN ELIZABETH.

(District Court, D. Washington. February 8, 1902.)

COLLISION—STEAM VESSELS MEETING—NEGLIGENT NAVIGATION.

The steamship Queen Elizabeth, in tow of the tug Tyee, was passing up Puget Sound to the southward from Port Townsend, near the west shore, at about 4 in the morning, when they met the steam schooner Lakme, going out from Tacoma, which came in collision with the Elizabeth. The tug and schooner saw each other's lights when three or four miles apart, and were then nearly head on. Later the Tyee signaled her intention to pass starboard to starboard, which was acceded to, and she immediately starboarded her helm. *Held*, under the evidence, that she was justified in choosing the outside course in passing with her tow, owing to the nearness to the shore, and that neither she nor the Elizabeth were in fault, but that the fault for the collision rested entirely upon the Lakme, for being in charge at the time of an unlicensed and incompetent mate and too close in shore, for porting her helm, instead of starboarding, after answering the signal, and changing only when the vessels were in close proximity, and in failing to reverse at once when the danger of collision became apparent.

In Admiralty. Cross actions for collision.

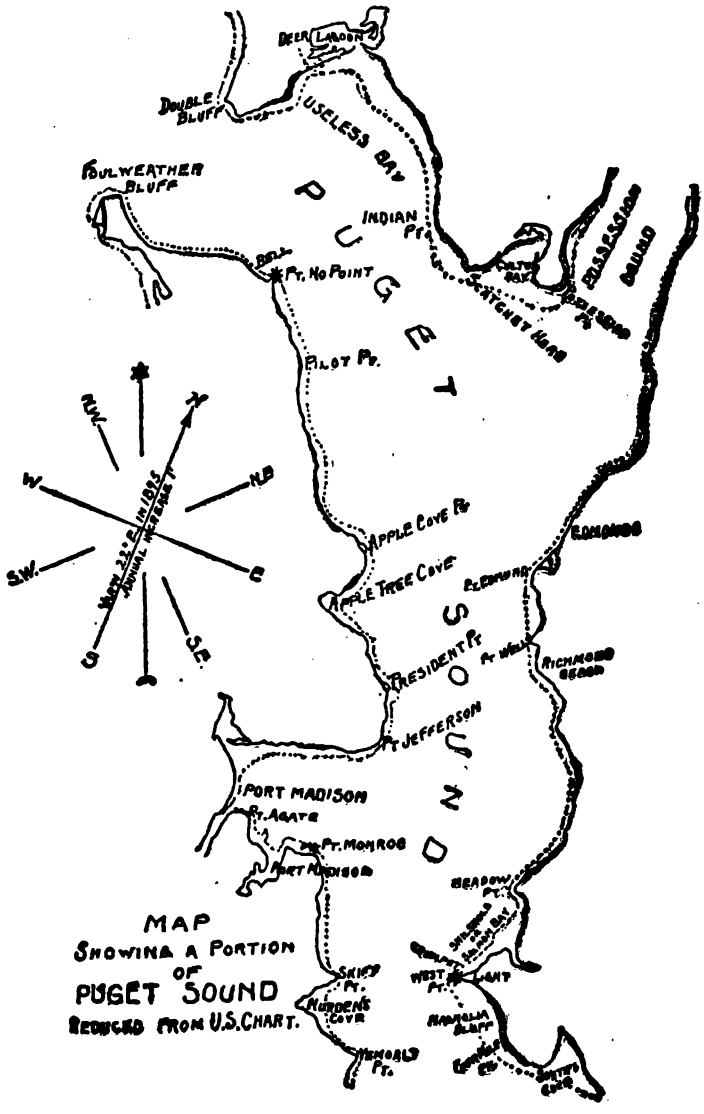
Preston, Carr & Gilman, for libelant.
Herbert S. Griggs and W. A. Peters, for cross libelant.
Struve, Allen, Hughes, & McMicken, for respondent.

HANFORD, District Judge. For convenience in designating the different parties to these suits, the Queen Elizabeth Company, owner of the ship Queen Elizabeth, will be referred to as the "libelant"; Charles Nelson, owner of the steam schooner Lakme, will be referred to as the "cross libelant"; and the Puget Sound Tugboat Company, owner of the steam tug Tyee, will be referred to as the "respondent." The first suit was commenced by the libelant against the Lakme to recover damages sustained in a collision between the Lakme and the British ship Queen Elizabeth, which occurred between 3 and 4 o'clock on the morning of April 14, 1900, in the vicinity of Point No Point lighthouse, on the west side of Puget Sound;

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the Lakme being at the time bound from Tacoma to San Francisco, and the Queen Elizabeth being towed by the steam tug Tyee from Port Townsend to Port Blakely. The cross libelant charges responsibility for the collision upon the Tyee, and claims damages for the injury sustained by the Lakme.

In order that the full effect of some of the testimony introduced in behalf of the cross libelant may be appreciated, a map showing the contour of the shores of Puget Sound from Foulweather Bluff to a point south of West Point lighthouse is here inserted.



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The night was clear, and each of the vessels carried all the lights required, though there is a dispute as to whether the colored lights on the Lakme were arranged properly, so as to show from dead ahead to two points abaft the beam, as the law requires. It is admitted, however, that the vessels were seen approaching each other by the officers in charge of both the Tyee and the Lakme, when they were distant from each other 3 or 4 miles; but the parties differ with respect to the exact location of the vessels when their lights became visible to each other, and at the time of the collision. All agree, however, that the collision occurred south of Point No Point lighthouse, a few minutes after the Tyee and the Queen Elizabeth had passed that point. The speed of the Lakme was 7½ miles per hour, and the Tyee, with her tow, was making 8 or 9 miles per hour. The Lakme was in charge of her second mate, her captain and the first mate being asleep, until the mast head lights of the Tyee were seen, when the captain was called and told that they were near Point No Point; but he was not informed that the other vessels were seen ahead, and he did not come out on the bridge until it was too late to avoid the collision. The second mate of the Lakme did not have a license or certificate entitling him to be employed as an officer of a steam vessel, either as master, pilot, or mate, and there was not at that time any licensed pilot on duty. The facts recited so far are either admitted or established by uncontradicted evidence. The particular circumstances and movements of the vessels immediately preceding the collision are stated in the evidence of the officer who was in charge of the Tyee as follows:

The Tyee took the Queen Elizabeth in tow, and started from Port Townsend southward, between 1 o'clock and 2 o'clock a. m., and reached Point No Point in about two hours. As she was coming around Point No Point, the lights of the Lakme were seen for the first time. The Tyee and the ship in tow made a curve around Point No Point until their position was proximately one mile from the west shore of Puget Sound, and then took a straight course, steering southeast. When the Tyee's helm came to steady on this course, the Lakme appeared to be straight ahead, but steering an irregular course, so that all her lights were visible at times, and then the red light and green light alternately disappeared. Four minutes before the collision, when the steamers were about one mile apart, and when the Lakme was showing her green light, the Tyee signaled, giving two blasts of her whistle, indicating her purpose to pass on the starboard side. This was immediately answered by two blasts from the Lakme. The pilot of the Tyee then put her helm hard to starboard and she swung to port. At the same time the Lakme, instead of turning to port promptly, as the signals indicated that she should do, swung around to starboard so that she showed her red light, and came on directly in the way of the other vessels, but steadied up when she came near to the Tyee, when the witness called out: "Are you crazy or what? Starboard your helm! Starboard your helm!" The two steamers passed each other starboard to starboard; the Lakme going astern of the Tyee. Her stem caught the steel towline, and she then swung to port, and went

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slipping along the towline until she struck the Queen Elizabeth on the port side of her bow. The towline parted just at the time of the collision.

In the testimony of this officer, he gives as the reason for sounding two blasts of the whistle for a passing signal that they were near to shore on the right-hand side, and, the Tyee having the burden of a ship in tow, it was safer for her to pass the other steamer on her starboard side, because at that place the tide sets in toward the shore. The testimony of the pilot who was in charge of the Tyee, above narrated, is corroborated by the quartermaster, who was in the pilot house steering the Tyee. It is consistent with all the evidence on the part of the libelant and of the respondent, and it harmonizes with the undisputed facts that the only signals given from one steamer to the other were two blasts of the Tyee's whistle, answered by two blasts from the Lakme, and that the Lakme did pass on the starboard side of the Tyee, and her port bow struck the port bow of the Queen Elizabeth.

On behalf of the cross libelant, the captain of the Lakme testified that when he came on the bridge, after hearing the two blasts from the Tyee, and the answer given by the Lakme, the Tyee was just crossing the bow of the Lakme. The first thing he did was to inquire as to the position of the helm, and was told that it was hard a-starboard, to which he responded, "Keep her there." The Lakme was then turning slowly to port, and the Queen Elizabeth was still off her port bow, and, seeing that a collision was inevitable, he ordered the engines stopped and the helm hard a-port. He did not order the engines reversed, because the propeller was liable to get foul of the towline. As to these matters, I can find no conflict between the testimony given by the captain and the testimony for the other parties. There appears to have been time enough to change the wheel from hard a-port to hard a-starboard, while the captain was coming from his cabin. If the Lakme had been swinging to starboard on a port helm, that movement would place her so that the Queen Elizabeth would appear to be off her port bow, and the fact that she was turning to port slowly with her helm hard a-starboard corroborates the testimony tending to prove that she was not given her starboard helm until the two steamers were very close to each other. The captain does, however, give his estimate of the distances from the place where the vesels met to Point No Point, and to the west shore opposite, which, if accurate, would locate the place of the collision one mile, or a little more than a mile, further from the shore, and one mile, or a little more than one mile, nearer to Point No Point, than indicated by the testimony of the witnesses who were on the Tyee; and the difference in the location would tend to support the contention of the cross libelant that the Tyee was in fault for giving two blasts of her whistle and going to port, instead of observing the general rule of the road, requiring vessels meeting end on, or nearly so, to turn to the right and pass each other port to port. But, considering the fact that the captain had no time to study the situation after coming on deck, and that his mind must have been fully occupied with other things, it is not probable that he could

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have made an estimate of the distances with as much accuracy as could the pilot of the Tyee, who knew the route, had time for observation before there was any occasion for excitement, knew the speed his vessel was making, took notice of her compass, and ordered her courses.

The first mate of the Lakme was asleep before the collision occurred. Both sides called him as a witness; but, as I am not obliged to decide the disputed question with respect to the shape and construction of the screens or boxes in which the Lakme's colored lights were placed, I do not regard his evidence as being of any importance. The man who steered the Lakme has not been called as a witness. So the case for the cross libelant depends mainly upon the testimony of her second mate, who was in charge of the deck, and the man who was on duty as lookout; and I regard the testimony of both of these witnesses as being entirely unworthy of belief. By way of illustration, the lookout, upon his examination in chief, conducted by the proctor for the cross libelant, testified as follows:

"Q. How long after you reported the light on the port bow was any signal given by any ship? A. A few minutes after he gave us two whistles. Q. Who gave? A. The tugboat gave us two whistles first. Q. What was done then? A. We answered the two whistles back again, and turned the wheel over. Q. What way was the wheel turned when the whistle was given? A. I was steering straight. After the whistle came, he turned to the port. That called for hard a-starboard. It was turned to the port. Q. You put your helm hard a-starboard? A. Hard a-port. Q. When the two signals came? A. When the two signals came. * * * Q. After the tug blew her two whistles, did she make any change in her course? A. Not before we came close to them. We made the change. Q. What change did she make? A. She turned the wheel to port, too. Q. What way did she come? A. She came to cross our starboard bow. Q. She came to cross your starboard bow? A. Yes."

In answering other questions on his direct examination, this witness also testified that the order given by the second mate to the man at the wheel, after the signals had been given, was "Hard a-starboard!" and that the order was obeyed promptly; and on cross-examination, answering a direct interrogatory, he made this statement: "Yes, sir; our wheel was put hard to starboard." These contradictory statements make it impossible to ascertain from the testimony of this witness whether the Lakme's wheel was first turned to starboard, or to port, after the signals were exchanged. I would not reject his evidence for a mere inadvertent misstatement; but, taken as a whole, it is confused and unsatisfactory.

The Lakme left Tacoma after 9:30 p. m., the evening preceding the collision, and her log shows that she passed West Point lighthouse at 1:40 a. m. In his deposition, the second mate says, in effect, that he was the officer in charge of the deck from midnight until the time of the collision; that he made an entry in the log of the time of passing each point; that the speed of the Lakme was 7 miles or 10 miles an hour; that at 12 o'clock, when he went on deck, she must have been 100 miles from Tacoma; that he did not know what courses were steered after passing West Point, except that his last course was west half north; that she was kept in the middle of the

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channel; that he first noticed the Tyee and the Queen Elizabeth when they were coming around Point No Point, 3 or 4 miles ahead of the Lakme; that he then saw only the Tyee's masthead lights; that he did not see her starboard light until she crossed the Lakme's bow; that, after rounding the point, the Tyee was two points off the port bow of the Lakme, and showing her red light. I now quote from his deposition the following questions and answers:

"Q. What, if anything, did you do with reference to steering your own vessel at that time? A. We were steering clear. I did not do anything at that time, until we got a little closer. She was still on our port bow, when I ported our helm to give myself a little more sea room. Q. That would throw you further off to starboard? A. Yes, sir; but, even if I had kept on my course, we would have gone perfectly clear. When she got close to us, she was about a point on our port bow. * * * Q. What happened after that with reference to signaling? A. There was no signaling at all. He was coming on our port bow. I had my hand up to pull the whistle, when he blew two, and, of course, I answered him with two. I said, 'Hard a-starboard!' The man at the wheel put the wheel hard a-starboard. Q. How long was that after you got back on the bridge and had called the captain before those signals were passed? A. It may have been between three and five minutes. It may have been more, and it may have been less. Q. It may have been less than what? Less than three minutes? A. I could not exactly say. Q. Do you know whether or not you were there any appreciable time? A. I was there, walking up and down the bridge, I should judge, for about five minutes before the captain came up. Q. And during that five minutes what was the course of the two vessels? A. We were going about west half north, I should judge, or west quarter north. I would not be sure."

Then, answering further inquiries as to the distance of the Lakme's position out from shore at the time the signals were given, he made this statement:

"We were right in the center of the stream. We were just coming a midway course down the sound. Q. Did you keep that position up to the time that you ported your helm to give him more room? A. Yes, sir."

By referring to the chart, it will be seen that, if the Lakme was anywhere near the middle of the sound, three or four miles south of Point No Point, and steering a course west a half north, or west a quarter north, she would have been heading directly for the west shore, and any steamer showing a red light off her port bow would have been clear to the south, and standing on a course which would have made a collision impossible, unless one of the steamers had turned and chased the other. The statement that the Lakme had traveled 100 miles in 2½ hours also shows the witness to be stupid and reckless. On cross-examination, this officer reaffirmed the statement that, after the tug rounded the point and straightened up on a southerly course, the Lakme was heading west half north, and later, on cross-examination, other questions were propounded and answered as follows:

"Q. How far were you apart when you first ported your helm? A. We must have been probably a mile. Q. Then you changed from west half north to what course? A. West by south, just to give myself a little more sea room. Q. You changed from west half north to west by south? A. Just about that. Q. How could you change from west half north to west by south with a ported helm? A. With a starboard helm. Q. That is not what I asked you. You said you ported your helm to give yourself

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more sea room. A. Yes, sir. Q. And changed from west half north to west by south? A. Something about that. Q. With the port helm, and then the tug and Lakme were about a mile apart when you ported your helm? A. Yes, sir."

He also testified, on cross-examination, that, when the Tyee blew two whistles, he supposed that he was obliged to answer with two. The testimony of this witness in its entirety shows the man to be ignorant of the duties of an officer of a steam vessel, and entirely incapable of giving an intelligent report of the manner in which he handled the steamer preceding the collision, and I find no trustworthy evidence in the case with respect to the material facts to be weighed against the testimony of the pilot and quartermaster of the Tyee.

In the light of all the evidence, I find the following facts to be fully proven: The Lakme, before meeting the other vessels, was out of the proper course for a vessel going north, being too far over toward the west shore, instead of being on the right-hand side of the stream. She was steered negligently. Her wheel was turned the wrong way after answering and assenting to the passing signals, and without any excuse she failed to stop and reverse her engines, when she came into dangerous proximity to the other vessels, until it was too late to avoid striking the Queen Elizabeth. I consider that the evidence proves the Lakme to have been in fault in the following particulars: (1) For being under way without being in charge of a licensed pilot. (2) For approaching Point No Point from the southward, in the way of vessels going in the opposite direction, without any necessity or reason for being so far over toward the west shore. (3) For steering an irregular course after the lights of the Tyee and her tow had come into view ahead of her. (4) For porting her helm when she was distant from the Tyee one mile or less, without having previously given the proper signals indicating her purpose to change her course to starboard. (5) For being too slow in putting her helm hard a-starboard, after answering and assenting to the signal of the Tyee, indicating that the steamers were to pass each other starboard to starboard. (6) For not stopping and reversing her engines promptly when the danger of a collision became apparent. In view of the situation shown, I consider that the Tyee had a right to choose the course to be taken to avoid a collision, and was justified in signaling to pass starboard to starboard, and in changing her course in accordance with that signal after it had been assented to by the Lakme. The Tyee, therefore, did not commit any error which contributed to cause the collision, and the Queen Elizabeth is also shown by the evidence to be free from any fault in the matter.

The evidence proves that the damages to the Queen Elizabeth, including demurrage for her delay while necessary repairs were being made, amounts to the sum of $4,500. A decree will be entered in favor of the libelant for said amount, with legal interest from the 1st day of May, 1901, and costs.

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THE THOMAS P. SHELDON.
THE S. L. WATSON.

(District Court, D. Rhode Island. January 24, 1902.)

Nos. 1060, 1062.

1. CONTRACTS—BREACH—RULE REQUIRING DILIGENCE TO AVOID OR LESSEN DAMAGE.

The rule which requires reasonable diligence on the part of one injured by the breach of a contract by the other party to reduce the resulting damages should not be invoked by the party in fault as the basis for a critical examination of the conduct of the injured party, nor is he entitled to a reduction of the damages because he is able to show on afterthought that different action would have been more advantageous to him. Reasonably prudent action only is required.

2. MARITIME LIENS—BREACH OF CHARTER.

The lien arising out of a contract of affreightment is created by the law, and is mutual and reciprocal between ship and cargo, attaching only when the cargo has been delivered on board or into the custody of the master, and being discharged when the cargo is delivered at its destination and the freight paid. Hence there is no lien in rem on a vessel for breach of a charter which is wholly executory, or which has been partly performed by the carriage and delivery of one or more, but not all, of the cargoes contracted to be carried.

3. ADMIRALTY—JOINDER OF CAUSES IN REM AND IN PERSONAM.

There seems to be no fixed rule of admiralty practice, and no reason on general principles, which prevents the joinder in one libel of causes of action in rem and in personam, when such joinder will promote the cause of justice, and conduce to the convenience of the parties and the court, and is not governed by the admiralty rules of the supreme court.

In Admiralty. Suits for breach of charter party.

Carver & Blodgett, for libelant.
F. Dodge and H. Putnam, for claimants.

BROWN, District Judge. These libels are for breach of contract contained in a charter party dated July 26, 1899, providing for the carriage of five full cargoes of coal from Lambert's Point, Norfolk, Va., to Providence, R. I., by two barges,—the Thomas P. Sheldon and the S. L. Watson. The contract states: "It is understood that the above five cargoes are to be delivered in Providence previous to October 1st, 1899." In part execution of this contract, one cargo was carried by the Sheldon, and freight was paid. The libelant seeks damages for failure of the barges to carry the remaining four cargoes.

The first question relates to the authority of Stanwood, as agent, to sign the charter. I find as a matter of fact that on July 26th—the date of the charter—Stanwood was general agent of these barges, and was duly authorized to execute the charter. The libelee contends that his authority did not begin until August 1st, and was limited to making charters for single trips. I find against it both as to the date of the beginning of his authority and as to its scope. The testimony as to a limitation upon the number of voyages the agent could contract for was not satisfactory or convincing. But whether Stanwood's authority originated in the document of July 24th, or in previous arrangements, or on August 1st, does not seem to be of vital consequence. His authority as general agent extended over the period from August 1st to October 1st, within which the con-

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templated voyages were to be made, and within which the agent, with full authority, entered upon the performance of the contract.

The next question is whether one or two cargoes were delivered under the contract. I find, as a fact, that but one cargo was delivered,—1,037 tons by the Sheldon. There is positive evidence that the cargo of 907 tons was carried by the Watson in pursuance of a previous oral charter. The testimony of Slater, agent of the Providence Gas Company, shows clearly that two distinct contracts were made for coal at different rates of freight. It is argued for the libelee that the Virginia Iron, Coal & Coke Company had existing engagements under two contracts for the delivery of 6,300 tons of coal to the Providence Gas Company; that, as the charter provides for five trips of about 1,250 tons each, this would have been an adequate tonnage to fulfil both contracts; and therefore that the oral charter, if one was made, was merged in the written charter. But this inference is not strong enough to overcome positive testimony to the contrary. It is entirely reasonable to suppose that the five-trip charter was simply for the conveyance of the 5,000 tons of coal purchased by the Providence Gas Company on its second contract. Though the charter states that the Sheldon and the Watson have a capacity of "about 1,250 tons each," this was manifestly much more than the actual carrying capacity of either of the barges. The cargo actually delivered by the Watson on the previous contract was 907 tons; that of the Sheldon, 1,037 tons. Gilchrist himself testifies that the capacity of the Watson was from 1,000 to 1,100 tons; and of the Sheldon, 1,100 tons. It is apparent, therefore, that five trips would have been insufficient, by more than 800 tons, to complete the carriage of the coal on both contracts. It is much more probable that five voyages were contracted for to carry the 5,000 tons than that they were contracted for to carry 6,300 tons. There is a strong preponderance of evidence to the effect that an oral charter was made which had no relation to the 5,000 tons, and that this charter was not merged in the written charter. Though this matter has been argued at some length, it is difficult to see what possible advantage could result to the libelee by adopting its argument. If, on its theory, we increase the amount delivered, we must consistently apply the same theory, and increase by a larger amount the quantity which it is bound to deliver. If we assume that the owner agreed to carry 6,250 tons of coal in five voyages, and that it has delivered two cargoes,—one of 907 tons, and the other of 1,037 tons,—amounting to 1,944 tons, it has, according to its argument, an undelivered remainder of 4,306 tons. The libelant claims that it is in default only to the amount of 4,024 tons.

The next matter to consider is the contention that the libelant prevented performance by its unreadiness to deliver coal. It is satisfactorily proved by the evidence of Wilmer that throughout the entire period from August 1st to October 1st, with the exception hereafter to be mentioned, there was an ample supply of coal on hand to furnish full cargoes to either the Watson or the Sheldon. Nothing was done by the libelee until the barge Georger reported on September 18th, being tendered as a substitute. Her turn did not arrive, however, until after October 1st, the date specified in the con-

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tract for the completion of the delivery of the five cargoes. The owner was then already in default, and in no condition to take technical advantage of breaches by the charterer after that date. While there was a partial shortage of coal from the 29th of September to the 4th of October, this would not have resulted in any special delay, —probably not more than two or three days; nor did it absolve the owner from the consequences of its negligence in not earlier reporting vessels for the remaining four cargoes. Upon the evidence, the charterer was ready and willing to make substantial performance upon its part, and the withdrawal of the Georger was not justified under the circumstances existing, and renders her tender of no avail.

It is contended that the detention of the Georger was due to the preference of steamers arriving for bunker coal; but the evidence as to the rule of the port that steam vessels are entitled to this preference is not contradicted, and is not met merely by characterizing such preference as extraordinary. The owners were chargeable with knowledge of the usage of the port. Randall v. Sprague, 21 C. C. A. 334, 74 Fed. 247.

I am of the opinion that there is no evidence to sustain the contention that the barge Page was tendered in substitution.

I find that the owner, the Lake Shore Transit Company, is liable in damages for its breach of contract to the amount of the increased freight for the substituted tonnage, to wit, 95 cents per ton on 4,024 tons, amounting to $3,822.80; and also to the amount of $985.81, paid by the libelant for demurrage, not due to its fault, on the substituted vessels; making a total of $4,808.61, with interest from the date of the filing of the libel.

I see no reason for reducing the damages by the application of the rule of Warren v. Stoddart, 105 U. S. 230, 26 L. Ed. 1117, which requires reasonable effort to reduce damages. The delay in procuring other vessels, caused by negotiations and efforts to induce the libelee to perform its legal obligation, was, under the circumstances, both reasonable and prudent. Furthermore, it was necessary for the libelant to modify its contract with the gas company in consequence of the inability to get barges. It proceeded with reasonable diligence to do this, and to get the best terms for sailing vessels. The rule of Warren v. Stoddart requires reasonable conduct on the part of one whose legal rights have been violated; but it should not be invoked by a defendant as a basis for critical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which were wiser or more advantageous to the defendant. Reasonably prudent action is required; not that action which the defendant, upon afterthought, may be able to show would have been more advantageous to him.

It is next necessary to consider the form of the libels, and the decree to be made upon each. The libel against the Sheldon is solely in rem. She carried one cargo under the contract; but no other cargo was set apart for her by the charterer, or delivered to her, or came under the control of the master. The Watson carried no cargo under the contract; nor was any cargo set apart for her, or deliv-

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ered to her, or to the control of her master. So far as the libelant is proceeding in rem, a decision that the Sheldon is not liable in rem necessarily involves a decision that the Watson is not liable in rem, and renders it unnecessary to consider objections to a lien upon the Watson which are inapplicable in the case of the Sheldon. According to the weight of authority, a vessel is not liable in rem for the breach of a contract of charter party wholly executory. The Monte A. (D. C.) 12 Fed. 331, and The Ira Chaffee (D. C.) 2 Fed. 401, contain learned discussions of the authorities upon this subject. See, also, The General Sheridan, 2 Ben. 294, Fed. Cas. No. 5,319; The William Fletcher, 8 Ben. 537, Fed. Cas. No. 17,692; The Asa Eldridge (D. C.) 8 Fed. 720; The City of Baton Rouge (C. C.) 19 Fed. 461; The Missouri (D. C.) 30 Fed. 384; The Eugene (D. C.) 83 Fed. 222; Id., 31 C. C. A. 345, 87 Fed. 1001; The Bella (D. C.) 91 Fed. 540; The Ripon City, 42 C. C. A. 247, 102 Fed. 176, 180; The Universe (D. C.) 108 Fed. 968. The libelant contends, however, that, if any cargo has been taken under the contract of affreightment, the right in rem attaches for full performance. If there is, in this case, a lien in rem, it is difficult to see upon what principle we are to base it. The lien does not arise from the contract itself, but is created by the law upon a delivery of a cargo to the vessel or to the control of the master. What is the extent and character of the lien created by the law upon such delivery?

In The Freeman v. Buckingham, 18 How. 182, 188, 15 L. Ed. 341, 344, it was said:

"Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo until some lawful contract of affreightment is made, and a cargo shipped under it."

In Vandewater v. Mills, 19 How. 82, 90, 15 L. Ed. 554, 556, it was said:

"Now, it is a doctrine not to be found in any treatise on maritime law that every contract by the owner or master of a vessel for the future employment of it hypothecates the vessel for its performance. This lien or privilege is founded on the rule of maritime law as stated by Cleirac, 597: 'Le batel est obligée à la marchandise et la marchandise au batel.' The obligation is mutual and reciprocal."

In The Lady Franklin, 8 Wall. 325, 329, 19 L. Ed. 455, 457, it was said:

"The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the custody of the master, has been so often discussed, and so long settled, that it would be useless labor to restate it, or the principles which lie at its foundation."

In The Keokuk, 9 Wall. 517, 519, 19 L. Ed. 744, 745, it was said:

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master, or some one authorized to receive it."

It seems very clear from these authorities that the contract itself creates no lien, and that the lien which is created by the law is mutual and reciprocal. The parties to this contract undoubtedly had mutual

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and reciprocal rights of lien during the carriage of the first cargo, but the lien of the ship on cargo was discharged by the payment of freight and by delivery to the consignee. The contention that the lien in rem now exists cannot be based upon the principle that the ship is pledged to the cargo and the cargo to the ship; and, if there is a lien, it is unilateral, and not mutual or reciprocal. The libelant argues that we are to infer that part performance of an executory contract for the carriage of a number of cargoes creates a lien from the following language in The Freeman v. Buckingham, 18 How. 182, 188, 15 L. Ed. 341, 344:

"But the law creates no lien on a vessel as a security for the performance of a contract to transport cargo until some lawful contract of affreightment is made, and a cargo shipped under it."

But the preceding language, stating the principle that the vessel is bound to the cargo and the cargo to the vessel, as well as the other extracts from decisions of the supreme court, declares so clearly the rule that the lien created is a mutual and reciprocal lien as to exclude the view that a shipment of a single cargo, to which the shipowner's lien is limited in respect to a single voyage, creates in favor of the cargo owner a unilateral lien upon the ship for the performance of the contract to carry other cargoes. The lien of the cargo owner upon the ship must, therefore, be limited by the corresponding and reciprocal rights of the ship owner upon the cargo.

The libelant contends that the courts have held that, where any cargo has been taken under the contract of affreightment, the right in rem attaches for the full performance of the contract, "thereby brushing aside the theory of reciprocal rights only, and admitting a full right in rem wherever the contract has become in any part executed." This is practically a concession that, unless the theory of reciprocal rights can be brushed aside, and unless we are to treat these repeated expressions of the supreme court as mere dicta, we must deny the libelant's right to proceed in rem. The libelant has presented no authority which states any principle upon which a part performance which does not create a mutual and reciprocal lien can create a unilateral lien. Part performance gives no further validity to the contract, since the contract is valid irrespective of performance.

The libelee cites the case of The G. L. Rosenthal (D. C.) 57 Fed. 254, and The Oscoda (D. C.) 66 Fed. 347, and points out that these cases are distinguishable from the present case by the fact that they were upon towage contracts, and that by part performance a reciprocal lien between the tug and the tow had been established. In the present case no lien ever arose in favor of the vessel in respect to the four cargoes, for noncarriage of which the libel is brought.

While it may be considered a hardship that the charterer should have no remedy against the vessel for an abandonment after she had entered upon a contract contemplating numerous voyages, the hardship is no greater than where, after making the contract, she has failed to perform any part of it; and, though there may be dicta to the effect that, if a ship enters upon performance, it be-

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comes pledged to the complete execution of the contract, no argument has been advanced nor case presented which sets forth any satisfactory reason why we should not apply in this case the principles reiterated by the supreme court that the maritime lien between the cargo owner and the ship owner in respect to the carriage of cargoes is a mutual and reciprocal lien, not arising from the contract itself, but created by law upon the delivery of the cargo to the vessel, or to the control of the master.

While there may be, and probably are, other considerations which should be taken into account, they have not been presented, nor have they occurred to me. I therefore feel constrained to decide this case upon the principles of law that have been argued. No authority has been presented which would justify an acceptance of the libelant's contention that the theory of reciprocal rights so clearly stated by the supreme court has been brushed aside.

The libelee, by timely exceptions, raised the question of the right to join in one libel a cause of action in rem and a cause of action in personam. This question was before this court in the case of Heney v. The Josie, 59 Fed. 782. Judge Carpenter, in delivering the opinion of the court, said:

"The general principle is that several issues may be tried in one action when that course will promote the cause of justice, and conduce to the convenience of parties and of the court, and when no considerable inconvenience will arise therefrom. On this principle actions are sustained against a defendant for several independent but analogous claims, and also against several defendants for claims arising out of the same transaction, where the claims themselves are analogous. On general principles, there is no reason why a libel both in rem and in personam should not be retained in cases where the matter comes within the above definition, and when this practice is not forbidden by the rules of the supreme court."

In The Eliza Lines (C. C.) 61 Fed. 308, 324, Judge Putnam had occasion to consider an objection to the joinder of a proceeding in rem with one in personam; and, holding that this technical question of pleading had been waived, intimated by a dictum that, if it was necessary to consider the fundamental question involved, the court would probably come to the same result. While I incline to the view that in a case like the present, not provided for by the admiralty rules of the supreme court, there is no fixed rule which prevents the joinder in one libel of causes of action in rem and in personam, and that the present joinder was justifiable and for the convenience of all parties, I do not deem it necessary to dwell upon or to decide this point; for the libel against the Watson and the Lake Shore Transit Company, which joined proceedings in rem with proceedings in personam, must be dismissed so far as it is in rem, and in retaining it as a proceeding in personam I follow the suggestion of the brief for the libelee.

Decrees may be presented dismissing the libel No. 1,062 against the Sheldon, with costs to the libelee; dismissing the libel in No. 1,060, so far as it is in rem, against the Watson, with such costs as the libelee may have sustained by reason of the seizure; and awarding damages against the Lake Shore Transit Company in the sum of $4,808.61, with interest from the date of the filing of the libel, and with costs as upon a libel in personam.

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COLTRANE et al. v. BLAKE et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 425.

1. BUILDING AND LOAN ASSOCIATIONS—LAW GOVERNING CONTRACTS—DUAL RELATIONS WITH BORROWING STOCKHOLDERS.

The relations between a building and loan association and its stockholders, as such, are the same as between other business corporations and their stockholders, and their respective rights and obligations under the contract are governed by the general law, unless modified by statute. As to matters arising out of such relations, the decisions of the courts of the state are not binding upon the federal courts, but when a stockholder becomes also a borrower his contract as such is governed by the local law, and upon the question of his rights and liabilities thereunder the state decisions are controlling.

2. SAME—DISTRIBUTION OF ASSETS IN INSOLVENCY—STATUS OF HOLDERS OF FULL-PAID STOCK.

Holders of full-paid stock issued by a building and loan association as authorized by its by-laws, and which differs from the common or installment stock only in the fact that the holders are paid interest or a fixed dividend at stated periods instead of their proportionate share of the profits of the association, are stockholders, and not creditors, and on the winding up of the corporation in insolvency are entitled to no preference over other stockholders.

3. SAME—EFFECT OF NOTICE OF WITHDRAWAL.

A matured notice of withdrawal given by a stockholder of a building association, as permitted by the terms of his contract, does not operate to terminate his membership, and convert him into a creditor entitled to preference of payment over other members in the distribution of the assets of the association in insolvency, contrary to the express provisions of the by-laws.

4. SAME.

Where certificates of paid-up stock issued by a building association gave the holder the right to withdraw and have his stock redeemed subject to the provisions of the by-laws, which required 30 days' notice of intention to withdraw to be given, the status of a holder of such a certificate as a stockholder is not affected by a notice of withdrawal, given less than 30 days before the commencement of proceedings in insolvency against the association.

5. SAME—ACCOUNTING WITH BORROWING STOCKHOLDERS.

Where a stockholder in a building and loan association becomes also a borrower, his contract as such is governed by the local law, and where by such law it is usurious, in a settlement on the winding up of the association in insolvency before the maturity of his loan he should be charged with interest on the sum borrowed at the legal rate, and credited with all sums paid as premiums and interest, but the local law does not govern as to payments made by him as dues on his stock which are made under his contract as a stockholder, and the principles of equity require that as to such payments he be placed on an equality with nonborrowing stockholders, and share ratably with them in the assets remaining after the debts of the association are paid; and he is not entitled to credit on his loan for such payments where the proceedings are in a federal court, whatever may be the rule of the courts of the state.

Appeals from the Circuit Court of the United States for the District of Maryland.

See 110 Fed. 272, 281, 293.

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Wm. Hepburn Russell (Wm. Beverly Winslow, Morton Schaeffer, Randolph Barton, and Archibald R. Watson, on briefs), for appellant receivers.

Richard S. Culbreth, for appellant Coltrane.

Fielder C. Slingluff, for appellant Baltimore Building & Loan Ass'n.

William Pinkney Whyte, for appellee Powhatan Improvement Co.

Thos. Foley Hisky and M. N. Packard, for appellee Blake and others.

E. S. Douglass and George H. Lamar (Joseph D. Wright, on briefs), for appellees Cummin and Gulliver.

Edwin J. Farber (David Stewart and E. Stanley Toadvin, on briefs), for appellee Wilkins and others.

Henry C. Kennard (Henry A. Whitaker, on briefs), for appellees Eunice R. Pearce and others.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of Maryland. There are now before us three separate appeals growing out of the settlement of the affairs of the Baltimore Building & Loan Association. The Baltimore Building & Loan Association is a corporation created under the laws of the state of Maryland. It conducted a large business for several years, had members, and had placed loans in North Carolina, Virginia, West Virginia, Pennsylvania, and the District of Columbia, as well as in the state of Maryland. The association having become embarrassed, proceedings were instituted in the circuit court of the United States for the district of Maryland by Daniel B. Coltrane, in behalf of himself and all other stockholders against the association, praying for the appointment of a receiver, and for the administration of the affairs of the corporation in that court. The cause coming on to be heard, Bird M. Robinson was appointed receiver, and subsequently Randolph Barton, Esq., was associated with him as co-receiver. Auxiliary suits were instituted in the circuit courts of the United States for the states above mentioned, and in the supreme court of the District of Columbia, and the assets of the association were put in process of collection. The receivers having made progress in this collection, and a goodly part of the assets having been realized, the court entered an order providing for the intervention in the cause of all stockholders and investors in the association for the purpose of ascertaining and protecting their rights. At the same time John C. Rose, Esq., was appointed special master for the purpose of receiving proofs of claims, and he was instructed to report thereon, with his conclusions of law and findings of fact. A large number of interventions have been made. The special master has made his report. The claimants are all holders of stock in the association. Some have paid up their stock subscription entirely, and have been enjoying fixed semiannual dividends at the rates of 8 per cent. per annum with some, and 6 per cent. per annum with others. Some, having paid up their stock

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in full, have attempted to exercise the privileges of withdrawal given by the by-laws, and have in accordance with them given the required notice. The insolvency of the association defeated the payment of this withdrawal value. All of these two classes claim to occupy the position of creditors. Others are stockholders who have obtained an advance from the funds of the association and have given security therefor. They claim that in settling, ascertaining, and repaying this advance they are entitled to credit for all sums paid in by them by way of dues, premiums, and interest, and that on an adjustment so made they will be discharged from any further obligation as stockholders. Others are stockholders who have paid their dues regularly up to the insolvency of the association, and have never had any advance. They claim that they are entitled to be paid out of the assets of the association, realized and to be realized, the value of their stock, in equal proportion with all the other holders of stock certificates.

The special master, in an exhaustive and able report, discussed the claims of all these classes, and disallowed those of the first three set out above. He held that all holders of certificates of stock were stockholders, entitled to share in equal proportion the remaining assets of the association, the proportion to be measured by the number of shares held by each. And with regard to the third class, the advanced shareholders, he held that they were not entitled as a credit on their advances to the amount of dues on stock subscription paid by them. Exceptions were taken to his report, and the cause was heard by the circuit court. All the exceptions were overruled, except those to his conclusion as to the third class, the advanced stockholders. As to these the court differed with the special master, and held that they were entitled to credit their advance with the dues as well as with all other money paid by them into the association, by way of premium and interest. Appeals and cross appeals were allowed to the decree of the circuit court, and the whole case is here on many assignments of error.

Before entering in detail into a discussion of these assignments of error, a question underlying all of them must first be met. The court below felt itself bound by the decisions of the court of last resort in Maryland in the solution of all questions arising in the administration of the assets of this insolvent Maryland corporation. It held that these decisions led inevitably to the conclusion reached by it. On the other hand, it is earnestly contended that the questions involved in this case, establishing the relations between stockholders and the corporation the Baltimore Building & Loan Association, are questions of general law, determining the nature and obligation of the contracts growing out of these relations, to be solved according to the principles of equity governing the federal courts, and in no wise controlled by decisions of the state courts.

Building and loan associations differ from an ordinary corporation created to deal in money in this: They are allowed to lend out their money, and, under certain restrictions, as such, are exempted from the usury laws of the state. In many other respects they are as other corporations. Their stockholders, in their relations with the

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corporation as stockholders, enter into the same character of contracts, come under the same character of obligations as do stockholders in other business corporations. And these are regulated by the general law, unless modified by statute. The statute law of Maryland has not modified this relation in these respects. The Maryland statutes, so far as building and loan associations are concerned, have special provisions as to the lending of money by them. In this respect do the Maryland decisions control. A corporation of this character is in one aspect a limited copartnership. Each stockholder ventures a certain sum of money, the amount of stock purchased or subscribed by him. His liability is measured by the stock held by him. Usually, if the enterprise fails, and its assets are exhausted in the payment of debts, the stockholder loses the stock, then valueless, and his liability ends. Sometimes as stockholder he is subject to an additional liability, measured always by the stock held by him. As stockholder he shares in the profits of the association, and, of course, to the extent of his stock and any fixed liability beyond it, he must share the losses. "Qui sentit commodum sentire debet et onus." Each stockholder stands on the same footing with regard to each share of his stock, and each is liable equally and in the same respect with every other for his subscription, according to the form in which he contracts to pay it, whether it be in an entire sum in cash or whether it be in installments at fixed intervals. All these are governed by general law,—the law merchant.

But when a building and loan association begins to exercise the purpose of its creation, becomes a lender of money, and any person—a stockholder—gets any of that money, such stockholder assumes a new relation to the association. Whether such a transaction is called an advance from the common fund, or whether it is called a loan, the transaction makes the corporation the creditor, and such person, though a stockholder, the debtor. He incurs a liability which must be discharged. This feature in the business of a building and loan association is regulated and controlled by the local law. Is such a loan or the incurring of such a liability legal? Does the question of usury arise? Are the general statutes against usury modified with respect to this building and loan association? Are the securities given in this transaction valid? All of these questions must be determined by the local law. Provisions as to such matters vary with the states in which they are made.

In the case at bar, each stockholder—every stockholder in the Baltimore Building & Loan Association—bound himself to pay his stock subscription. This was a contract in which every creditor and every other stockholder of the corporation was interested. He had the option of paying it in cash at once, or he could pay it in certain installments at certain fixed times. All the money so paid under these contracts of subscription went into the common treasury, in which every stockholder had an interest. This transaction is perfectly legal, and not dependent for its legality on any local law. It comes within the general law of contracts. If any one, being a stockholder, because he is a stockholder, concludes to get from the common treasury money in it, and gets it, call it a loan or call it an advance, it has

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all the characteristics of a debt for which ex æquo et bono he is responsible. He hopes to pay this perhaps by the maturity of his stock at the usual period of similar companies. The insolvency of the company defeats this hope; insolvency brought about by causes which could not be prevented, or perhaps caused by the negligence, fraud, or incapacity of the agents of the stockholders. But this, of itself, cannot release him from his contract, or free him from his responsibility as a stockholder, or cancel his stock. The disappointment which he suffers is common with every stockholder in the association. Every stockholder—each one—has paid his subscription, either in cash or in installments by way of dues, expecting profit at the maturity of the stock in the hoped-for time. The money of each of them has gone into the common fund, and he has used a part of it. The insolvency of the association frees him from the payment of any other dues. But to the extent of the dues paid he is and he remains a stockholder, with all the rights and subject to all the responsibilities of a stockholder. This is according to the law merchant, and no statute of Maryland has altered this law. So the stockholder who has had an "advance" or "loan," whichever term is used, occupies a twofold relation to the company. He is, first of all, a stockholder, bound by his contract of subscription, and enjoying the advantages and suffering the responsibilities of a stockholder. He afterward becomes a debtor, subject to the terms of his contract as borrower,—a contract wholly distinct from that he assumed as stockholder. The one contract comes under the law merchant; the other contract is controlled by the local law.

Holders of paid-up stock; are they creditors of the association? In his very able report the special master discusses and exhausts this question. He holds that they remain stockholders, and are not entitled to stand as creditors. "There is nothing in any of the by-laws of the corporation which as much as suggests that the holders of paid-up stock are anything other than stockholders. They were allowed a vote at stockholders' meetings, and many of them, including the petitioners intervening in this cause, did vote at least by proxy. They were eligible to office, and were so elected. It is true that they received a definite dividend on their stock, and would not have been entitled to any more, no matter how great the profits of the corporation might have turned out to be. But such a contract is not uncommon between corporations and holders of certain classes of stock." And then he quotes 1 Cook, Stock, Stockh. & Corp. Law, § 269; Hamlin v. Railroad Co., 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C.) 82 Fed. 365. These cases sustain him. The case last quoted was decided by the circuit court of the United States for the district of Maryland. In that case the circuit court (a full bench) says: "There is a legal inference that the claim of a stockholder, with a voice in the management of the corporation, is subordinate to debts due to creditors. That this inference is a well-recognized rule of law, and that to rebut it the expression of a contrary intent, in clear and unambiguous language, is required, is shown by the following citations." Then follows a long list of authorities. If this be the status of this paid-up stock, the

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holder of it comes within the rule of law which governs other stockholders. They cannot share the assets until all debts are paid. Plimpton v. Bigelow, 93 N. Y. 592; Fisher v. President, etc., 5 Gray, 373; Gibbons v. Mahon, 136 U. S. 557, 10 Sup. Ct. 1057, 34 L. Ed. 525. And so they are neither more nor less than stockholders. The Maryland courts adopt this view also. Tax Cases, 50 Md. 321. We concur with the court below in overruling the exception to the report on this point, and in adopting the conclusion of the special master.

Are stockholders who have given notice of withdrawal creditors? The special master finds as a fact that, under the by-laws of the association as amended, it is expressly declared that a withdrawal notice does not constitute a withdrawal or terminate the membership, or give to the person filing such notice the status of a creditor, or create any rights of action, legal or equitable, against the association, or in any manner alter or disturb the rights or duties as a member. This ends the case so far as those are concerned who acquired their stock after May, 1899, the date of the amendment.

The master also finds as a fact that, under the by-laws of 1891, 30 days' notice was required before the stock could be withdrawn or reduced. In fact no notice of a desire to withdraw was given 30 days before the appointment of a receiver in any claim proved in this case. The master discusses the question at some length, and reviews the authorities. He shows that there is a conflict of authorities upon the question whether a stockholder who has exercised his right to withdraw, and has given the notice required, and such notice has matured, can rank as a creditor. But all authorities agree that he cannot be recognized as a creditor if such notice has not matured. And this is based on reason. The condition precedent to a right to withdraw is notice for 30 days. This condition has not been fulfilled. The insolvency of the association forbids and prevents its fulfillment. This insolvency puts an end to all business of the association, and destroys its vitality as a going concern.

What are the rights of stockholders who have had advances? It is contended by this class of stockholders, and the contention is sustained by the circuit court, that in the administration of the assets of this insolvent corporation they are to be charged with the sum actually advanced to them, with lawful interest at 6 per cent. per annum, and they are to be credited with all payments made by them by way of dues, premium, and interest, with interest at the same rate, upon the principle of partial payments. Is this the law?

It will be noted that they are stockholders, and that by subscription to the stock they have become bound, as all other stockholders are, to pay this subscription; that by the by-laws it is expressly declared that the losses, if they exceed the undivided profits, shall be charged pro rata against the several shares; that there are other stockholders who have faithfully fulfilled their contracts of subscription; that by the insolvency of the corporation each of them has been disappointed in the expectation upon which their payments were made; yet, by the conclusion reached by the court below,

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each stockholder who has had an advance gets back every dollar he has paid into the association, not only upon the contract for usurious interest, but for the sums paid upon his subscription to the stock, whilst every other stockholder who made the same stock contract as he did, upon precisely the same expectation, but who has not enjoyed any advance, is remitted to his pro rata of the depleted assets. Surely this establishes an inequality which is not equity, and throws upon a part of the stockholders all the losses which by the by-laws must be borne by all. This conclusion confuses the obligation of two entirely distinct contracts. In subscribing to the stock, the shareholder binds himself to pay the subscription, either in cash at once or in installments, called dues. This is a perfectly legal contract, if the corporation be a legal one, as the one in question undoubtedly is. Having become a stockholder, he then gets an advance from the common fund. This is another and an entirely distinct contract, based upon an entirely distinct consideration. When one subscribed for stock and paid for it by a mortgage payable at times mutually agreed upon between the parties, this was merely a mode of payment. He stands in two capacities,—one as debtor to the association, the other as stockholder in it. These capacities are independent of each other. Payments on stock are not payments on the mortgage debt, and do not ipso facto work an extinguishment of so much of the mortgage. The payment on one is not necessarily a payment on the other. Ely v. Sprague, 1 Clark, Ch. 351; Southern Building & Loan Ass'n v. Anniston Loan & Trust Co., 101 Ala. 582, 15 South. 123, 29 L. R. A. 120, 46 Am. St. Rep. 138; Wilson v. Martinez, 47 C. C. A. 591, 108 Fed. 705. The conclusion reached by the court below gives to the advanced stockholder the benefit of all payments made upon this independent contract, and also aids them with payments made on the other contract, wholly distinct from it. The contract made by a stockholder subscribing to stock in a business corporation is regulated by the general law common to all such corporations. He binds himself to pay his subscriptions. He shares in the profits of the corporation so long as it is a paying, going concern, and when its career ceases he gets his share of its assets after payment of all the debts. Gibbons v. Mahon, 136 U. S. 557, 10 Sup. Ct. 1057, 34 L. Ed. 525. When he borrows funds of the corporation, he assumes a different relation. Its obligations are determined by the local law. If the loan be usurious, it is not relieved of this taint simply because it is a transaction between the stockholders and the corporation. In adjusting the debt, the local law must be followed. So, in the case at bar, inasmuch as the Maryland statutes make usurious the demand of a fixed premium, and the payment of interest on the whole sum borrowed despite the premium, the stockholder who has borrowed is only accountable for the exact sum received, with interest, and is credited with all sums improperly paid, either as premium or interest. But this adjustment cannot affect his responsibility upon his contract of subscription, and cannot equitably be held to have canceled that obligation. Under the by-laws of this

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corporation he does not cease to be a stockholder when he becomes a borrower.

It is supposed that when a stockholder borrows money from the association the consideration influencing him is the ability to repay it in several periodical payments spread over a number of years; that by the insolvency of the corporation this consideration is lost, and the borrowing stockholder released from much of his obligation. But how is his case different in this respect from every other stockholder? A building and loan association is a business enterprise, entered into in the hope of profit. Every stockholder partakes of the adventure, and hopes to share the profit. He cannot escape a share in the losses, limited if it be incorporated, general if it be unincorporated. Each hopes and expects that, with a period approximately definite, the corporation will mature and the profit be realized,—the paid-up stockholder getting his fixed dividend, in the meanwhile expecting full return of the cash paid in; the nonborrowing stockholder paying his dues in several increments, spread over a number of years, and hoping when the maturity is reached that he will get back all he has paid in and a reasonable profit besides. The borrowing stockholder gets the hoped-for profits in advance, and expects at maturity to get back his securities canceled. Each has the same expectation. Each meets with the same disappointment. Yet the conclusion reached by the court below compensates the borrowing stockholder for his disappointment at the expense of every other class.

There is another point of view. A stockholder in a corporation, by reason of his ownership of shares, has the right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts. Plimpton v. Bigelow, 93 N. Y. 592; Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; Fisher v. President, etc., 5 Gray, 373. So, upon the dissolution of the corporation, after the debts are paid, the stockholders rank as creditors, and have a legal claim on so much of the capital stock as remains. The rule in the United States is that the capital stock of a corporation is impressed with a trust for the payment of the creditors of the corporation. Wood v. Dummer, 3 Mason, 308, Fed. Cas. No. 17,944; Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731. Especially is this the case with insolvent corporations. The capital stock of a building and loan association is composed of the subscriptions to it, either by cash or by dues. If any part of these dues is diverted from the claims of creditors generally, and is used for the benefit of a single stockholder by way of credit on a debt due by him to the corporation, it is a misuse of trust funds, and so unlawful.

In our opinion, the debt due to the association by the borrowing stockholder should be adjusted by charging him with the sum really advanced, with interest thereon at 6 per cent., and by crediting him with all sums paid by way of premiums and interest, upon the principle of partial payments, the remainder thus ascertained to be part of the assets of the association; that on the debt account

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he receive no credit for dues paid by him; and that in the final distribution of the assets he share in them in proportion to the amount paid in by him as dues upon his stock, with interest thereon for the average time prior to March, 21, 1890, according to the rule recommended by the special master in his report on the Blake intervention.

NATIONAL FOUNDRY & PIPE WORKS, Limited, v. OCONTO CITY WATER SUPPLY CO. et al.

(Circuit Court of Appeals, Seventh Circuit. February 1, 1902.)

No. 673.

1. MORTGAGE—SUIT TO REDEEM FROM SALE—RES JUDICATA.
   Complainant brought suit in a federal court to establish a mechanic's lien upon the property of a water company for supplies furnished in the construction of its plant, and obtained a decree establishing its lien, and also a judgment against the company. Pending such suit a mortgage upon the plant of the company was foreclosed in a state court, and the property was sold and purchased by the mortgagees, who were not parties to the suit in the federal court. Thereafter complainant brought a creditors' suit in the federal court in aid of its judgment, one of the purposes of which was to obtain a decree of priority of its lien claim over the mortgage, and the title acquired by the mortgagees thereunder. It obtained such decree, but on appeal its bill was dismissed by the circuit court of appeals, following a decision that had in the meantime been rendered by the supreme court of the state, holding that, under the state statute, waterworks property was not subject to a mechanic's lien. *Held*, that such judgment was a conclusive adjudication of the invalidity of complainant's lien as between it and the mortgagees, and that, having only the status of an unsecured creditor, it could not maintain a suit against such mortgagees and their grantee to redeem from the mortgage sale.

2. COURTS—JURISDICTION OF SUBJECT-MATTER—PENDENCY OF SUIT IN ANOTHER COURT.
   The pendency of a suit in a federal court to obtain a judgment and a decree establishing a mechanic's lien, in which the court does not take possession of the property which remains in the defendant, does not affect the jurisdiction of a state court to entertain a suit for the foreclosure of a mortgage on the property; nor does the decree in the lien suit bind the mortgagee, who is not a party thereto, or affect the rights of a purchaser at the foreclosure sale.[1]

3. LIS PENDENS—OPERATION AND EFFECT—PERSONS BOUND BY DECREE.
   The doctrine of lis pendens affects only intermediate purchasers who voluntarily acquire rights from one of the parties pending the suit. It has no application to a case where, pending a suit to establish a lien upon property, a mortgage thereon antedating the lien suit is foreclosed in another court, so as to render the decree in the lien suit binding on the purchaser at the foreclosure sale, whose title relates back to the date of the mortgage.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

George H. Noyes, for appellant.
George G. Green and W. H. Webster, for appellees.

[1] Conflicts of jurisdiction between federal and state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.

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Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This is a suit in equity to compel redemption of a waterworks plant in the city of Oconto, Wis., from sale under several mortgages foreclosed in the state court by the appellees Andrews & Whitcomb, purchased and bid in by them upon sale under the foreclosure for some $64,000, moneys loaned and advanced by them and used in the erection and construction of the plant, and afterwards sold by Andrews & Whitcomb to the appellee, the Oconto City Water Supply Company, and since owned, occupied, and operated by said company. The subject has been in litigation for several years both in this court and the state courts, and the matters involved in this suit, if not stare decisis or res adjudicata, in view of the decisions already made in the state and federal courts, there is in the judgment of the court, upon a careful study of these cases and of the record, but little ground for the appellant to stand upon. Almost any person or party less heroic in contested and stubborn litigation, and not so skilled in shifting attitudes and raising new points, would have been reasonably satisfied, in view of the decision of this court in a former suit involving the same subject and title, and reported as Andrews v. Pipe Works, 22 C. C. A. 110, 76 Fed. 166, 46 U. S. App. 281; City of Oconto v. National Foundry & Pipe Works, Id.; Chapman Valve Mfg. Co. v. Oconto Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830; and National Foundry & Pipe Works v. Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125,—to have given up the struggle without further effort at litigation. The opinion of the district judge who heard this case, which is printed in the record, seems to be entirely satisfactory, and places the decision dismissing the bill upon solid ground. The facts are not fully stated in that opinion, but they have been so many times stated in the cases referred to, both in the state and federal courts, and the history of the litigation so fully given, that it seems almost a needless labor to go over the work again. But perhaps a brief statement will be prudent, if not necessary to the proper understanding of the questions involved.

The foundation of the appellant's claim against the property in the various forms in which it has been successively made is the furnishing to the Oconto Water Company, a corporation organized to construct a system of waterworks in the city of Oconto, a quantity of pipe sold to the water company between September 8 and November 24, 1890, amounting to the sum of $25,637.32, and used by that company in the construction of the plant. On September 12, 1890, the water company mortgaged its plant and franchises to Andrews & Whitcomb, citizens of Maine, who advanced and loaned to the company money to the amount of $64,000, and which was used in the construction of the plant. On January 30, 1891, the appellant began suit in the court below against the Oconto Water Company to enforce a mechanic's lien on the company's water plant, and on October 3, 1892, obtained a decree for such lien in the sum of $24,250.04. It also obtained a judgment at law in the same court for the amount

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of its claim. On June 17, 1891, Andrews & Whitcomb commenced an action in the state court to enforce their mortgages, and obtained a judgment of foreclosure and sale in due form of law on August 13, 1891; and under this judgment a sale of the property and franchises was made to the mortgagees, Andrews & Whitcomb, which sale was duly confirmed by the court, and a deed and conveyance of the plant and franchises and all the property appurtenant thereto or connected therewith was made to Andrews & Whitcomb. After the title was thus vested in Andrews & Whitcomb, on July 12, 1892, they transferred the property to the Oconto Water Supply Company, a corporation organized for the purpose of purchasing the same and operating the plant to supply the city and the citizens thereof with water. On July 11, 1892, appellant commenced a creditors' suit in the United States circuit court for the Eastern district of Wisconsin supplemental to and in aid of its judgment at law, one of the purposes of which was to obtain a decree of priority of its lien claim upon the plant and property over the title of Andrews & Whitcomb under the mortgage foreclosure proceedings and deed of conveyance. In this action the rights of the parties to that suit, including the right of the appellant to a lien under the mechanic's lien laws of Wisconsin, as against Andrews & Whitcomb, were presented for adjudication. The claim on the part of Andrews & Whitcomb was that they were not bound by the lien judgment, because not made parties to the suit to enforce it, and that the waterworks were not subject to the laws of Wisconsin respecting mechanics' and material men's liens. On the part of the appellant, the National Foundry & Pipe Works, the validity of the mortgages under which Andrews & Whitcomb claimed title was attacked, and it was claimed that its lien was a first claim against the water company's property, and should be so adjudged. The decree of the circuit court gave the appellant all it asked, and made its claim a first lien, and ordered a sale of the plant and franchises of the water company to satisfy the lien. The case was appealed to this court. Before a hearing could be had here, however, the supreme court of Wisconsin, in Chapman Valve Mfg. Co. v. Oconto Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830, had, upon full consideration, decided that a water plant provided by a city, by contract with a private corporation, for the protection and convenience of its citizens, is not, under the laws of Wisconsin, subject to lien claims under chapter 143, Rev. St. 1878. The circuit court had entered a decree in the suit sustaining the lien judgment, and adjudging that it was binding upon Andrews & Whitcomb as privies of the water company; the theory being based on the fact that they were owners of the stock of the water company when the indebtedness accrued for which the lien was claimed. This decree as to Andrews & Whitcomb was reversed by this court, and the bill dismissed. See 22 C. C. A. 110, 76 Fed. 166, 46 U. S. App. 284. The issues in that case were much broader than in the case at bar,—broad enough, probably, to have included the issue made here upon the right of the appellant to redeem from the sale under the mortgage foreclosure, if such a claim had been made and such relief asked for. But in that case appellant did not ask to redeem as though it were a junior incumbrancer,

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but asked for a decree adjudging the title and right of the property to be in the appellant, without money and without price, unless its claim was paid. The contention was that its rights in the property were superior and paramount to those of Andrews & Whitcomb. This issue was adjudged against the appellant; this court holding that under the decisions of the state court the appellant never had any lien upon the property, and that the judgment adjudging a lien was erroneous, although it was res adjudicata as to the parties to that suit, in which the lien was adjudged. In that opinion this court, by Woods, circuit judge, say:

"The question of primary importance, it is evident, is whether the liens decreed in favor of the complainant and one of the interveners were authorized by the provisions of section 3314, Sanb. & B. Ann. St. Wis. As between two of the parties to the record, the question has been decided by this court in the affirmative. Oconto Water Co. v. National Foundry & Pipe Works, 7 C. C. A. 603, 59 Fed. 19, 18 U. S. App. 380. But in another and later case, in which the Chapman Valve Company, also a party to this appeal, was the complainant, the supreme court of Wisconsin, in a carefully considered opinion, affirmed the contrary ruling of the circuit court for Oconto county. Chapman Valve Mfg. Co. v. Oconto Water Co., 89 Wis. 264, 274, 60 N. W. 1004, 46 Am. St. Rep. 830. The ruling of this court was based upon the opinion delivered in the circuit court by Judge Jenkins, who, it will be observed, deduced his conclusion from the analogies of previous decisions of the supreme court of Wisconsin, none of which involved the precise question. That opinion and its affirmance by this court are referred to in the later opinion of the Wisconsin court, which declared itself 'constrained to a different judgment by the force of its former decisions and by the logic of the situation,' and added that the view taken was deemed to be 'in accord with the weight of authority and the better reason.' That decision, being the first direct ruling of the supreme court of the state upon the exact question under consideration, must be regarded as establishing a construction of the statute which the federal courts will follow without further inquiry. Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Stutsman Co. v. Wallace, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; Lowndes v. Town of Huntington, 153 U. S. 1, 14 Sup. Ct. 758, 38 L. Ed. 615; Roberts v. Lewis, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747; Folsom v. Ninety-Six Tp., 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; Balkam v. Iron Co., 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953. In Forsyth v. City of Hammond, 18 C. C. A. 175, 71 Fed. 443, 34 U. S. App. 552, to which reference has been made, this court declined to follow the latest ruling of the supreme court of the state from which the case came, but it will be observed that it was because the decision was deemed to be distinctly inconsistent with the previous decisions of that court, and in conflict with the weight and general current of authority on the subject. In respect to the title of Andrews & Whitcomb, we are of opinion that the mortgage of the franchise carried with it the water plant. The franchise, as described in the ordinance referred to in the mortgage, included the right to 'construct, own, maintain, and operate' the particular water plant which was in contemplation and already in process of construction when the mortgage was executed. In the opinion in Chapman Valve Mfg. Co. v. Oconto Water Co., 89 Wis. 264, 273, 60 N. W. 1004, 1005, 46 Am. St. Rep. 830, it is said: 'Nor does the franchise follow the plant by force of the rule that the incident follows its principal. If that maxim has any application, it should be considered that the franchise is the principal thing. All other rights spring from the franchise.'"

It seems to this court now that after that decision there was not much standing ground for the appellant, founded upon its claim to a mechanic's or material man's lien under the statute. If the appellant has no lien subsequent and subordinate to the appellees' title, it is

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difficult to see on what solid ground it could base a claim to redeem. It is simply in the position of a general creditor. As such it could not have been made a party to the foreclosure of the mortgages, because it had no lien upon, nor interest in, the property covered by the mortgages. And, no doubt, that was why it was not made a party to that foreclosure. If it could not be made a party to the foreclosure and its interest barred, it is difficult to see how, after Andrews & Whitcomb had purchased the property and sold it to the water supply company, the appellant, without any lien at all, can come in and demand the right to redeem and take the plant from the purchaser.

But this is not all the litigation that has been had between the parties. After the decision of this court was rendered adjudging that the appellant had no lien, and dismissing the bill for want of equity, an action was brought by this same appellant against the Oconto City Water Supply Company, in possession, to compel that company to surrender the waterworks property to the plaintiff, upon the theory that the defendant water company, by organizing under the statute to acquire title to such property, and the right to exercise all the rights, privileges, and franchises of the old corporation, and taking such property with knowledge of the plaintiff's lien, became a mere continuation of the old organization under another name. Judgment was prayed against the defendant for the amount of the plaintiff's claim against the old Oconto Water Company, and that it be given possession of the waterworks property; that defendant be enjoined from using the property,—particularly the pipes furnished by plaintiff and used in the construction of the plant,—unless within a reasonable time defendant should pay its claim. It will be observed that this suit was in equity, and went to the right and title to occupy and use the property. Defendant answered the complainant, and the issues thus formed were tried and determined by the state circuit court of Oconto county; the decision being, in effect, that in the aforesaid action in the federal court, to which the plaintiff and defendant were parties, it was decided that plaintiff was not entitled to any lien upon the waterworks property as against the title under the Andrews & Whitcomb foreclosed mortgages; that the issues raised in the case were all presented in the case in the federal court, and were adjudicated adversely to the plaintiff; and that such adjudication was binding between the parties, and conclusive in that action. Judgment was rendered in favor of the defendant, dismissing the plaintiff's bill of complaint. An appeal was taken from this judgment to the supreme court of the state, and an elaborate and satisfactory opinion given by Judge Marshall, affirming the decree of the circuit court. On the question of the issues in the case at bar being res adjudicata, in view of the former decision of this court and that of the supreme court of Wisconsin, what that court said in that case seems quite as applicable to this case as to the case in the state court. The court says:

"The question of whether the trial court erred in deciding that the judgment of the federal court is res adjudicata on all points upon which appellant relies to recover is presented for consideration. It is elementary that all questions appertaining to a cause of action, within the issues, and actually litigated, or which might have been litigated, are irrevocably an-

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swered by the final decree, so far as affects the parties to such action, as regards the subject thereof. That, of course, includes not only the primary right sought to be enforced by the action, but matters germane to, and actually involved in, it. Wentworth v. Racine Co., 99 Wis. 26, 74 N. W. 551. It is conceded that under that rule it was not open for appellant in this case to litigate the question of whether its lien judgment was binding on the respondent. But it is said the right of appellant to hold the respondent liable for its claim, upon the ground that the latter took the property in controversy subject to its lien claim, was not involved in the former litigation, or presented to the court, or decided. It is with some difficulty, we confess, that we can follow the course of reasoning which leads to the statement of such premises as correct, or the conclusion based thereon. The validity of the Andrews & Whitcomb mortgages, and the title acquired through the foreclosure of them, were subjects of controversy in the creditors' suit. The pleadings show that, and the opinions filed, as well. If appellant was possessed of a claim upon the property, either by reason of the judgment against the Oconto Water Company or otherwise, paramount to the rights claimed under the Andrews & Whitcomb mortgages, they were entitled to have had such claim declared to them in the creditors' suit. The object sought by such suit was to obtain a decree to the effect that appellant was entitled to the property in controversy as it stood September 15, 1890, free from any claim of Andrews & Whitcomb, or any other party to the action. That brought before the court for adjudication the nature and validity of the title obtained through the foreclosure proceedings, not only as regards whether it was affected by the lien decree against the Oconto Water Company, because of Andrews & Whitcomb's connection with such company, but whether such title was subject to the appellant's claim under any circumstances. An examination of the pleadings in the creditors' suit leaves no doubt on that question, and, by reference to the published opinions of Judge Woods in the case, it appears that all the matters involved in the controversy above mentioned were actually decided. We might quote at length from such opinions, found in Andrews v. Pipe Works, 22 C. C. A. 110, 76 Fed. 166, 36 L. R. A. 139, and Id., 23 C. C. A. 454, 77 Fed. 774, 36 L. R. A. 153, conclusively establishing what is here said, but it is not deemed necessary. It is sufficient to say that in our judgment the decision in the creditors' suit is just as decisive that the title acquired by the foreclosure sale passed to the purchasers free and clear of any claim of the appellant, as it is that Andrews & Whitcomb were not bound by the lien judgment. Appellant's counsel concede that the effect of the decree is that their claim was not a lien upon the water company's property as against the Andrews & Whitcomb mortgages. With that concession, there was nothing left undecided, as it seems, which is involved in this case. If there was no lien as against the mortgagees, the owner under the foreclosure sale did not take any benefits which belonged legally or equitably to appellant."

It is true that the particular relief prayed for in this suit was not asked for in the former cases in the federal and state courts. But the issues involved and the prayers for relief were broad enough to cover the relief sought here if counsel had seen fit to make the claim. Under the decisions, what might fairly and properly have been litigated in these cases must be considered as having been litigated, and are answered by the final decree, as well as those things which were openly and professedly litigated. Upon the merits of the controversy in the state court, aside from the question of res adjudicata, the supreme court says:

"The mere fact that a suit is pending in the federal court on one cause of action or subject of action, affecting property not in the custody of the court, does not prevent the commencement or prosecution of any number of actions between other parties on other causes or subjects of action affecting the same property, or prevent the property from being seized in such other actions, so long as no prior possession of the res by the federal court is dis-

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turbed. * * * Identity of subject of action or disturbance of actual possession is what limits the exclusive jurisdiction of the federal court as applied to this case. In that view, it is readily seen that the proceedings in the state court to foreclose the Andrews & Whitcomb mortgages did not conflict in the slightest degree with the jurisdiction of the federal court to enforce appellant's lien against the Oconto Water Company. * * * If the Andrews & Whitcomb mortgages were valid liens upon the waterworks property, paramount to plaintiff's claim, so that by the enforcement of the mortgages the purchaser at the foreclosure sale only obtained the benefit of the mortgage security, they became possessed of no benefit that they did not fully pay for, or anything that was equitably applicable to the payment of plaintiff's claim. The essential of prior equity of plaintiff in the property, which is an absolute essential to the liability of the new owner of such property for the debts of its predecessor, does not exist, so the principle invoked does not apply. * * * The defendant became the bona fide owner, for full value, of the property of the Oconto Water Company, and all the franchises possessed by it for the profitable use and enjoyment of such property. The purchasers at the foreclosure sale took title to the property with the incidental right conferred by section 1788, Rev. St. 1898, to form a new corporation to take the same by assignment, and possess the rights of the old organization. When the mortgages were given, section 1788, Rev. St. 1898, became a part of them, and a very material element in the value of the security. The right guarantied by such section was as much a part of the mortgage security as the tangible property described. The theory of the appellant is that the statute clothing a corporation circumstanced as the defendant is with the right to exercise the powers, privileges, and franchises possessed by the old corporation, which it shall have acquired bona fide, by mortgage sale, or by assignment based on a title acquired through such a sale, instead of adding to the value of a corporate mortgage covering all the property of the corporation, tangible and intangible, impairs it, and may destroy it, because a new corporation cannot be organized with the benefits of the statute without incurring the penalty of being liable for all the unsecured indebtedness of the old corporation, whether before the foreclosure sale the owner of the mortgage indebtedness had a first lien on the property or not. In other words, that the statute not only operates to prevent the general creditors from being cut off by the foreclosure proceedings, but transposes the parties so as to give the general creditors a claim on the property paramount to the mortgage. The statute will not admit of a construction leading to such an absurd result, even if the question were an open one; and it is not, as we have seen. The manifest purpose of it, as indicated, is to add to the value of a corporate mortgage of the kind under consideration. That is too plain to admit of serious controversy. Candor compels us to say that we do not think that the contrary theory merits the consideration we have given to it, since its fallacy is so glaringly apparent, and has so often been exposed in this and other courts. * * * To satisfy the above-indicated requirements, we are told that when Andrews & Whitcomb purchased the waterworks property at the foreclosure sale they knew that plaintiff had an adjudged lien thereon for the amount of their claim, good against the common debtor, and that the respondent was likewise circumstanced when it took the title; therefore, though it may be conceded that title passed to the respondent, it was subject to the lien judgment, and the respondent should not be allowed to use such property, except upon condition of paying the appellant's charge upon it. If that is good law, all a junior lien claimant need do to acquire precedence over the prior lién is to obtain a judgment for the enforcement of it in an action to which the prior lien claimant is not a party. We cannot agree with that proposition. The rights of Andrews & Whitcomb under their mortgages, relative to the rights of the appellant under the claim for a lien on the mortgage property, were not affected in the slightest degree by the judgment in the federal court in the lien suit. They were not parties to it or in privity with the Oconto Water Company so as to be bound as such. That seems too clear for serious controversy, and was adjudicated between the parties in the creditors' suit. So, if the appellant was not entitled to a lien on the waterworks plant as

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against Andrews & Whitcomb, the latter derived no advantage from the foreclosure sale, except that for which they gave a full equivalent by a satisfaction of the mortgage indebtedness. They took the property without any burden resting upon it; hence incurred no duty, within the maxim which the learned counsel invoke."

There can be little question but that the decision of the state court is conclusive on the question of jurisdiction. It was fairly before that court for decision, and it decided it. But aside from the question being res adjudicata, there can be no doubt about the jurisdiction of the state court in the foreclosure proceedings. The appellant was not made a party to that suit, and so was not bound by the decree. The appellees were not parties to the suit to establish the mechanic's lien, and so were not bound by that judgment. On the question of the state court not having jurisdiction of the foreclosure proceedings because a suit for a wholly different purpose was pending in the federal court, it may be said there was no possession, actual or constructive, in either the state or federal court, during the pendency of foreclosure proceedings. The mortgagor was in actual possession during the whole time. There was no reason why the actions might not have proceeded concurrently as well as successively. The question of the better right to the property was open. Suit was brought by appellant to test that right in the federal court, and the judgment of the court went against it. Suit was then brought in the state court to test the same right, shifting the ground of the action, and the judgment of the state court was against the appellant's claim. A third suit is brought here to test the same claim, again shifting the ground of the action, but setting up and relying upon the same facts. As has already been said, if the issues involved are not fully and technically res adjudicata, they are so nearly so as to leave the appellant small standing room in court. It may properly be said that it has had its day in court. It has had its day in two courts,—in this court and in the state court. The decisions of those courts cover fully the several grounds of recovery as the appellant was then able to state them, and it cannot, by changing the grounds of its claim, continue the litigation indefinitely. One of the grounds of recovery stated in the former suit in the federal court, if it had been good for anything, was entirely adequate to furnish relief and give title and possession to the appellant. If it was entitled to a mechanic's and material man's lien on the plant, that, under the statute, would relate back to the very beginning of the improvement, and constitute a lien paramount to the lien of the mortgages; and, if the decree of the United States circuit court for the Eastern district of Wisconsin had been affirmed by this court, that would have given appellant title to the property under the sale which was made to it by the marshal under that decree. But that decree was reversed, and the bill dismissed. It had been held upon full consideration by the unanimous judgment of the highest court of the state, in the first case where the question had been squarely and fully considered, that the lien laws of Wisconsin had no application to properties of this kind. The terms of the statute were not broad enough to cover such a case, and it

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was against public policy that it should. As the plant could not be separated from the franchise by any adverse process, there could be no lien by judgment on it. That was the settled law of the state, and this court could not do otherwise than follow the decision of the supreme court of Wisconsin. Improvement Co. v. Wood Co., 81 Wis. 559, 51 N. W. 1004, 17 L. R. A. 92; Fond du Lac Water Co. v. City of Fond du Lac, 82 Wis. 332, 52 N. W. 439, 16 L. R. A. 581; Chicago & N. W. Ry. Co. v. Forest Co., 95 Wis. 80, 70 N. W. 77; Chapman Valve Mfg. Co. v. Oconto Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830.

In announcing its opinion in the Chapman Valve Mfg. Co. Case, supra, the supreme court of Wisconsin was simply enforcing the logic of its own prior rulings,—that the franchises and rights of a quasi public corporation, owing important duties to the public, and the property vested in it necessary for their use and enjoyment and the accomplishment of the purposes for which it was created, constitute an entirety, and, in the absence of special statutory authority, are not subject to be seized and sold on execution, or for mechanics' liens, or on tax process. Chicago & N. W. Ry. Co. v. Forest Co., 95 Wis. 80, 70 N. W. 77. The same principles were delivered by the supreme court of the United States in Buncombe Co. v. Tommey, 115 U. S. 122, 5 Sup. Ct. 1186, 29 L. Ed. 305, and Railway Co. v. Doe, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136. So that it is stare decisis, as well as res adjudicata, that the statute of Wisconsin gives appellant no lien on this property,—the visible property or the franchise. Andrews v. Pipe Works, 22 C. C. A. 110, 76 Fed. 166, 36 L. R. A. 139; Id., 23 C. C. A. 454, 77 Fed. 774, 46 U. S. App. 619, 36 L. R. A. 153; National Foundry & Pipe Works v. Oconto City Water Supply Co., 105 Wis. 48, 81 N. W. 125. This last case affirms a judgment which determines that the appellant has not, and never has had, a lien on the plant and franchise, and that the Oconto City Water Supply Company owns the property by purchase from Andrews & Whitcomb under the foreclosure sale, by title paramount to, and free and clear of any claim or lien of, appellant. This might well have ended the litigation. If the appellant had no lien either prior or subject to the title of the water supply company, on what substantial ground could it claim a right to redeem the property from sale under the Andrews & Whitcomb mortgages? The appellant having no lien in fact, it was merely a general creditor of the water company, which it had trusted with material to go into the plant, and could not have been properly made a party to the foreclosure proceedings. Stout v. Lye, 103 U. S. 66, 26 L. Ed. 428; Herring v. Railroad Co., 105 N. Y. 340, 12 N. E. 763. As was said by the court below in its opinion in this case:

"The contention on behalf of complainant that the construction of the lien statute adopted by this court in the rendition of that judgment, which was affirmed on appeal (7 C. C. A. 603, 59 Fed. 19, 18 U. S. App. 382), being prior to the ultimate construction by the supreme court of the state, must control as a rule of decision up to the time of the final utterance, is opposed to the express ruling in Andrews v. Pipe Works, supra, and is not consistent with the rule stated recently by the United States supreme court in Wade v.

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Travis Co., 174 U. S. 499, 19 Sup. Ct. 715, 43 L. Ed. 1060. In the absence of a lien or title in fact, there can be no right to redeem. It is true that a mortgagee during the continuance of that relation is not permitted to contest the bona fides or validity of an actual conveyance from the mortgagor upon which to predicate the right. Even before foreclosure the mortgage cannot be subjected to payment or redemption by one who is in the status of a mere stranger to the title; and certainly the purchaser under a valid foreclosure may dispute either the fact of an interest acquired in the equity of redemption, or of the existence of such equity. Of the numerous cases cited in support of such right in the case at bar, none appear applicable."

The contention that the lis pendens filed in the lien suit puts the appellant in a position to demand redemption from sale under the foreclosure is also without foundation. It is true that by the lien action the parties were brought within the jurisdiction of the court, so that the lis pendens would bind any intermediate purchaser taking an interest from either party as a volunteer. But there is no warrant for saying that a like rule is applicable to the institution and completion of foreclosure proceedings by a mortgagee either in the same or some other court of co-ordinate jurisdiction. The opinion of this court by Judge Woods rendered on the decision of the motion for a rehearing when the case was here before (see Andrews v. Pipe Works, 23 C. C. A. 454, 77 Fed. 774, 46 U. S. App. 619) seems to be conclusive of this question. As there said:

"These defendants were not volunteer purchasers intervening as strangers. They purchased upon the foreclosure of their own mortgage, which antedated the commencement of the suit of the lienholders, and the title which they obtained related back to the date of their mortgage. The doctrine of lis pendens, as we conceive, does not apply."

If one decision of the same question is enough, then the appellant should be satisfied with that determination, which was made upon argument and consideration. The question was there fully presented upon the record, and there seems no reason to suppose any need to reargue the question in a new case. But upon the merits of the question we are satisfied that the lien decree was not operative in any such way, or in any way that has been suggested, to disturb or affect the title taken under the foreclosure. The mortgagees were the only persons having a lien upon the plant. At any rate, if there were any others, they are cut off by the foreclosure. They had advanced the amount of their mortgages in cash, which went into the construction of the waterworks plant. By their action and enterprise, and only thereby, was the plant saved to the city and to the people. The equities are all in favor of their grantee. Their mortgages were foreclosed, and all persons having any interest were made parties. They bid in the property for the full amount of their claim for money advanced, and for its full value, and sold to the water supply company.

There is some ground for the charge that the appellant has been blowing hot and cold with reference to its claims to this property, and that its positions in the same suit, even, are inconsistent with one another. The creditors' suit was grounded on the claim of a paramount title, and, as we have seen, if the appellant had had any lien at all, it would be paramount. But this court and the state court both

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held, as to these appellees, it had no lien at all, either paramount or subordinate. After that litigation ended by the dismissal of its bill, this suit was brought, which cannot obtain unless the appellant's lien is subject and subordinate to the appellees' title. In the former suit appellant set up the lien decree, sale and marshal's deed, and the foreclosure of the mortgages in the state court, claiming a conditional title, to wit, an absolute title unless appellees paid its debt. In the present suit, upon the same facts, it claims a conditional title, but with a totally unlike condition, viz., that it pay appellees' debt. These remedies are quite inconsistent, but much akin in this: that they are equally unfounded. It may be quite doubtful whether the appellant can be allowed to pursue such contradictory remedies upon the same facts. If it can, there is no reason why litigation cannot be continued so long as counsel can suggest new points and make fresh presentations. It was held by the supreme court in Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, that where a party has two remedies inconsistent with each other, any decisive act by him, done with knowledge of his rights and of the facts, determines his election of his remedy. And in Green v. Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061, the supreme court held that:

"Where the facts averred and relied upon in a former suit between the same parties which proceeded to final judgment are substantially those alleged in the pending case under consideration, the fact that a different form or measure of relief is asked by the plaintiffs in the later suit does not deprive the defendants of the protection of prior findings and decision in their favor."

See, also, Crook v. Bank, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. Rep. 17; Franey v. Park Co., 99 Wis. 40, 74 N. W. 548.

If the appellant's title under the marshal's deed is paramount to the appellees', as it still claims all through its brief, there is no need of an action to redeem, which cannot be maintained but by one holding a junior incumbrance. The language of the statute is:

"Any person having a lien at any time before the sale upon the mortgaged premises, or any part thereof or interest therein, subsequent to the lien of such mortgage may redeem." Section 3167, Rev. St. Wis. 1898.

And this is the law independent of statute. 2 Jones, Mortg. § 1055; Dawson v. Overmyer, 141 Ind. 438, 40 N. E. 1065; Lysinger v. Hayer, 87 Iowa, 335, 54 N. W. 145; Compton v. Jesup, 15 C. C. A. 397, 68 Fed. 331; Moore v. Beasom, 44 N. H. 215. If its title is paramount, it has a complete remedy in ejectment, and a court of equity has no jurisdiction. If it has a lien subordinate to that of the appellees, which is also apparently claimed,—for the appellant asks the privilege of redeeming,—from whence arises the lien, if not by virtue of the mechanic's lien laws of Wisconsin, which two courts have decided has no existence in fact or in law?

Other contentions are made, which have been duly considered by the court, but which it seems unnecessary to notice. The appellant is in the peculiar attitude of asking this court to enforce a judgment against the appellees to which they were not made parties, and which it must be now conceded was erroneously rendered upon a mistaken view of the effect of the lien law of Wisconsin, and against the law and public

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policy of the state, as has now been declared by the highest authority. This the court cannot do. The court will not make haste to found a decree for new relief upon a previous decree which it must now be admitted was erroneous and contrary to the public policy of the state. Lawrence Mfg. Co. v. Janesville Cotton-Mills, 138 U. S. 552, 11 Sup. Ct. 402, 34 L. Ed. 1005; 2 Beach, Eq. Prac. § 904; O'Connell v. McNamara, 3 Dru. & War. 411; Gay v. Parpart, 106 U. S. 679, 27 L. Ed. 256; Lawrence v. Berney, 2 Rep. Ch. 127; Hamilton v. Houghton, 2 Bligh, 169.

We find no error in the record, and the decree of the circuit court is affirmed.

Note. Since the preparation of this opinion WOODS, Circuit Judge, departed this life, but he fully concurred in the opinion. The handing down of the opinion has been withheld until the case of National Foundry & Pipe Works v. Oconto City Water Supply Co., taken by writ of error to the United States supreme court from the decision of the supreme court of Wisconsin, should be decided. A decision by the United States supreme court in that case affirming the judgment of the supreme court of Wisconsin was handed down on January 6, 1902. 22 Sup. Ct. 111, 46 L. Ed. —.

In re SOUDAN MFG. CO.

STITES v. DUNNAHOO.

(Circuit Court of Appeals, Seventh Circuit. February 12, 1902.)

No. 828.

1. BANKRUPTCY—LIENS—VALIDITY.

Under Bankr. Act 1898, § 67d, which provides that "liens given or accepted in good faith and not in contemplation of, or in fraud upon, this act, and for a present consideration, * * * shall not be affected by this act," the validity of a mortgage given to secure a present loan of money within four months prior to the borrower's bankruptcy does not depend upon his solvency at the time, or upon notice of his financial condition by the mortgagee, actual or constructive, but, to invalidate such a mortgage, it must be shown that the borrower was insolvent; that the purpose of the loan was to accomplish unlawful preferences, or otherwise violate the act; and that the lender knew, or was chargeable with notice of, both of such facts.

2. SAME—MORTGAGE TO SECURE BORROWED MONEY.

A mortgage on the plant of a manufacturing corporation to secure a loan of money made in good faith by the mortgagee, who was wholly unacquainted with the company, and acted through an agent, upon representations made by the president of the company and the report of an agent sent to examine the security, is not rendered void by the bankruptcy act, where the company was at the time a going concern, and actively conducting its business, and not known by the lender or his agent to be insolvent, although it was in fact insolvent and became a bankrupt within four months, and although the mortgagee knew that a large part of the money borrowed was to be used in paying outstanding unsecured debts.

3. CHATTEL MORTGAGES—VALIDITY—INDIANA STATUTE.

Under the laws of Indiana, as construed by its supreme court, the fact that a chattel mortgagee verbally agrees at the time the mortgage is given that the mortgagor may sell certain of the property covered thereby for his own benefit does not invalidate the mortgage as to other property to which such agreement does not apply.

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Appeal from the District Court of the United States for the District of Indiana.

This appeal is from a judgment of the district court, sitting in bankruptcy, in the matter of Soudan Manufacturing Company, bankrupt, on review of findings by the referee, whereby a mortgage lien claimed by Robert N. Stites, appellant, against the plant, machinery, and tools of the bankrupt, is disallowed, and upon additional findings by the court the ruling of the referee that the mortgage "constitutes no valid existing lien on any of the property" of the bankrupt is affirmed. The Soudan Manufacturing Company, an Illinois corporation, had its plant, consisting of machinery, tools, and fixtures, at Elkhart, Ind., and was there engaged in the manufacture and sale of bicycles, while its president, A. H. Winters, resided at Chicago, Illinois. The mortgage in question was executed August 1, 1900, to secure a present loan of $12,500 by the appellant for the purposes of the corporation, and was duly recorded prior to August 10, 1900, when a creditors' petition was filed for an adjudication of bankruptcy against the corporation. In the course of proceedings thereupon the appellant filed his petition to have such mortgage declared a first lien upon the machinery, tools, and fixtures of the bankrupt with result as stated. The loan was made upon the mortgage security without previous business relations between the parties, with information that the corporation was carrying on an active business, was in need of funds to pay off existing indebtedness, especially to meet advances made by one Webber, to furnish relief from present embarrassment and increase the output; and relying upon an investigation alone of the title to and apparent value of the machinery and fixtures, then in operation as a going concern, and upon general statements on the part of Mr. Winters, the president, with no examination of the books of the corporation or other investigation of its financial standing and ability.

Smiley W. Chambers and James D. Andrews, for appellant.

George H. Peaks and James L. Harman, for appellees.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

The proof is undisputed that the mortgage in question was made and accepted to secure a present loan by the appellant to the corporation of $12,500, and that previous to the negotiations for the loan no transactions had taken place and no acquaintance existed between the principals; but the validity of the mortgage is assailed upon two propositions: (1) That the corporation was insolvent, and by the transaction gave a preference to two of its creditors,—one being its president,—and the appellant received the mortgage with notice of such insolvency and purpose, thus violating the provisions of the bankruptcy act; (2) that the mortgage covered stock, manufactured and in process, with an understanding outside the terms of the instrument that sales could be made therefrom, by and for the exclusive use of the mortgagor, and the entire security was thus invalidated under the law of Indiana. Unless one or the other of these contentions is sustainable, the appellant is entitled to the relief sought by his petition, as jurisdiction to that end, if questionable, was not questioned, and the express submission amounts to consent. Bryan v. Bernheimer, 181 U. S. 188, 197, 21 Sup. Ct. 557, 45 L. Ed. 814.

1. The mortgagor corporation was insolvent in fact, if not so considered by its president, and obtained the loan for the purpose of

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paying up certain indebtedness, and with the effect of giving a preference to the creditors mentioned, within the definition of section 60a of the bankruptcy act; and while the appellant was not "the person receiving" such preference, "or to be benefited thereby," within section 60b, it is clear that the transaction violated section 67e of the act, if the loan was made upon the mortgage with notice that the corporation was then insolvent, and that it was intended thereby to accomplish unlawful preferences, or under circumstances which charge the appellant with notice that violation of the act was the purpose of the loan. It is equally clear that section 67d saves from invalidity the security thus founded upon a present consideration, if "accepted in good faith and not in contemplation of or in fraud upon this act," and, in the absence of notice which impeaches the good faith of the transaction as so defined, the mortgagee is entitled to the benefits of his lien, notwithstanding the fraud, if any there was, on the part of the mortgagor. In this view the inquiry is narrowed to the proof of facts and circumstances brought home to the appellant, or to the attorney who conducted the transaction for him, touching both the insolvency of the borrower and the unlawful purpose of the loan. The findings below are, in effect, that the corporation was insolvent when the loan was made, and the appellant had notice of such condition, of the use to be made of the loan, and had "reasonable cause to believe that it was intended thereby to give" preferences. Conceding for the moment that the insolvency and notice so found would justify the conclusion against the validity of the mortgage, the review upon this appeal cannot rest upon such findings alone. Section 25 provides for the appeal to be taken "as in equity cases," and thus removes the "cause entirely, subjecting the law and fact to a review and retrial." U. S. v. Goodwin, 7 Cranch, 108, 110, 3 L. Ed. 284; 1 Rose, Notes, 485. And thereupon the material facts must be ascertained from the testimony which is brought up for review.

For a considerable period prior to the loan in controversy, and up to the filing of the petition for involuntary bankruptcy, the corporation was actively engaged in the business of manufacturing and selling bicycles. The amount of invested capital does not appear, but its plant consisted of machinery, tools, and fixtures, the value of which depended largely upon successful operation of the business, estimated on behalf of the appellant, when the loan was made, at $25,000 to $30,000, and appraised as bankruptcy assets at $5,000. Mr. Winters, the president of the corporation, was a lawyer of Chicago, actively engaged in the practice of his profession; and his principal part in the business of the corporation was in connection with the finances, in the use of his personal credit and influence to obtain means for carrying on the operations of the company. Needful funds and credit were thus furnished, both through temporary loans made by his friends or clients upon collaterals of the company, and through a plan of "check-kiting," whereby Mr. Winters sent checks upon his Chicago bank, signed in blank, to be filled out and used by the company as required. Drafts or checks would then be forwarded by the company to him for the amount, and funds were provided to meet his Chicago check when presented, either through

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friends, or by special arrangement at the bank. For the purpose of taking up indebtedness so incurred, and to provide a margin against future need for such expedients, Mr. Winters states that he applied to various parties for a loan, to be secured by mortgage upon the plant, and that Mr. Chancellor, an attorney representing the appellant, took the matter under consideration for his client, resulting in this loan of $12,500,—the appellant taking no personal part therein, except in making the checks, and acting wholly on the advice and representations of Mr. Chancellor; and the latter, on his behalf, examined and found clear title to the mortgaged property in the corporation, sent an appraiser to ascertain the value of the machinery, and, upon report thereof, advised the loan. The details of the representations made by Winters to Chancellor as to the financial condition of the company and the demands for the money do not appear in the testimony of either, but Chancellor's version is substantially this: That Winters, who was an acquaintance of his partner, but not of the witness, "stated that his company had a fine bicycle plant" at Elkhart, and "they were in need of money to push their business with, and they wanted to secure a loan"; that witness "told him to bring a list of the machinery in his plant," and he would look it over; that the list was brought, with valuations carried out, and delay occurred in making the examination; that Winters called frequently meantime, and finally mentioned that the delay had made it necessary for him to obtain from one Webber further advances, and the indebtedness to him was to be taken up through the loan; that he further stated that they needed the money to push the business with a view to consolidation with or sale to a New York concern; that all the statements tended to convince him that the company "was a live concern, a good concern transacting a large business and that their notes would be paid promptly"; and that he made no inquiries as to the solvency of the company, "because that question did not come up," and no suspicions were aroused in his mind at any time. The testimony of Winters, the other party to the transaction, is of like general tenor. He states that he acted on an inventory and statement made at the factory for the purpose, and showing approximately the following assets: Merchandise, $23,000; machinery, $27,000; tools, fixtures, etc., $3,000; accounts receivable, $8,257,—making over $60,000 of assets at fair valuation as a going concern, according to his information and belief, against $33,000 of total indebtedness, and that he believed the company to be solvent when he negotiated the loan. Whether this statement was exhibited to Chancellor, the witness does not recollect, and says, "I have not got a clear memory as to what was said with regard to the general standing of the company, because I don't think that was gone into at all." In the course of his testimony, however, he is reported as saying to Mr. Chancellor, in reference to the notes held by Webber, "That practically the company at the time those notes were made was in a state of bankruptcy"; and notwithstanding the subsequent correction of such remark, and its inconsistency with his entire version of the negotiations, the language so reported is the chief reliance for the conten-

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tion that the appellant had ample warning that the company was insolvent. But the context and the explanation which follow show that the witness did not intend to state this as a remark made to Mr. Chancellor, but as a comment which he volunteered at the hearing—and the introductory word "That" was probably inserted by the stenographer by mistake. With parties of the ability of these negotiators for a loan, it is not probable that such statement of disability would either be made or pass unchallenged. As remarked by Winters in his denial, he "was not going to frighten the man off."

The testimony presents no ground for suspicion of actual fraud or collusion in the transaction, and on the part of the appellant and his attorney it is unquestionable that the loan was made as an interest-bearing investment, on the faith of the valuation reported of the mortgaged property as a going concern, and with the expectation of a continuance of operations to meet the payments. For the failure in expectation and judgment the appellant must bear the loss, but the bankrupt law does not invalidate his security for mere error in judgment. If he acted in good faith, contemplating no fraud upon the act, his remnant of security is left undisturbed, while mala fides on his part will deprive him even of benefit in that. On the issue so raised, the utmost that the testimony tends to show of notice of the financial condition of the company and the object of the loan is this: That the amount invested in the plant and material left it with insufficient funds to enlarge or carry on with profit a successful business; that it had been compelled to borrow, on short time and with collaterals, and was then owing several thousand dollars so borrowed, of which payment was required; that a permanent loan was urgently needed and desired to pay up such indebtedness and furnish means to push the business; and that the value of the plant was deemed sufficient to secure such loan. The conditions thus outlined cannot be treated as extraordinary in the line of manufacturing enterprise, and do not imply insolvency, as defined in the present bankruptcy act, in view of the valuation then placed upon the property by the appellant's appraiser. Notice of insolvency of the borrower, to impeach the bona fides of the loan, must be based on a valuation of assets in the condition existing when the loan was made, with the works in operation, and not on the appraised value after an adjudication of bankruptcy, whatever may be the rule for ascertaining the fact of insolvency when that issue is directly involved. So the appellant's knowledge of the intention to pay the indebtedness to Webber, and making his check for $5,522.29 to pay the same, and information that other portions of the loan were intended to pay debts of the company which had been met temporarily by Winters' "check-kiting" arrangement, do not affect the bona fides of the loan, in the absence of notice of insolvency.

The validity of this security, however, does not depend upon the solvency of the borrower, or upon notice, actual or constructive, of its financial condition. The policy of the bankrupt law respecting liens for a present consideration differs radically from its treatment of preferences generally, or security for an existing indebtedness. While a preference is voidable (vide section 60b) when accepted with

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"reasonable cause to believe it was intended thereby to give a preference," and liens or security given to creditors within four months are declared void (section 67c, e, f), irrespective of notice, the provision which governs this case (section 67d) makes good faith on the part of the appellant the sole test. In the bankruptcy act of 1867 no express provision appeared for this class of security, but in Tiffany v. Institution, 18 Wall. 375, 388, 21 L. Ed. 868, the doctrine applicable to security given upon a present consideration was thus stated:

"There is nothing in the bankrupt law which interdicts the lending of money to a man in Darby's condition [an insolvent], if the purpose be honest, and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, and without any intention to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure the power to raise money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable."

And it was thereupon held, in conformity with the rule in England, "that advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and the party making these advances can lawfully take security at the time for their repayment." See 8 Notes on U. S. Reports, 190, citing cases which follow this rule; also the same case, before Dillon, circuit judge, and Treat and Krekel, district judges, under the title of Darby v. Institution, 1 Dill. 141, Fed. Cas. No. 3,571. In accordance with the view so held, the act of 1867 was subsequently amended to provide that nothing in section 35 of the act (section 5128, Rev. St.) "shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of making such loan." 18 Stat. pt. 3, c. 390, § 11. The like provision in the present act was obviously framed in the same view, and the rule so stated is equally applicable. In re Wolf, 98 Fed. 84, 3 Am. Bankr. R. 555; In re Davidson, 109 Fed. 882, 5 Am. Bankr. R. 528. We are of opinion, therefore, that the appellant's security is not invalid under the provisions of the bankruptcy act.

2. The contention that the mortgage is void under the law of Indiana rests upon two propositions: (1) That a general clause in the mortgage, after the schedule of machinery, tools, and fixtures, includes as well the stock on hand and in process of manufacture, and that the proof shows an understanding outside the instrument permitting sale of such stock, in usual course, by the mortgagor for its exclusive benefit; and (2) that such an agreement is fraudulent, under the statutes of the state, and invalidates the entire mortgage. Assuming, but not deciding, the first proposition to be well founded, we are of opinion that the second is untenable, for the reason that the question is one of local law, and the supreme court of Indiana has ruled decisively against the construction sought in this case in Davenport v. Foulke, 68 Ind. 382, 34 Am. Rep. 265, and Lockwood v. Harding, 79 Ind. 129, approving the like ruling in Barnet v. Fergus, 51 Ill. 352, 99 Am. Dec. 547. The doctrine of these cases, which governs the mort-

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gage in question on the assumption indicated, is thus stated in Lockwood v. Harding, 79 Ind. 133:

"It is clear, therefore, that the chattel mortgage was, in any event, a valid and binding lien upon the [property not subject to such sale by the mortgagor], and that far forth it was not void in any view of the law."

The earlier cases indicating a different view are thereby overruled, and those cited in the opinion below and on the argument as holding contra—including, of course, In re Burrows, 7 Biss. 526, Fed. Cas. No. 2,204, and Stout v. Price, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857—cannot be followed. The petition filed by the appellant claims only the property scheduled in the mortgage, comprising machinery, tools, and fixtures, whereof sale by the mortgagee is expressly prohibited by the terms of the instrument; and it is not claimed that the alleged agreement for sale applied to such property,—no lien being asserted against the stock or other personal property in the hands of the trustee,—and, upon the authority of the decisions referred to, the lien so asserted must be upheld.

The decree of the district court is reversed, with direction to allow the claim of the appellant in conformity with this opinion.

THE NEW YORK.

SMITH et al. v. McALLISTER.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 87.

ADMIRALTY PRACTICE—CLAIMANT'S BOND.

Where, on motion of a libelant in rem, the court made an order, which it had power to make, setting aside a sale of the libeled vessel under a decree entered at the same term in another suit, on the ground of fraud and collusion, unless a bond was given by the claimant, and he furnished an ordinary claimant's bond, on which the vessel was released, he cannot thereafter be heard to deny that the bond stands in the place of the vessel, and is available to libelant in case of his recovery, unaffected by the prior decree and sale.

Appeal from the District Court of the United States for the Eastern District of New York.

See 93 Fed. 495.

Nelson Zabriskie, for appellant.

James K. Symmers, for appellees.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. That there was an implied warranty of the seaworthiness of the vessel, and that the libelants were entitled to enforce the maritime lien, are clear, and it is unnecessary to add anything to the opinion of the court below in respect to these questions. We entertain no doubt that the decree below is correct, unless the lien was displaced by the sale of the vessel under the decree relied upon, by the claimant, the present appellant.

The evidence shows that, immediately after the claimant became

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aware that an action in rem against his vessel was to be brought to enforce the lien, he procured an action in rem to be brought against her in the United States district court for the Eastern district of New York. The nominal libelant in that action was the master of the vessel, and the claim alleged was one for wages. Process was issued in the action, a decree taken by default, and May 14, 1896, the vessel was sold by the marshal under a writ of venditioni exponas. The claimant purchased the vessel at the sale for $160, she being of the value of upwards of $7,000 or $8,000. Shortly after the sale the libelant brought the present action in rem in the same court, and the vessel was seized upon process therein. Soon afterwards the libelants made an application to the court to vacate the default decree and the sale thereunder as fraudulent. The application was resisted by the claimant, but resulted in a decision by the court to vacate the decree and sale unless the claimant should give a bond in the present suit to release the vessel in the sum of $2,000. The bond was given and the vessel released from seizure. The decree in the suit for wages was not formally vacated. The fraudulent character of the proceedings in the suit for wages is so manifest that it would be a waste of words to discuss the evidence. If the master had an honest claim for wages he had no cause of action in rem, as he had no lien upon the vessel. The suit and the sale were collusive proceedings instituted by the claimant himself with the sole object of defeating any lien of the libelants upon the vessel. There can be no doubt of the power of a court of admiralty to vacate its own decree for fraud. Whether another court can do so consistently with the principles which govern courts of equity we need not inquire. The claimant availed himself of the benefit of the decision allowing the decree and sale to stand, and must accept its burden. He secured the release of the vessel by giving the bond as a security for the claim of the libelants. It was the plain meaning of the decision that the decree and sale should not prejudice their lien, and that a bond sufficient to secure it should be given as a condition of the release of the vessel; in other words, that to the extent the bond was a substitute for the vessel it should stand for the vessel unaffected by the decree and sale. The claimant cannot now be heard to allege the contrary. Compton v. Jesup, 167 U. S. 1, 35, 17 Sup. Ct. 795, 42 L. Ed. 55; Michels v. Olmsted, 157 U. S. 198, 15 Sup. Ct. 580, 39 L. Ed. 671; Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 38 L. Ed. 578.

The decree is affirmed, with interest and costs.

BRADFORD BELTING CO. v. KISINGER-ISON CO.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1902.)

No. 1,002.

1. EQUITY—CONSTRUCTION OF DECREE.

A decree dismissing a bill upon a general demurrer thereto must be presumed to have been passed upon the merits, and not for want of jurisdiction, in the absence of any statement therein to the contrary.

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2. PATENTS—RIGHTS OF LICENSEE—EFFECT OF ASSIGNMENT BY LICENSOR.
A patent was adjudged infringed by an article manufactured under a later patent, and sold by the defendant under a license from the owners of such patent, by which they also contracted to protect it and its customers in the sale and use of such article, and save it harmless from any suit for infringement. Subsequently such owners sold and assigned their patent to other parties, who thereafter assigned it to complainant in the infringement suit, which then became the owner of both patents. *Held*, that such assignment did not enlarge the rights of defendant in such suit as licensee, nor affect the force, between the parties, of the adjudication of infringement, and therefore afforded no ground for a bill in equity by the licensee to establish the right to continue the sale of the infringing article under its license.

3. SAME.
While an assignee of a patent takes it subject to equities existing in favor of a previous licensee, he does not, in the absence of express contract, assume any obligation to perform the contract of his assignor with the licensee, or to protect the latter in the rights which the license purports to convey.

4. SAME—LICENSE—BREACH OF WARRANTY OF VALIDITY.
A decree against a licensee, adjudging that an article manufactured under a patent and sold by defendant is an infringement of a prior patent, does not constitute an adjudication that the later patent is void, so as to establish a breach of a warranty of its validity by defendant's licensor.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

The Kisinger-Ison Company, the appellee in this appeal, on February 8, 1897, being the owner of letters patent No. 428,123, issued to David B. Morrison May 20, 1890, and of letters patent No. 491,811, issued to W. S. Kisinger March 7, 1893,—both said patents being for improvements in wire couplings,—exhibited its bill in the court below against the Bradford Belting Company, the appellant herein, complaining of the infringement by the latter company of the rights secured under the patents aforesaid. The answer of the defendant to the bill averred that the alleged infringement consisted of the sale of wire couplings made under and in accordance with letters patent No. 575,641, issued to Gerard and Lawrence January 19, 1897, and denied that their sales of couplings infringed either the Morrison or the Kisinger patents. Upon the hearing of that case the circuit court decreed in favor of the defendant, dismissing the bill. Upon appeal this court reversed the decree so far as it concerned the Morrison patent, which it held valid and infringed. An injunction was ordered, and a reference to a master to take and report an account of profits and damages, was directed. In pursuance of the mandate of this court, the circuit court issued a perpetual injunction against the defendant in that suit, and also ordered a reference to the master to take the account. The master proceeded upon the reference. Thereupon the defendant in that suit filed in the same court this bill, wherein, after setting forth the proceedings in the former suit as above recited, it alleged that, prior to the making of the sales of couplings which had been adjudged in said former suit to be an infringement of the Morrison patent, it had acquired, by grant from Gerard and Lawrence, the exclusive right of sale of wire couplings made under their said patent for the full term thereof; the said Gerard and Lawrence at the time of making such grant further stipulating to deliver to it (the Bradford Belting Company), at an agreed price, such couplings as it would from time to time order, or that upon their failure to do so the said Bradford Belting Company might manufacture them for itself, and, further, that they would protect it in the sale and use of said couplings, and save it harmless from all loss and damages from any suit that might be brought for infringement on account of the sale or use thereof. It was therein further alleged that about April 1, 1897, Gerard and Lawrence assigned all their right, title, and interest in their said patent, including their

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said contract with it (said Bradford Belting Company), to one Edward Case; that on the 8th of April, 1897, Case assigned one-half his interest therein to Gerard, and that Gerard and Case continued to furnish couplings to said company until about the date of the determination of this court in said former suit; and, further, that after the final decree therein, and the perpetual injunction therein ordered had been issued, Gerard and Case assigned all their right, title, and interest in said Gerard and Lawrence patent to the Kisinger-Ison Company for the expressed consideration of $150. It is charged that the Kisinger-Ison Company, at the time it took said assignment, had full knowledge of the rights of the complainant under its said grant and contract from and with Gerard and Lawrence, but that the said Kisinger-Ison Company refuses to perform the said contract. And it is complained that said Bradford Belting Company, as well as the public, are precluded from the benefits of said Gerard and Lawrence patent. The relief prayed by the bill is that the defendant, the Kisinger-Ison Company, be decreed to account for and pay over to the complainant the expenses of said former suit, as provided in the contract of the latter with Gerard and Lawrence; that the injunction in the former case be dissolved, and the complainant accorded its right as conferred by said contract with Gerard and Lawrence; that the complainant be absolved from all loss, cost, or damage arising out of said former suit; that specific performance by the defendant of the contract of Gerard and Lawrence with the complainant be decreed; and that such further relief be granted as the nature of the case requires. To this bill the defendant interposed a general demurrer. The case coming on to be heard on these pleadings, it was held and decreed "that the said demurrer be sustained, and the bill of complaint dismissed, at complainant's cost." Complainant appeals.

W. W. Wood, for appellant.

George J. Murray and Walter F. Murray, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. It is assigned as error that the court held that it had no jurisdiction over the matter complained of in the bill; but the demurrer raised no such question, nor is there anything in the record to show that the court held that it had no jurisdiction. On the contrary, the decree shows that it was passed upon the merits. If it had been dismissed for lack of jurisdiction, it should have been so stated therein. Ashley v. Board, 60 Fed. 55, 68, 8 C. C. A. 455; Terry v. Davy, 46 C. C. A. 141, 107 Fed. 50–52; Cattle Co. v. Frank, 148 U. S. 603–612, 13 Sup. Ct. 691, 37 L. Ed. 577. We must therefore presume from the decree that the bill was not dismissed on that ground. But it seems proper to say that we see no reason to doubt that, notwithstanding there is no independent ground of jurisdiction, the matter of the bill is so related to that of the original suit that it may be regarded as a dependency thereof, and may be supported upon the jurisdiction acquired in the former suit. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Johnson v. Christian, 125 U. S. 642, 8 Sup. Ct. 1135, 31 L. Ed. 820.

2. Upon the merits the contention of the appellant is that the appellee, by taking an assignment of the legal title to the Gerard and Lawrence patent with notice of the exclusive license to the appellant to sell articles covered by that patent, and of its contract with the pat-

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entees, is now estopped from denying to the appellant the right to the full enjoyment of the privileges professed to be granted by its license and contract, notwithstanding the exercise of such privileges would infringe the Morrison patent, of which the appellee was and continues to be the owner, and notwithstanding the latter patent has been adjudged to be superior to the former, and, further, that the appellee is bound to execute the stipulations of Gerard and Lawrence in the contract which accompanied their license to the appellant. Can this contention be maintained? The decree in the former suit conclusively established, as between this appellant and the appellee, that at the time of its rendition the appellant had no right to use the Gerard and Lawrence patent under its license from those patentees in such a way as to infringe the Morrison patent, which belonged to the appellee. It was an adjudication that the Gerard and Lawrence patent conferred no right, as against the Morrison patent, so long as the term of the latter should endure. A subsequent assignment to a third person by Gerard and Lawrence could not have enlarged the right of the appellant. The status of the patent was already fixed, so far as the appellant was concerned, and the assignee would be incapable of improving the licensee's position. It appears there was a contract on the part of Gerard and Lawrence to furnish couplings to their licensee, or that in case of their failure the licensee should have the right to manufacture them. They also undertook to protect their licensee and its customers in the sale and use of the couplings, and to save the licensee harmless from any suit for infringement. It is alleged in the bill that the contract as well as the license was assigned to Case, and that an undivided one-half interest in both was assigned by him to Gerard. But it is not alleged that anything more than the patent itself was assigned to the appellee. The rights of the parties here are therefore not affected by the stipulations of the contract, except as they may affect the title to the patent. No doubt, the general rule is that the assignee takes the title subject to the equities of other parties who have acquired rights therein, of which he had notice, express or implied. But he takes no other burden. He comes under no affirmative obligation to make good the previous contracts of his assignor. The claim of the appellant is that it is let into the enjoyment of the Morrison patent by a transaction which it had no right either to compel or prevent. The appellant has been put in no worse situation by the transfer. What equity has supervened in its favor since the decree in the former suit? The appellee owed it no duty, and has not prejudiced the appellant. Nor has it acquired any right which it has not paid for, or which, owing no duty to the appellant, it had not equal right to purchase with any other person.

3. But there is another reason why this bill cannot be maintained, even if it were possible to hold that the appellee was affected by some positive duty of the licensor toward the licensee. It is not averred in the bill that the Gerard and Lawrence patent is void, or that the court has held it so. For aught that appears, it may be for an improvement upon the Morrison patent, or may be used in connection with other forms so as not to involve that patent. In such circumstances, there would be no breach of the guaranty of validity resulting from the decree complained of in the bill. In Noonan v. Athletic Club Co., 39 C. C. A. 426, 99 Fed. 90, a bill was filed by the assignee of certain pat-

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ents, complaining of the infringement thereof by his assignor, who was the patentee. The latter denied infringement. The complainant insisted that the defendant was estopped to deny the validity of the assigned patent, when construed in accordance with the full import of its terms. Upon this subject, Judge Lurton, in delivering the opinion of this court, said:

"It seems to be well settled that the assignor of a patent is estopped from saying his patent is void for want of novelty or utility, or because of anticipation by prior invention. But this estoppel, for manifest reasons, does not prevent him from denying infringement. To determine such an issue, it is admissible to show the state of the art involved, that the court may see what the thing was which was assigned, and then determine the primary or secondary character of the patent assigned, and the extent to which the doctrine of equivalents may be invoked against an infringer. The court will not assume, against an assignor and in favor of his assignee, anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, and will apply to the patent the same rule of construction, with this limitation, which would be applicable between the patentee and a stranger. Babcock v. Clarkson, 11 C. C. A. 351, 63 Fed. 607; Ball & Socket Fastener Co. v. Ball Glove Fastening Co., 7 C. C. A. 498, 58 Fed. 818; Cash Carrier Co. v. Martin, 14 C. C. A. 642, 67 Fed. 786; Chambers v. Crichley, 33 Beav. 374; Construction Co. v. Stromberg (C. C.) 66 Fed. 550; Clark v. Adie, 2 App. Cas. 423, 426."

That decision has been confirmed in subsequent decisions of this court. Smith v. Ridgely, 43 C. C. A. 365, 103 Fed. 875; Stimpson Computing Scale Co. v. W. F. Stimpson Co., 44 C. C. A. 241, 104 Fed. 893. Smith v. Ridgely was a case in which the suit was brought by the licensee of the patent against his licensor for infringement, and the question arose in regard to the extent of the estoppel resting upon the defendant. In regard to this we held (referring to the Noonan Case) that he was "precluded from denying the validity thereof [the patent] to the same extent, and to the same extent only, that a third person would be, subject to the limitation, however, that he could not allege the total invalidity of the patent; the result being that he is still left at liberty to show that, assuming his patent to be valid, it is nevertheless subject to the limitation of the prior art." In respect to the Gerard and Lawrence patent, the Morrison patent was a part of the prior art, and the former was restricted by it. However this might affect the undertaking to save the licensee harmless from infringement suits, it is clear that no ground for an estoppel is shown, arising out of the granting of the license or the authority to manufacture couplings. We think that the appellee acquired by its purchase only the right to manufacture couplings under the Gerard and Lawrence patent during the term thereof; that it had not the right of sale thereof, for the reason that such right had been carved out of it by the license of the patentees to the appellant; and that upon the termination of the Morrison patent the appellant will have the right, unrestricted by that patent, to sell couplings manufactured under the Gerard and Lawrence patent. Probably, it will also have the right to manufacture the couplings for its use after the Morrison patent has expired. And it has at all times the right to practice the Gerard and Lawrence invention, provided it does so in such a way as not to infringe the Morrison patent. The bill does not allege that any of these rights of the appellant are denied.

The decree of the circuit court will be affirmed, with costs.

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VANDEGRIFT v. UNITED STATES.

(Circuit Court, S. D. New York. March 18, 1902.)

No. 3,025.

CUSTOMS DUTIES—LAP ROBES PART COTTON AND PART WOOL.

Lap robes made in part of wool, but of which cotton is the component of chief value, are assessable under Act 1897, par. 366, as "manufactures made wholly or in part of wool," and are not classifiable, under paragraph 322, as "manufactures of cotton not specially provided for."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The articles imported were lap robes, made in part of wool, cotton being the component of chief value. They were assessed by the collector under paragraph 366 of the act of 1897, as "manufactures made wholly or in part of wool." The importers insist that they should have been classified under paragraph 322 of the same act, as "manufactures of cotton, not specially provided for."

The decision of the board of appraisers is affirmed upon the authority of U. S. v. Altman, 46 C. C. A. 116, 107 Fed. 15.

UNITED STATES v. ROUSS.

(Circuit Court, S. D. New York. March 18, 1902.)

No. 3,017.

CUSTOMS DUTIES—CLASSIFICATION—COTTON QUILTS—FRINGE OF WOOL.

Cotton quilts having a fringe of wool are assessable under Act 1897, par. 366, as "manufactures made wholly or in part of wool," and are not covered by paragraph 322, governing "manufactures of cotton not specially provided for."

Appeal by the United States from a Decision of the Board of General Appraisers.

D. Frank Lloyd, Asst. U. S. Atty.
Albert Comstock, for the importer.

COXE, District Judge (orally). The merchandise imported consists of cotton quilts having a fringe made of wool. They were assessed for duty under paragraph 366 of the act of 1897, as "manufactures made wholly or in part of wool." The importer protested, insisting that the merchandise is covered by paragraph 322 of the same act as "manufactures of cotton, not specially provided for." As these quilts are made in part of wool they fall within the decision of U. S. v. Altman, 46 C. C. A. 116, 107 Fed. 15.

The decision of the board of general appraisers is reversed.

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CONVERSE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 18, 1902.)

No. 3,095.

CUSTOMS DUTIES—CLASSIFICATION—COLORED COTTON CLOTH—GOAT HAIR POLKA DOTS.

Colored cotton cloth, having polka dots about one-quarter inch in diameter, composed of goat hair and superimposed upon the fabric with a species of glue, and applied by a process of printing, is assessable, under Act 1897, par. 366, as a "fabric made wholly or in part of wool," and is not dutiable under paragraph 308 as "cotton cloth," nor under paragraph 322 as a "manufacture of cotton," nor under paragraph 339 as a "fabric appliquéed composed wholly or in chief value of cotton."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in question consist of colored cotton cloth having "polka dots," about one-fourth of an inch in diameter, composed of goat hair, superimposed upon the fabric with a species of glue and applied by a process of printing. It is conceded that the polka dots thus added are, for the purposes of tariff classification, made of wool.

The collector assessed the importations under paragraph 366 of the act of 1897, as a "fabric made wholly or in part of wool." The importers insist that they were properly dutiable under the proviso of paragraph 308 of the same act, as "cotton cloth," or under paragraph 322 of said act, as a "manufacture of cotton"; there is also an alternative protest under paragraph 339 of the same act, as a "fabric appliquéed, composed wholly or in chief value of cotton." The board finds that the goods in question are made in part of cotton and in part of wool, cotton being the component of chief value. The case is therefore ruled by the decision of the circuit court of appeals in U. S. v. Altman, 107 Fed. 15, 46 C. C. A. 116, which case has been recently followed in this court in the cases of Vandegrift v. U. S., 113 Fed. 816, and U. S. v. Rouss, 113 Fed. 816.

The decision of the board of general appraisers is affirmed.

SOUTHWEST MISSOURI LIGHT CO. v. CITY OF JOPLIN, MO.

(Circuit Court, W. D. Missouri, W. D. February 7, 1902.)

No. 2,419.

1. MUNICIPAL CORPORATIONS — CONTRACTS—ORDINANCE GRANTING FRANCHISE TO ELECTRIC LIGHT COMPANY.

The statute of Missouri (Laws 1891, p. 60) which authorizes a city to erect and operate electric light or water works: "Provided, that the council may * * * grant the right to any person or persons or corporation to erect such works * * * upon such terms as may be prescribed by ordinance: provided, further, that such right * * *

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shall not extend for a longer period than 20 years,"—provides two alternative methods by which a city may secure lights or water for its inhabitants; and where a city has acted under the second method, by passing an ordinance granting the right to erect and maintain electric light works for 20 years, and fixing the terms, rates of charge, etc., such ordinance, when accepted and acted on by the grantee, creates a valid contract, an implied term of which is that the city will not within the 20 years erect works of its own and enter into competition with the grantee in furnishing lights to private consumers.

2. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT—CITY ORDINANCE.

An ordinance passed by a city, under assumed authority from the state, providing for the erection of electric light works for the purpose of supplying lights to its inhabitants, in competition with an electric light company, in violation of the implied terms of a contract made by a prior ordinance granting a franchise to such company for a term of years, is a law impairing the obligation of contracts, within the meaning of the contract clause of the federal constitution.

In Equity. Suit for injunction. On final hearing.

Trimble & Braley and John A. Eaton, for complainant.

C. A. Montgomery, Hugh Dobbs, and Lathrop, Morrow, Fox & Moore, for respondent.

McPHERSON, District Judge. Both complainant and respondent are citizens of the state of Missouri, and, the amount in controversy being sufficient, this court acquires jurisdiction because of the federal question presented,—the alleged impairment by defendant city of its contract with complainant, entered into by an ordinance conferring the right to establish an electric light system. This case was before this court on an application for a temporary injunction, and, the writ being granted, an opinion was filed. For the purpose of abbreviating this opinion, I refer to the former opinion, as found in 101 Fed. 23. Counsel before me in oral argument and in their printed briefs in no way criticise the former opinion as to the statement of facts, and the analysis generally of the situation; the contention being as to the conclusions of law in the opinion stated. And since that opinion was filed, the record, either by pleadings or the evidence, has not materially changed. In my judgment, the only questions of importance now presented were then presented. As I view the case, the question whether a light, and what kind of a light, was kept at the porch on Freeman's Foundry, is in no sense pivotal, let the facts be as they may. The same is true as to whether complainant at all times furnished lights up to the standard of the contract. In all such cases, in all contracts for public services, such as schools, churches, public franchises, such as street car service, gas lighting, telephones, and electric lighting, complaints are made. The complaints may be well founded in part, and may be made partly because of the right, real or supposed, to be in opposition to what exists. If defendant city operates a system of electric lighting, it will meet with like complaints. But many of these alleged shortcomings were adjusted by the city reducing complainant's bills. But in no event were any of these things of such importance as to warrant the city in avoiding its contract, if a contract exclusive in its character were made.

The complainant has erected its power house at some waterfall some

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few miles outside the city limits. And this, it is claimed, is such a violation of the alleged contract as to warrant the defendant city in abrogating the contract. The very statute under which the ordinance in question was adopted provides that, when the city erects the lighting plant, it may exercise the power of eminent domain, outside the city limits, for right of way for pipe lines and other conveniences and necessities. The substantial thing required of complainant, under the ordinance, was to furnish electric lights. The city was and is in no way wronged or prejudiced by the fact that the electricity was conveyed from out in the country by wire into the city. And the small amount of taxes the city would lose because of the assessment of the power house by some country precinct is too trivial to discuss, and I only mention it because it is in the record. If the contract were made to induce the erection of the property for taxation, then let the city charge complainant with the taxes. But it is idle to claim that such was the purpose. The contract was to secure lighting. I can serve no purpose by analyzing and discussing the several things done, finally vesting in complainant all the rights under the ordinance in question. That it has all the rights conferred by the ordinance, I have no doubt; and the city from the first has so treated it, and at all times so recognized. I do not care to give any of the foregoing matters further attention. No one of them, as well as other matters singly, nor all combined, are in any sense controlling in this case, while I suspect that most of them are afterthoughts, arising when considering the defense to this action.

The question the deciding of which rules this case is a very important one, and is not easily solved. To it I have given much time. It arises upon the following statement: The statute of the state of Missouri, section 1519 (Laws 1891, p. 60), is set forth in the former opinion herein. 101 Fed. 24. It will be seen that a city is authorized to erect, maintain, and operate electric light works in the city, to light the streets, and to supply the inhabitants with light for their own use, and to establish the rates therefor, all of which may be done and prescribed by ordinance. Then the statute recites:

"Provided, the city may * * * grant the right to any person or persons or corporation to erect such works * * * upon such terms as may be prescribed by ordinance: provided, that such right * * * shall not extend for a longer period than twenty years." Laws 1891, p. 60.

Subsequent to the passage of that statute the defendant city adopted an ordinance authorizing complainant (its grantors) to erect an electric lighting plant in the city; and at great expense the plant was erected, and has since been maintained and operated. This ordinance of October 7, 1891 (No. 441), while conferring benefits upon complainant or its grantors, is quite drastic, and with much detail protected the rights of the city, and placed burdens upon the complainant. Private parties, as well as the public, were to be protected from all damage in the erection of the works and the occupancy of the streets and alleys. The work was to be commenced promptly and consummated with dispatch. The size and the placing of the poles were all provided for. The printing of the ordinance was to be paid for by complainant. The rates to be charged private consumers were fixed by the ordinance.

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And all these requirements were complied with. The ordinance does not require the city to take street lights from complainant, and it was required to furnish one at a railroad crossing, which was to be, and has been, at no expense to the city. Shortly before this action was brought, the city adopted an ordinance providing for the erection by it, as by it claimed, by virtue of the statute hereinbefore alluded to, of a system of electric light works, with which it proposes to light its streets, and also to furnish lights to the inhabitants as private consumers. The purpose seems to be to enter into competition with complainant. That the city can, regardless of the ordinance, light its streets, I have no doubt. At all events,—and be this as it may,—the complainant cannot and does not make complaint as to that. But is the contract, by ordinance, between the city and complainant, impaired, and therefore in violation of the constitution, which recites, "No state shall * * * pass any * * * law impairing the obligation of contracts"? And whether the state as a state, or the state through a municipality, does the act complained of, the same inhibition applies. The history of the proposal of this constitutional provision, and what led up to it, and its adoption, as portrayed by Bancroft, as well as by others, and notably by Justice Samuel F. Miller, is to me one of the most interesting phases of our history. And the evils sought to be avoided and prohibited were, perhaps, after the commerce clause, and a few others, the important work of the convention. And to impair a contract does not mean to destroy it. If the rights under a contract are practically taken away, the contract is impaired. And another thing must be kept in mind: A city council, in adopting ordinances, acts sometimes in one capacity, and sometimes another. Some ordinances are legislation, making laws for the government of the people of a city. In so doing it is acting in a legislative capacity. Such ordinances are always and at all times subject to repeal, amendment, or modification. Other ordinances are enacted by the council under statutory authority granted, when the council is not acting in a legislative capacity, but in a business capacity. And such was Ordinance No. 441, under which complainant erected its plant, and has since operated it. There is no provision of the constitution of the state of Missouri bearing upon the question. And the legislature of the state has adopted no subsequent statute upon the subject,—facts to be kept in mind in view of some of the cases cited, and later to be noticed. The statute of 1891, before referred to, and the ordinance (441) must be considered and construed together. And the validity and regularity of the adoption of the ordinance are not questioned. Nor is it suggested that the ordinance is in excess of the statutory authority. The general scope of the statute is to authorize the city, by its council, to erect, maintain, and operate a lighting system by the agency of electricity. On that subject the statute is full and complete, and the unquestioned power is conferred upon the city. But in the same statute, and in the very same section, is a negative in the shape of a proviso. This proviso is that, instead of the city erecting and operating the plant, it may confer such privileges and impose the burdens upon persons or a corporation, such persons or corporation consenting thereto. And is it not a strained and unwarrant-

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ed interpretation of the statute to say that the legislature conferred authority upon the city to do both at one and the same time? Does not the statute in effect provide that the city may erect and operate the plant, or it may have it done by some person or corporation? And I fully agree with all that is said in the former opinion herein as to how any statute shall be construed. The implied provisions and the spirit of the statute are as much of the statute as the express provisions. And the courts are no more justified in riding down the implied provisions and the spirit of the law than they would be in riding down the express provisions. "For the letter killeth, but the spirit giveth life," is well to keep in mind in the court room as well as elsewhere. The plain meaning of this statute, to me, is that the city may do one or the other thing, and only the one thing at a time. The city made its election. In the fall of 1891 it said, in effect, that it either could not, or, if it could, it would decline to exercise its right to, erect a plant. But it would, if it could, find some person, and grant the right to another. Terms were proposed, and those terms were accepted. By those terms complainant was to erect its plant within a certain time, and in a certain way, and pay certain expenses, and save the city harmless from damages, and furnish the city at a crossing a light free, and furnish the inhabitants lights for their houses and shops and stores at certain fixed rates. It is of little concern how the city accepted those terms,—whether in writing or verbally or by the acquiescence of both parties. The terms were accepted, and for years so regarded by both parties, and so acted upon by both parties. The council, acting in a business capacity, as above stated, proposed the terms, and complainant accepted. Why was a contract not then made? What element or phase of a contract was then lacking? One may possibly be suggested, but I can conceive of none. After the contract was made, the complainant erected its plant, and in so doing expended its money, assuming that under the statute the contract would continue in force for 20 years, at which time the whole matter will be relegated back to the people. But after a few years the officers of the city change, and they conclude that public ownership is the better way. And perhaps it is. But because one party to a contract changes its mind, and concludes that the contract was an improvident one, does not justify the abrogation of the contract. This can only be done by mutual consent, and in the case at bar the mutual consent to abrogate the contract is lacking. And I know of no reason why the government or a state or a county or city should not with the same good faith, in letter and in spirit, observe contracts, as is expected from individuals. And while every one ought to agree to this, yet the fact remains that, of all the cases taken to the supreme court under the constitutional provision in question, the greater number of cases are those where some subsequent municipal body concludes that it will not observe the contract fairly made by its predecessor.

That a contract was made, I have no doubt. What was the contract? Complainant was to erect the plant at its sole expense, and do so in the way above enumerated. It was to operate its plant at its sole expense. It was "to supply private lights for the use of the inhabitants of the city and its suburbs," in the language of the statute.

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It is true that this quotation is taken from the part of the statute providing for the city to erect its own plant. But in the proviso the same power and rights are conferred upon the persons when they erect and operate them. The complainant was obligated to erect its works, place its poles, and string its wires. Its only compensation, and the only way it could be reimbursed, was to charge the private consumers. And it was to charge the private consumers the ordinance rates. What consumers did the ordinance contemplate? All those needing the lights, and able and willing to pay the ordinance rates. Such was the contract. Has it been impaired? The contract was to extend for 20 years. But if the city can now erect its plant, and place its poles, and string its wires by the side of complainant's, and charge the same, it is not speculative to say that, for the same service, complainant will do no business. Every inhabitant of Joplin is a partner with all the others, and every man of sense, for the same service at the same price, will patronize his own concern, and thereby increase the profits in which he will participate in one form or another. And then complainant will have a mere naked contract on paper, with the poles standing in the street, and its power house idle. That is not only an impairment, but a wiping out, of its contract. My own views are, independent of the cases, this should not be allowed. I regard the following cases in point: Walla Walla Water Co. v. City of Walla Walla (C. C.) 60 Fed. 957; Id. 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. In that case the city agreed not to build during the term covered by the contract. And in the case at bar the same agreement was impliedly made. The case of Westerly Waterworks Co. v. Town of Westerly (C. C.) 75 Fed. 181, is directly in point. The only criticism that can fairly be made of the case is that it was in a trial, and not in an appellate, court. But the reasoning of the opinion and the authorities cited make an unanswerable argument. Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, is urged by the defendant herein, with earnestness, as supporting its contention. But that case is not in point, for several reasons. In that case the ordinance was not passed under legislative authority. In the case at bar the ordinance (No. 441) was passed under legislative authority. In that case the contracts had expired by limitation. In the case at bar the contract would not expire for 10 years from the time this action was commenced. Nor is the case of Stein v. Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622, in point. In that case the contract was to bring water from a particular river, while the new contract was to bring water from another source. In Washington & B. Turnpike Co. v. Maryland, 3 Wall. 210, 18 L. Ed. 180, the old contract was with reference to a turnpike, while the new one was with reference to a railroad for the carrying of people who might never have used the turnpike.

At present I do not see but that the case of Thompson-Houston Electric Co. v. City of Newton (C. C.) 42 Fed. 723, decided by Judge Shiras, is in opposition to my views. The same ordinance was again before the same court in Levis v. City of Newton (C. C.) 75 Fed. 884, and it was held that the rights conferred by the ordinance could not be taken away by a repealing ordinance. And that decision was affirmed

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by the circuit court of appeals for this circuit in 25 C. C. A. 161, 79 Fed. 715. The question now under consideration was not decided, the court observing that the question is "serious and doubtful."

The case of In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270, is not in point, because in that case the ordinance was construed as not granting an exclusive franchise to a company, and the second ordinance granted another franchise to another corporation, —a very different question from the one now under consideration. The same can be said of the great and leading case of Charles River Bridge v. Warren Bridge, 11 Pet. 536, 9 L. Ed. 773. And there are a great many like cases, which I do not take the trouble of citing. But these cases are in no way in point, because no such question is in the record in the case at bar. The city of Joplin has not, by ordinance or resolution, conferred or attempted to confer a like franchise upon another. It must be kept in mind that what is complained of is that the city itself is about going into the business of furnishing commercial lights inside the city limits. The effect of doing that is the question, and is the only question, in this case. I do not contend that all of the cases are in harmony. But I do contend that the weight of the authorities support these views. No case has yet been decided by the supreme court or by the circuit court of appeals for this circuit to the contrary. I regard the Walla Walla Case, above cited, by the supreme court, as controlling, because I believe that the implied provisions and the spirit of a contract are just as binding as are the express provisions. And when the city agreed that, if complainant would erect the plant, it would have the business of the private consumers at the ordinance rates, I believe that the city impliedly agreed to not itself erect a plant. Such, as it seems to me, was the spirit of the agreement. And if that be so, then the Walla Walla Case becomes controlling. The city did not, as is often done, reserve any right in the ordinance to alter or amend it. Therefore I conclude that fair dealing requires the city to abide by its contract until it expires by limitation, the end of 20 years from the adoption of the ordinance.

The decree will be for the complainant, and the temporary injunction will be made permanent.

JACK v. WILLIAMS et al.

STATE ex rel. CUNNINGHAM et al. v. JACK et al.

(Circuit Court, D. South Carolina. February 1, 1902.)

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES—ACTIONS EX RELATIONE.

A suit in the name of a state, on relation, is to be treated, for the purpose of determining the jurisdiction of a federal court, as though the relators were alone the complainants.

2. RAILROADS—DUTY TO OPERATE—NATURE AND EXTENT.

In the absence of special circumstances, or an express contract embodied in a charter, the owner of a railroad, whether a corporation or individual, cannot be compelled to maintain and operate the same at an actual loss. The duty arising from the ownership of the franchise is merely to meet the public requirements, and, where the traffic on a road is not sufficient to pay its operating expenses, such duty does not require its operation, and it may be abandoned.

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3. SAME—POWER OF COURT TO ORDER DESTRUCTION OF ROAD AND SALE OF MATERIALS.

A railroad company built a short piece of road, wholly with the proceeds of bonds sold, and then became insolvent. In a suit to foreclose the mortgage securing the bonds a receiver was appointed, who by leave of court issued certificates, with the proceeds of which he completed the road to a length of 12 miles, by which it connected two towns. He operated the road for a number of years in the most economical manner, and without salary himself, but its earnings barely paid operating expenses, producing nothing for creditors, or even for maintenance and repairs. After several attempts to sell the road, at which no bids were received, it was purchased for $15,000 by three holders of receiver's certificates, and the sale confirmed. At that time private persons could own and operate a railroad under the laws of the state, but by a law passed soon thereafter all natural persons owning a railroad were required to organize into a corporation within 60 days, in default of which the franchise of the road was declared forfeited. The purchasers of this road failed to incorporate, and after its franchise had thus been forfeited one of them brought a suit to obtain a sale of the property and a division of the proceeds. A receiver was appointed, and the road was inspected by an expert, who reported that $10,000 must be expended in repairs to render the road safe to operate for one year. There was no statute of the state making it obligatory upon the owner of a railroad to operate the same, nor was there any such requirement in the charter of the original company, which was permissive only, and the road had not been operated since its sale. *Held*, that to compel the owners to repair and operate the road at a certain loss, or to keep it intact, though unused, would be to deprive them of their property without compensation, and that the court was justified, under the circumstances, in ordering the receiver to dismantle the road and sell the materials.

4. SAME.

The receiver having taken up and sold the rails under an order of court entered without opposition, the court could not require the owners to purchase new materials and rebuild the road, on an offer by interveners to lease and operate the same if restored, especially in view of the fact that the franchise to operate it as a railroad had been forfeited.

In Equity. On cross bill of interveners.

See 102 Fed. 210, 106 Fed. 259.

Ansel & Cothran, for complainant.

B. A. Hagood, for defendants.

J. W. Barnwell, B. M. Shuman, and J. H. Heyward, for cross complainants.

Ansel & Cothran, B. A. Hagood, S. J. Simpson, and J. R. Lamar, for cross defendants.

SIMONTON, Circuit Judge. This case now comes up on the cross bill filed by the state of South Carolina, ex relatione T. B. Cunningham, and others, the answers thereto, and the testimony taken before the special master upon the issues therein set forth. Although the name of the state is used, still the suit being ex relatione, this court has jurisdiction. Maryland v. Baldwin, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; Indiana v. Glover, 155 U. S. 517, 15 Sup. Ct. 186, 39 L. Ed. 243.

The legislature of South Carolina, in December, 1882, granted a charter to the Greenville & Port Royal Railroad Company, permitting it to construct a railroad from Greenville, S. C., to the port of Port

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Royal, in the same state. It had the power to issue bonds and secure the same by the mortgage of its property and franchises, and natural persons and municipal corporations, as well as other corporations, were authorized to subscribe to its capital stock. In December, 1885, its charter was amended by the general assembly of South Carolina. Its name was changed into that of the Atlantic, Greenville & Western Railway Company, and its route was so changed as to extend from Greenville to Ninety-Six, in said state, with the privilege of extending eastward from Ninety-Six to some point on the Atlantic Coast, and westward from Greenville to the North Carolina line, by such route as the directors should select. By this act power was given to townships along the line of the road, or interested in its construction, to subscribe to the stock of said road, and to this end any such townships were declared to be bodies corporate. This special provision has been declared invalid. Floyd v. Perrin, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242. By an act passed in December, 1886, the Piedmont and Pelzer Manufacturing Companies were each authorized to subscribe to the capital stock of this road. It may be mentioned in passing that there is no evidence in the record showing that any municipal or private corporation or person subscribed or paid any cash or property toward the capital of this company. In 1887, under the provisions of the general railroad act of South Carolina, this Atlantic, Greenville & Western Railway Company was consolidated with a corporation existing under the laws of the state of North Carolina and of the state of Tennessee, and thus became known as the Carolina, Knoxville & Western Railway Company. Some parts of the roadbed of this projected railway were built, but no part of it was constructed, except some 12 miles, starting from Greenville, toward the town of Marietta, in said county. The story of this enterprise is one of disaster. The construction company which undertook the contract for building the road became insolvent, and was placed in the hands of a receiver. The railway company itself was also placed in the hands of a receiver, being utterly insolvent. Soon after his appointment the receiver of the railway company applied to the court for leave to issue certificates to be used in completing the road toward Marietta, a distance of three miles. At the time of this application the road had no other terminus except Greenville, the other terminus being in the woods, and it was hoped that should it be extended to Marietta its business would be improved and its profits increased, and perhaps means could be provided for extending the road into territory which would serve the purposes of the contemplated enterprise and induce prosperity. Leave was granted, and the town of Marietta was reached. So low, however, were the credit and prospects of the railway that but for the efforts of the receiver and his personal friends the certificates could not have been placed. The railway under the receivership was conducted with the greatest economy. Every unnecessary expense was cut off. The receiver himself received no salary, notwithstanding that he gave his personal attention to the management. As a result, however, whether owing to the poverty of the territory or to the indifference of the people, the part of the railway so constructed scarcely met its operating expenses. Finally, the

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services of a superintendent could not be provided for, and the receiver had to fill the place himself. The roadbed of the other parts of the road and the railway on this small section had been constructed entirely from the proceeds of bonds secured by a mortgage of the whole road. Not a dollar of interest had been paid on any of these bonds, the amount of the total issue being $200,000. The right of way contracted for and secured had not been paid for. The road ran through a territory requiring many trestles, and these and the roadbed itself were fast decaying, requiring immediate repair, their condition endangering life and property. Under these circumstances, the creditors applied for a sale of the road. No organization could be effected for its purchase, and a sale was ordered on 17th August, 1892, at an upset price of $50,000. At the sale under this order no bids were received. Another sale was ordered 16th March, 1895, the upset price having been fixed at $30,000. No bids were made at this sale. Then the upset price of $25,000 was fixed at another sale ordered 23d September, 1895, and again no bids were made. Finally, on 24th June, 1896, a sale was ordered, and the highest bid, $15,000, was received and accepted. At this sale James T. Williams became the purchaser. At the date of this purchase the road, roadbed, and rolling stock of the railway were in such a dilapidated condition that the railway could not have been operated without putting on many and expensive repairs. Williams did not operate it at all. Thereupon proceedings were instituted before one of the state judges, by way of mandamus, to compel him to operate the road. These proceedings failed because of an irregularity in them, the rule for the mandamus having been issued by one judge, and the return heard and mandamus issued by another judge, who was without jurisdiction. At the date of the purchase of this road the law of South Carolina gave the privilege to any purchaser of a railroad sold under foreclosure, of or under a provision in a mortgage, to organize a corporation to own and operate the same. Rev. St. S. C. § 1610.

In 1897, March 5th, the legislature passed an act requiring any person then owning any line of railroad in this state to reorganize, under section 1610, within 60 days after the passage of that act, under a penalty of $50 per day for each day of failure to operate said road, unless reasonable cause be shown to the contrary, and, in addition to the penalty he should forfeit all the franchises, powers, and privileges granted to the railroad purchased. Williams did not accept the provisions of this act. Soon after the passage of the act, D. F. Jack filed his bill in this court, stating the purchase of this road by Williams; that the purchase was made by him for the benefit of himself, D. F. Jack, and H. C. Beattie; that he was not willing to organize a corporation under the requirements of the act of 1897; that it was impossible to rebuild the road, except at great expense, and with no prospect of gain; and praying an injunction against his co-tenants from making any effort in that direction; praying also for the appointment of a receiver to take charge of the property. Answers were filed, the injunction issued, and the receiver appointed. It is well to say here that this court in granting this order had no notice whatever of the mandamus proceeding in the state court. An inspection of the rail-

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road property was had by a skillful railroad supervisor, under the instructions of the receiver, who reported that there were 22 trestles on the road, all of which but 2 needed extensive repairs; that 12,000 cross-ties were needed; that in many places the roadbed was covered with dirt two feet deep; and that it would cost over $10,000 to put the road in proper condition to run one year.

The case thus presented to the court was this: This section of the railway had been built with borrowed money; had been operated for several years; had not, even when it was new and without need of repairs, earned more than its operating expenses, paying nothing on its debt by way of interest or principal, and paying nothing to the receiver. Its business had not increased. Its road had run down, requiring large additional expenditure. Its right of way had not been paid for, and the claims on this head were a first lien. It paid nothing on its first cost. It could pay nothing on the increased outlay which was imperatively demanded. Any one, natural person or corporation, attempting to operate it, would meet certain loss. It could not be operated except by a corporation, and the purchasers had lost the privilege of incorporation, and the right to exercise the franchises, under the provisions of the act of 1897. Under these circumstances, the court authorized the sale of the rails on the road, and the taking them up. The sale was made, and the rails brought $28,000, the Charleston & Western Carolina Railway Company being the purchaser. After the order of sale the present relators filed their petition for leave to intervene, the prayer of which was granted, and leave was also given to review the previous action of the court in ordering the sale. They filed their answer to the original bill, and asked and obtained leave to file this cross bill. This has been answered. The main issue in the case is: Can the court authorize the taking up and the sale of the rails on this railroad, which has been under operation, thus practically authorizing its abandonment?

A railroad is in a sense a public concern. To its construction and operation the action of the sovereign is needed. If a corporation is created, the franchise to be a corporation can be given only by the sovereign. Its franchise as a common carrier for hire of passengers and freight comes from the sovereign. Its right to exercise the right of eminent domain can come only from the sovereign. And, as its road is in a sense a highway, the sovereign grants that also. The consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public, the road must be kept up in such a condition that life and property both must be made as safe as practicable. The rates of transportation of persons and freight must be reasonable. And the reasonable number of trains must be kept up, dependent upon the circumstances surrounding the railway. Whilst thus serving the public, however, no corporation or private person is obliged to continue the service without a reasonable remuneration. No one can be compelled to serve the public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. Smyth v. Ames, 169 U. S. 467, 18 Sup. Ct. 418, 42 L. Ed. 819; Road Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Chicago, M. & St. P. R. Co.

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v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Railway Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. All these cases determine that a railroad company, in the full enjoyment and use and capacity to use its franchises, cannot be compelled to exercise its franchises without reasonable remuneration. A fortiori a railroad corporation, or a person owning a railroad, cannot be compelled to operate that road, not only without remuneration, but at a loss. And this not by any means because such corporation or person is insolvent. If a citizen has the wealth of the Rothschilds, he cannot be compelled to use a dollar of his wealth for public purposes without compensation. What, then, is a person to do who becomes possessed of wholly unproductive railroad property? Sell it? But in the case at bar several distinct efforts to sell had been made, and made in vain. No bid whatever had been made except by these purchasers. The public—even that portion of the public on the line of the road—could not be induced to make a bid on it. Repair it and put it in condition? But experience had shown that even when it was a new road, requiring no expense for repairs, it barely paid operating expenses. Could the state or the public, in the face of the fourteenth amendment, compel such an expenditure, involving certain loss? Evidence has been introduced of persons who are of the opinion that the road would pay. Can such testimony override the result of actual experience? It appears also in evidence that, notwithstanding the existence of this road, dealers in cotton and farmers preferred to carry their cotton to market in wagons, rather than to ship it by rail. The difference of cost must have been small. But, small as it was, the people about the road evidently estimate the general advantage of the road at a sum still smaller. Under these circumstances, what other course could have been pursued? The roadbed was in such a condition that it could not be operated. The expenses attending its repair held out no hope of remuneration. The purchasers had lost the privilege of incorporation and retention of the franchise. They owned the property. Was it to be kept idle and useless, or could they dismantle it?

This question is somewhat of novel impression,—at least, there is no decision exactly on all fours with it. The leading case on this subject is Kansas v. Dodge City, M. & T. R. Co. (Kan.) 36 Pac. 755, 24 L. R. A. 564, and this clearly resembles the case at bar. In that case a mandamus was refused. This is the headnote:

"Where a railroad company owning a short line of railroad, 26 miles only, is wholly insolvent, and such company has no cars or engines with which to operate it, and no funds or property to be applied to the payment of expenses of the company or the road, and the road has been abandoned for several months, and the road cannot be operated except at a great loss by any corporation or person, not taking into account the repairs of the road and the taxes thereon, the supreme court, having discretion in the granting of a writ of mandamus, will not compel by a peremptory writ the railway company to replace or put in repair its track, a part of which has been torn up, as such an order would be futile and of no public benefit."

The facts of that case show that the road had been sold, and that a private person had bought it, and had sold to another person, who had removed the rails. Among other things the court says:

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"The order prayed for should only be issued in the interest of the public. If the track is replaced there is no reasonable probability that the road will be or can be operated. If a railway will not pay its mere operating expenses, the public has very little interest in the operation of the road or in its being kept in repair."

Several cases are quoted in the note to this case, the annotator admitting that they leave the question uncertain. One of these cases (Talcott v. Pine Grove, 1 Flip. 120, Fed. Cas. No. 13,735) says that a railroad cannot be abandoned after it has become one of the great thoroughfares of the country. But this is clearly an obiter dictum, having no bearing on the case whatever, the question in which was the validity of certain municipal bonds. See Pine Grove Tp. v. Talcott, 19 Wall. 666, 22 L. Ed. 227. State v. Sioux City & P. R. Co., 7 Neb. 357, was the case compelling a railroad company to keep up its entire line because of a contract growing out of land grants toward its construction. People v. Albany & V. R. Co., 24 N. Y. 261, 82 Am. Dec. 295, went off on a question as to the remedy. In Rex v. Railway Co., 2 Barn. & Ald. 648, the company was ordered to restore an abandoned tramway, designed for the use of others besides itself, but the court refused to order the maintenance of the tram road. In State v. Hartford & N. H. R. Co., 29 Conn. 538, a part of the track of the railroad was abandoned in order to prevent competition by steamboats. This was held unlawful. And so with all the other cases quoted in this note. The question is incidentally touched upon in Railroad Co. v. Dustin, 142 U. S. 499, 12 Sup. Ct. 285, 35 L. Ed. 1095, and there the court says:

"If, as in Railroad Co. v. Hall, 91 U. S. 343, 23 L. Ed. 428, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So, if the charter requires the corporation to construct its road and to run its cars to a certain point on tide water (as was held to be the case in State v. Hartford & N. H. R. Co., 29 Conn. 538), and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. New Orleans, M. & T. R. Co. v. Mississippi, 112 U. S. 12, 5 Sup. Ct. 19, 28 L. Ed. 619; People v. Boston & A. R. Co., 70 N. Y. 569. But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point, when it would not be remunerative. Railway Co. v. The Queen, 1 El. & Bl. 858; Railway Co. v. The Queen, 1 El. & Bl. 874; Com. v. Fitchburg R. Co., 12 Gray, 180; State v. Southern Minnesota R. Co., 18 Minn. 40 (Gil. 21). In Com. v. Fitchburg R. Co., 12 Gray, 180, mandamus was refused to compel the running of passenger trains over a branch road on which this had been discontinued, after running them for a time, because they were unprofitable. The question is not as to the existence of the duty, but as to its extent and qualifications. The duty of a railroad company is not more than to meet the public wants. If trains run at reasonable and moderate fares, and cannot be supported, it is because they are not needed."

The text writer Morawetz also says:

"The duty of a railroad company to operate its road requires it merely to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in opera-

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tion. In such case the company may cease operating the road, unless this be contrary to the express terms of the charter." Mor. Priv. Corp. § 1119.

This is sustained in Ohio & M. R. Co. v. People (Ill.) 11 N. E. 350. In Coe v. Columbus, P. & I. R. R. (Ohio) 75 Am. Rep. 524, the court says:

"If we are at liberty to suggest on what the legislature very probably relied for the continued operation of a railroad, once constructed, we should say it was the interest of the owners. If it can be operated profitably, the interest of those concerned will rarely, if ever, fail to keep it in operation so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss, and certainly there is no mode provided by which it can be operated at the risk of the state."

There is another point of view. The purchasers of this railroad bought it at public auction, under an order of this court. They purchased all the visible property of the insolvent railroad corporation, its rolling stock, roadbed, iron on the road, together with its franchises, including the rights of way. At the time they purchased, private persons could buy, own, and operate a railroad. The legislature of South Carolina repealed this privilege, and required all natural persons owning railroads to organize as a corporation within 60 days, and, failing so to do, declared that they forfeited all the franchises of the railroad company. They did not fulfill this condition. They could not be compelled to fulfill this condition. No power exists in the legislature to compel an individual to join a corporation or to compel several individuals to become a corporation. They accepted the results of a failure to comply with the condition, and voluntarily forfeited its franchises. This, however, did not deprive them of their property, not included in their franchises. Being the owners of this property, having dominion over this property, they could dispose of it at pleasure. True, it had been applied to a public use. But the legislature has defeated and forbidden that use. If the purchasers, this act having been passed, cannot dispose of their property, they are deprived of it without due process of law.

So far the question has been discussed with reference to the facts and circumstances surrounding the case when the purchase was made, and the order permitting the removal of the iron was passed. Since this intervention two persons have made distinct and binding offers to lease the railroad, if it be restored, and so to operate the same. This offer comes too late. Rights have vested and acts have been done which cannot be set aside. The rails have been removed and have been sold. To restore them would require the investment of money by the purchasers, the remuneration of which will be fixed, not at its value, but at the rental value, which, in the estimation of third persons, will enable them to operate the road. Nor can these offers be taken as indicating the value of the road at the date of its sale. Apart from the fact that long experience has shown that the best test of the value of property is a sale at public auction open to all bidders, not one effort was made by any one, either among those using the road or owning property adjacent to it, either to buy it or to aid it in its extremity. Not a dollar of subscription money was used in its construction. Not a bid upon it was ever made except by

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these purchasers, and two of them were holders of receiver's certificates, bidding to protect themselves. No better test could be had showing that in public opinion the property was not profitable. When the conveniences offered by the road—offered, but by no means accepted by the public—were withdrawn, then some of the public became awake to the fact that that road could have been made useful,—had been neglected. But this neither the purchasers nor the court could foresee. The value of the road, or rather its hopeless want of value as an investment, was determined by the facts existing at the time and the attitude of the public to it.

As the result of this examination, it will appear that, in the circumstances of this case, the purchasers could rightfully exercise the option of accepting the provisions of the act of the legislature by incorporating themselves within 60 days after its passage, and trying the operation of the road, or of forfeiting the franchises they had purchased; that they exercised this option, and forfeited the franchises, rendering any proceedings in quo warranto unnecessary; that thenceforward any attempt by them to exercise the franchises of a railroad company would have been unlawful; that they, being the owners of property which could not be used for the purposes of a railroad, by reason of this forfeiture, and the illegality of its use consequent thereon, could lawfully dispose of the same; that having thus taken up the rails on the road, and having sold them, this court will not compel them to buy other rails, rebuild the decayed trestles, decayed when the purchase was made, renew the cross-ties, which were also decayed at that time, and operate the railroad without remuneration.

There is another intervention in this case filed by landowners through whose lands the railroad company had rights of way. Their rights will depend upon the correctness of the adjudication on this branch of the case. As without doubt the review of an appellate court will be sought, further proceedings in the matter will be postponed to await such an adjudication.

SEAL v. BEACH.

(Circuit Court, D. New Jersey. December 26, 1901.)

1. PATENTS—EFFECT OF LICENSE—ESTOPPEL OF LICENSOR TO DENY VALIDITY.
The owner of a patent, who, for a valuable consideration, has granted an exclusive license thereunder, is estopped to deny that the licensee took good title to the privilege which he undertook to convey; and he cannot defend against a suit by the licensee against him for infringement on the ground that he had granted a prior license, of which complainant had notice.

2. SAME—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
In a suit for infringement by an exclusive licensee under a patent against the licensor, a defense that the license was procured by fraud cannot be considered on a motion for preliminary injunction, especially where the defendant has retained the consideration received, and has taken no steps to procure a rescission; and, for the purposes of such motion, the license must be treated as valid.

In Equity. Suit for infringement of letters patent No. 414,335, issued November 5, 1889, to Charles Henry Webb, as assignee of

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Lester C. Smith, for an improvement in adding machines. On motion for preliminary injunction.

A. Parker-Smith, for complainant.
R. A. Parker, for defendant.

KIRKPATRICK, District Judge. The bill of complaint in this case sets out: That some time in the year 1889 Lester C. Smith filed an application with the proper authorities for a patent for a new and useful improvement in adding machines, and that before the patent office had acted upon said application said Smith conveyed to Charles Henry Webb all his right, title, and interest in and to said application, and the invention and improvement covered thereby, and requested that said patent, when granted, be issued to said Webb. Accordingly, on November 5, 1889, a patent (No. 414,335) issued from the patent office to said Webb for such improvement. That afterwards said Webb conveyed to Webb's Adder Company all of his right, title, and interest in said patent, and the said company afterwards conveyed the same to Edwin R. Beach, who is the sole defendant in this suit. The bill also recites that afterwards the said Edwin R. Beach granted to the complainant, by instrument in writing dated July, 1900, the full and exclusive license and authority to make and sell the improvement covered by said letters patent No. 414,335, for a period of three years, beginning August 1, 1900. The bill further alleges compliance on the part of the complainant with her part of said agreement of license, the payment of the sum of the $300 called for therein, and the expenditure of a large sum of money in preparation to put upon the market the required number of adders. The bill charges infringement by said licensor, in that he had sold adders covered by the claims of the patent, which, to his knowledge, were made, not by the complainant, but contrary to the terms of the license. There is a prayer for an injunction pendente lite restraining defendant and his agents from further infringement.

The answering affidavits do not deny the specific charges of infringement set out in the bill of complaint, and which consist of sales of the patented article during the term of the license, but seek to justify them on the ground that the complainant did not get good title to her license—First, because the defendant at the time of executing said license had no legal authority to make the license, he having before that time given a similar exclusive license to another party, of which the complainant had notice; and, second, because, as defendant alleges, he was induced to execute the license to the complainant through false representations made by one Herring, who acted as complainant's agent in procuring the license, as to the financial responsibility of the prior licensee, and its capability to carry out its contract.

It is well settled that, as against the owner of a patent, a licensee cannot set up invalidity to avoid the payment of the royalties. He is estopped from so doing by acceptance of the license. For like reason it would seem inequitable and unjust that the grantor of an exclusive license under a patent should be permitted, during the term of the grant, to deny that the grantee took good title to the privilege which he himself undertook to convey. In a suit between the licensee and

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third parties this objection might be raised, but surely not by one who received a valuable consideration for the grant. The purchaser of a license takes it subject to all outstanding licenses, and notice of their existence is not essential to their validity, nor necessary for their enforcement. Notice of an outstanding prior license would not render void, as between the parties, the license which had been given and accepted, but merely affect any remedy in the way of damages which might be sustained by reason of its existence. Whatever may be the right of the complainant under the license as against third parties, certainly as against the licensor she is entitled to protection.

The other defense cannot be sustained at this time. Allegations of fraud such as are relied on cannot be considered now. Their determination must await determination on final hearing. Until that time the license speaks for itself. It is admitted that when the contract was signed, according to its terms, the licensor accepted $300. For more than a year this money has been retained, and no action has been taken by the defendant to rescind the contract for the fraud he now sets up, nor has he refunded the money. In the meanwhile he has stood idly by and permitted the complainant to expend large sums of money in preparing to make and put upon the market the patented machines.

On the case as made on the moving papers and answering affidavits, I am of opinion that the complainant is entitled to the preliminary injunction against the defendant as prayed for. Let a decree be prepared.

In re SALSBURY.

(District Court, N. D. New York. February 10, 1902.)

No. 232.

BANKRUPTCY—DISCHARGE—FALSE OATH.

Clear and convincing proof is required to sustain objections to a bankrupt's discharge on the ground that he omitted property from his schedules and made a false oath thereto.

In Bankruptcy. On application for discharge.

G. S. & H. L. Hooker, for bankrupt.
James A. Wood, for creditor.

COXE, District Judge. I have read the report of the referee and have examined the papers submitted. I agree with the referee that the objections to the discharge have not been established. The questions discussed have heretofore been decided by me in analogous circumstances. In addition to the cases cited by the referee the attention of counsel is called to the following: In re Howden (D. C.) 111 Fed. 723; In re Eaton (D. C.) 110 Fed. 731. In these cases the objections principally relied on by the objecting creditor were considered, upon somewhat similar facts, and disposed of adversely to the creditor's contention.

The report is confirmed and the discharge is granted.

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WESTERN ELECTRIC CO. v. ANTHRACITE TELEPHONE CO. et al.

(Circuit Court, W. D. Pennsylvania. January 27, 1902.)

1. PATENTS—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR ADJUDICATION.
A circuit court will not hold itself concluded by a decree entered by it in a prior suit adjudging the validity of a patent, although such decree has been affirmed on appeal, where it appears that prior to the hearing in the cause it had ceased to be an adversary proceeding, which fact was unknown to either court.

2. SAME—INVENTION—TELEPHONE APPARATUS.
The Carty patent, No. 449,106, for improvements in telephone circuits and apparatus, construed, and *held* void for lack of patentable novelty, in view of the prior development of the art and the definite prior knowledge by the electrical profession of the principles upon which the invention claimed therein rests, which rendered the combination of devices shown, all of which were old, but the natural outgrowth of such development.

In Equity. Suit for infringement of letters patent No. 449,106, issued March 31, 1891, to John J. Carty for improvements in telephone circuits and apparatus. On final hearing.

George P. Barton and Frederick P. Fish, for complainant.

Charles C. Bulkley and R. S. Taylor, for respondents.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. This is a bill filed by the Western Electric Company against the Anthracite Telephone Company and others, charging infringement of letters patent No. 449,106, now owned by complainant, applied for August 16, 1890, and granted March 31, 1891, to John J. Carty, for telephone circuit and apparatus. This patent has heretofore been considered by the courts of this circuit. In the case of Western Electric Co. v. Millheim Electric Tel. Co. (C. C.) 88 Fed. 505, the patent was held valid in an opinion delivered by Buffington, J. This decree was affirmed by the circuit court of appeals, in an opinion reported in 37 C. C. A. 38, 95 Fed. 152, delivered by Kirkpatrick, J., the remaining members of the court, Acheson and Dallas, JJ., concurring. Later, the present bill was filed, and a preliminary injunction on the adjudged patent sought against the respondents. On hearing such motion, Judge Acheson refused a preliminary injunction in an opinion found at 100 Fed. 301. In addition to other grounds thereto moving the court, including the fact that in the Millheim Case the court had not been required to, and had not in fact, passed upon or defined the scope of the claims, it was there said:

"Enough, however, here appears to justify a refusal of a preliminary injunction unless the adjudication in the Millheim Case is to be considered as conclusive against the defense of prior use at this preliminary stage of the case. But the proofs before the court disclose circumstances connected with that adjudication which, I think, ought to deprive it of such effect. It appears that the American Bell Telephone Company was and is the owner of more than one-half of the capital stock of the Western Electric Company, the plaintiffs in the Millheim Case and in this suit, and that by virtue of

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such controlling ownership and also by reason of contract relations between these companies, said two companies were and are jointly interested in this litigation on the Carty patent, their common interest being to sustain the patent. Now it further appears that, pending the suit in the Millheim Case, the local representative of said Bell Telephone Company, acting in the interest of that company, and for it, bought out the Millheim Telephone Company and all its property. The negotiations for this purpose began in January, 1898. The terms of sale were settled on February 10th, and the transaction was consummated by transfer and delivery of possession in March, 1898, when the alleged infringing apparatus was taken out by the Millheim lines and replaced by other apparatus. It seems to me from the evidence that a real controversy between the Western Electric Company and the Millheim Electric Telephone Company no longer existed when the Millheim Case was heard in the circuit court on February 17, 1898. Certainly, there was no such dispute when that court made its decision on July 18, 1898. It may, I think, be affirmed confidently that, if the learned judge who sat in the circuit court had known the facts, he would not have heard or decided the Millheim Case, and that the court of appeals would have dismissed the appeal had the facts been brought to its notice. Lord v. Veazie, 8 How. 251, 12 L. Ed. 1067; Cleveland v. Chamberlain, 1 Black, 419, 17 L. Ed. 93; East Tennessee, V. & G. R. Co. v. Southern Tel. Co., 125 U. S. 695, 8 Sup. Ct. 1391, 31 L. Ed. 853."

Subsequently, much testimony was taken in this case, and it came up for final hearing before Judges Acheson and Buffington. Being fully advised of the facts on such hearing, this court adheres to the view above expressed, that the prior decision of this court, reported at 88 Fed. 505, and affirmed by the circuit court of appeals, is not conclusive in the present case.

As the general nature of telephone party lines and the difference between series and multiple systems are quite fully set forth in the prior opinions, they need not be here detailed at length. Suffice it to say the Carty device is of the multiple circuit construction, and at each station is a permanent bridge, in which is seated a bell magnet, with a high coefficient of self-induction, and of marked impedance. There are also two other bridges, normally open, and closed only when the station is in use. The telephone bridge circuit, normally open, is closed in multiple arc with its own bell magnet, and, of course, with all others in the line, when in use. The generator call circuit, normally open, when used, forms a second bridge or cross connection between the wires in parallel circuit with the bridge circuit of its own bell and those of all others in the line. In operation, the tendency of the call current to short-circuit is counteracted by using a bell magnet of high self-induction and impedance. This not only prevents short-circuiting, but effects a more even current distribution through the bell magnets of the entire system. By means of the numerous windings of the bell magnets, the small portion of the call current passing exerts a marked magnifying effect on the cores and a spirited working of the call signal. Does such combination involve patentable novelty? The solution of this question turns on whether the placing in combination of these elements all of which, individually, were old in the art, involved inventive genius, or was the natural advance incident to the application of electrical engineering skill to the solution of recognized difficulties. In that connection, it will be observed the general principles applicable to series and multiple-arc distribution of currents

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were known and utilized prior to Carty's alleged invention, and that in a multiple-arc system the current divided itself among parallel bridges in proportion to their several resistances. Moreover, it was known that by the use of magnets of high impedance certain currents would, and certain would not, be allowed to pass. So also the difference between voice currents and generator call currents in telephoning was appreciated, and the fact that high impedance magnets were opaque to the former, but not to the latter. Now, wherein does the alleged invention lie in Carty's arrangement? We take, as fairly representative of complainant's contention, the statement of Mr. McBerty, an officer of the complainant company and an expert witness by it called:

"The invention of the patent in suit is a many-station or party telephone line, in which the parts, the different signaling and speech transmitting instruments, are so adapted and arranged with relation to each other, both at each and at all of the stations, that they work harmoniously, each without impairing the efficiency of the other. The central idea of the invention is found in the connection of the different instruments in multiple; the parts at each station are connected in multiple at the station, and the different stations are connected in multiple with the line conductors. As this was not possible with the apparatus arranged for serial connection, the different appliances for the substation were also modified by Carty to adapt them to one another in their new relations in the circuit, and, indeed, to make the new arrangement possible; and in the case of the call bell particularly, a new appliance was provided of high resistance and of very high impedance or self-induction. A bell was constructed with long magnets, with more iron than usual, and with a great number of turns of fine wire, the construction resulting in self-induction so great as to prevent the transmission of telephone currents through it in its place in the circuit. The self-induction of a magnet results from the same condition which makes it a magnet and enables it to do work; and here in Carty's invention this quality which, in the series arrangement, had limited the construction of party lines and impaired their usefulness, is taken advantage of, amplified, and utilized to construct a bell which may be connected in a bridge of a telephone circuit without forming a diverting path for telephone currents."

It will thus be seen that according to Mr. McBerty the central idea of the invention was the connection of the different elements in multiple at each station and the different stations in multiple with the line conductors. That is, Carty put each of the three essentials of a station, viz., call, voice, and signal apparatus, in its own bridge, and he placed the station itself in bridge with the line conductors. The serial apparatus of the call and voice apparatus were modified to adapt them to the new multiple relation, and "in the case of the call bell particularly a new appliance was provided, of high resistance and of very high impedance or self-induction." Statements made by Mr. Carty himself both in an address delivered September 9, 1890, at the Detroit convention of the National Telephone Exchange Association, and also in a letter of November 1, 1890, to the London Electrical Review commenting on such address, show wherein he considered his invention did, and wherein it did not, lie. In his judgment at that time it did not lie in bridging. His address was on bridging bells, but bridging he explicitly disavows. He then said:

"We do not want to make any contention for a patent on bridging. Bridging apparatus is not new. It was advocated in a paper read at Minneapolis last year, and one of the first things that Mr. Hibbard did in the

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long-distance company was to throw out the looping arrangement and bridge the operators in."

In his letters he says:

"I would call your attention to the fact that, as shown by the official report of the convention proceedings and all published accounts of my remarks, I did not claim any novelty for the bridging system per se, being well aware that it had been in use for years, both in Europe and America."

Wherein his invention did lie, he thus states in the Detroit convention address:

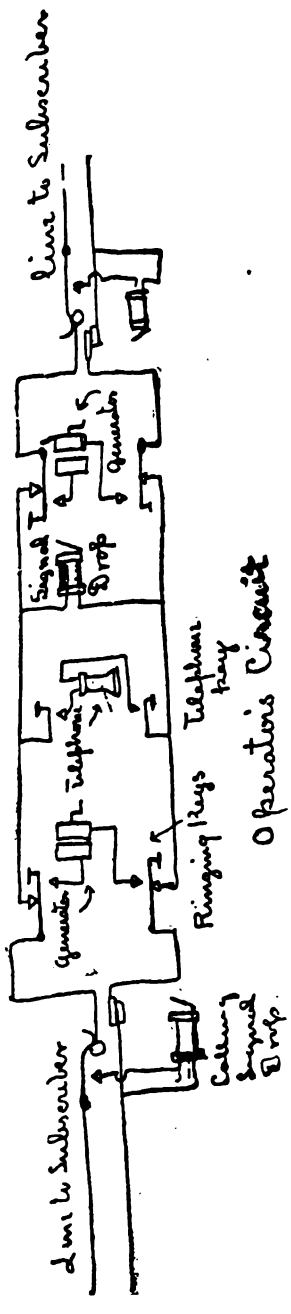
"The bell is on exhibition in the rear of this hall. It is a magnetic bell that is much simpler than any yet designed. There is no bottom contact on it, and the bell rings equally well whether the telephone is on the hook or off. The construction of that bell is very little different from some other bells that are made to do the work, but when you come to use 10 or 15 stations on a line you have got to have exactly that construction, and it is such an important matter to the licensee that we are making great effort to get a patent upon it. In designing that we not only have an idea of our immediate wants, but we aimed to get a bell that we could say would work on any line up to 20 stations."

This view he confirms in another part of his London letter, where he says:

"My invention, however, relates to a specially designed bridging magneto bell, by means of which the talking and signaling on a line containing 20 stations equipped with this bell are equally as good as with a line containing only 2 stations. These results are not attainable with the ordinary form of magneto bell. The details of the construction of my bell were not described by me at the convention, as an application for patent rights was then pending in the United States patent office."

It will be noted that the patent in suit is not for a magneto bell, but for a combination of which such bell is an element. These statements are not here cited as constituting an estoppel as against Carty, but they have an important bearing on the statements in his subsequent testimony claiming a broader scope for his improvement. Moreover, the accuracy of this earlier statement is, we think, supported by other testimony. In testing the alleged patentable novelty of this improvement, the exceedingly rapid development of the art is a factor to be considered. Once it was started, the country was strung with wires with unparalleled rapidity. In this hasty development, attention was naturally first given to city systems provided with exchanges and to long-distance lines uniting large cities. Rural and side lines were of less importance, and naturally problems incident to the lines in and connecting large commercial centers demanded and received the earliest and best telephonic engineering study. Whatever advances were made in these long-distance and exchange systems would naturally be extended later to the development of the less important lines. This reasonable and to be expected course of events we see strikingly exemplified in the present case. But while we naturally look to the exchange and the long-distance line for such development, and in fact find it there existing, the initial development therein made, and the devices used in such systems, were not called to our attention in the Millheim Case. Taking up first the exchange system, we find there in use the operator's cord circuit, shown in the accompanying sketch:

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A cord circuit is one of several such fixtures at each operator's table before a switch board in a central office. Its purpose is to connect lines of subscribers for conversation. The method of its use is as follows: At the left of the above sketch is a subscriber's annunciator or calling signal drop. This is in the subscriber's, and not in the operator's, circuit. When the subscriber calls the central operator she plugs into a spring-jack on the board, thus cutting out the calling subscriber's annunciator and connecting her cord circuit with his line. At the center of the cord circuit, and normally disconnected from the line at both terminals, but adapted to be connected by spanning the line, is her telephone. By pressing on buttons above and below, she connected her telephone with both sides of her cord circuit and inquired for the number wanted. Having learned such number, she then inserts the right-hand plug of her cord circuit into the spring-jack of the desired subscriber. At the right of the cord circuit, normally disconnected from the line at both terminals, but adapted to be connected therewith by spanning the line, is a call generator. By pressing the buttons as before she connects the generator with the two sides of the line of the subscriber to be called, and at the same time, by breaking the contacts with the cord circuit lines, she disconnects the remainder of the cord circuit from the generator, and by operating the generator thus sends a call to the desired subscriber alone. She then disconnects the generator and thus restores the contacts between her cord circuit and the line of the subscriber called. In this situation, which is the condition shown in the sketch, the lines of the two subscribers are connected by a continuous line through the cord circuit. But so long as this condition continues, both subscribers are powerless to break their continuous connection and put themselves in a position to communicate with other subscribers. To do this it is apparent that the agency of the central operator must be invoked, and the apparatus by which this is done must be such that, while it is in a permanent permissible operative relation as a signaling apparatus,

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it must meanwhile be opaque to the voice currents of the conversing subscribers. Such result was effectively secured by the device in the sketch marked "Signal Drop," and known as a "clearing-out" annunciator. If the electro-magnet which operates the signal drop was of low impedance, the voice current would short-circuit, and conversation would be unsatisfactory; hence one of high impedance was used, and prevented such result. At the same time the signaling current, either an alternating generator current of low frequency or a steady battery one, crosses freely and signals. The use of these signal drops, and the functional effects secured by them, are clearly pointed out by different witnesses. Mr. Dunbar, an expert for respondents, says:

"The disconnecting annunciator was normally bridged across the main wires of the circuit ready to receive a disconnecting signal sent over the line by either of the connected subscribers, and was thus bridged across the two wires of the main line while conversation was taking place between the two subscribers. This disconnecting annunciator was wound to a high resistance and high inductance, so that but little of the telephone current would be shunted or short-circuited through this path, and also so that this disconnecting annunciator would readily respond to the generator currents sent over this same main line from either subscriber's station. These disconnecting annunciators were used to give a visual indication to the operator, by the releasing of a shutter through the agency of an armature attracted by the high-wound magnet of the annunciator. Such visual signals were, of course, better adapted for attracting the attention of the operator at the central office than the bells used at the subscriber's stations to attract the attention of the subscribers."

Thomas D. Lockwood is an officer of the complainant company, and was called as a witness in its behalf, and acted as attorney for the applicant in preparing the application for and specifications of the patent in suit. He testified in the interference case of Kellogg v. Scribner v. Pickernell, No. 15,754, and his testimony, which Mr. Lockwood discussed when called as a witness in the present case, is quoted by Mr. Dunbar, as follows:

"Interrogatory 185. When did you first know of the use in any switch board of annunciators whose cores were wound to a resistance of 500 ohms, and when, if ever, were coils of that description used in the Boston board, and when, if they were, and you know, was it determined to use such coils in that board? A. I suppose that although the resistance of 500 ohms precisely is mentioned in the question, that figure as there given means virtually any high resistance for such annunciators,—say between 400 and 1,000 ohms,—and I will answer accordingly. The first case of which I know is that of the Paris exchange, and I knew of this in 1884. The resistance of the annunciators was about 400 ohms. Later, when metallic circuit switch boards were adopted in this country and used on a large scale, the first instance being the Cortlandt street, New York, exchange switch board, it became evident very shortly after that switch board was put in operation that talking was unduly weakened by having clearing-out annunciators in the talking circuit formed of any two lines, and that if clearing-out annunciators were to be used or retained in use they must be placed in a bridge or in a branch to earth (the latter in the case of grounded lines); and to the end that when so placed in bridge or branch circuit they would not carry off a large portion of the talking current to the detriment of the distant telephone, they must be made of high resistance."

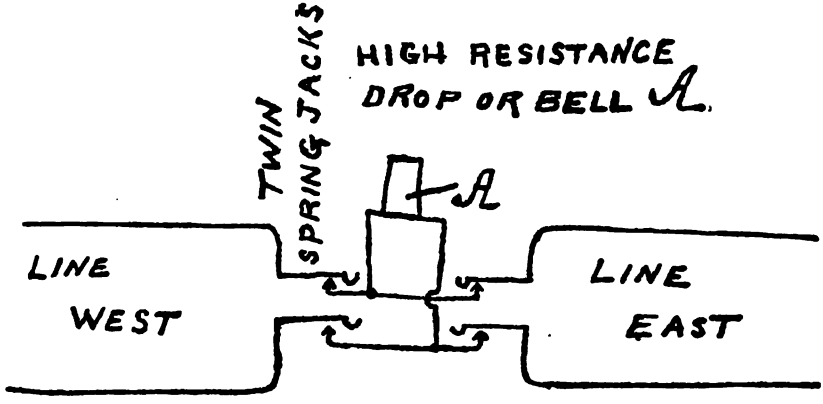
Mr. Pickernell, also an officer of the complainant company, says:

"Experimental drops of high resistance were first used some time subsequent to April 8, 1889 The high-resistance bridging drop at toll boards was adopted in the summer of 1889."

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The significance of the relation of this prior structure to Carty's apparatus will be seen from the following considerations: It shows the prior use for signaling of a magnet of such high impedance and inductance as to make it opaque to voice currents; such magnet is placed in bridge; the call mechanism, as well of the subscribers as of the central operator, was not in series with the signaling apparatus of the cord circuit. That these signals were visible instead of audible is a matter of mechanical detail; that they were used to end a conversation, and not to open it, makes no difference in principle. They show the use for signaling of a high impedance bell, opaque to voice currents and in bridge.

We also find in the prior art the apparatus used for signaling intermediate stations of long-distance lines, and shown in the accompanying sketch:



Such intermediate station had a drop or signaling bell permanently bridged on the line. It was used to signal the station operator, so that connection could be made with a local subscriber. Being in constant normal operative relation, it stood ready for use when needed, but being of high impedance and self-induction it was opaque to the voice currents passing between the principal stations. The cord circuit of the local operator formed the remainder of her set. When the operator was signaled, she plugged into the line, and that brought her cord circuit with its telephone and generator into operative connection with the line. It will be noted the telephone was out of connection with the line as in the Carty device. The operator in the long-distance station brought it in by pressure on buttons or the like, while in Carty's device it was brought in by the subscriber removing it from the hook. These differences were merely mechanical, as were also those incident to the generator. Both were normally disconnected; when in use both were in bridge. The functions of this device and its use prior to the Carty patent are shown in the testimony of Mr. Pickernell, who says:

"High resistance magnets were first used at intermediate stations some time after November 14, 1899. I can't state just how long after it was. I find that on November 14th I advised the manufacturer of the magnets

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for the use at intermediate stations that the sample that was then submitted to my approval was defective, and I returned this sample on that date for correction. It probably took several days to correct the sample, and probably several weeks to manufacture a lot of bells."

The witness further testified in reference to the foregoing sketch that the bell or drop marked "A" was of high resistance and high self-induction; that it was used for signaling an operator at an intermediate station (as a line signal); that "this drop was made of high resistance and high self-induction so as to prevent the passage or shunting of the telephone current when the circuit was used for transmitting speech between the terminal stations." The proofs established these facts: The signaling bells were of high impedance and high self-induction; they were mounted in bridge; they were in bridge alone; they were used for initial signaling,—conditions akin to those of Carty's system. Indeed, that the whole telephonic art was in a state of rapid but regular development; that the two devices described were the natural outgrowth of such progress; and that Carty's device was one of the regular steps of such advance when party lines came to receive their due share of skilled electrical attention,—is clear. Some phases of such development are shown in the public addresses made by Messrs. Pickernell, Hibbard, and Carty, their testimony, and the part they bore in such advance. These three trained electrical engineers were all in the employment of one company, and engaged in the introduction of long-distance lines in the East. They joined in the preparation of a paper entitled "New Era in Telephony," read before the Minneapolis convention of the National Telephone Exchange Association, held September 11, 1899, and composed of electrical experts. The substitution for grounded lines of metallic circuits constituted the "new era" to which the paper referred. To this change and its attendant problems the highest electrical thought was given, and the change naturally caused many advances in constructive and operative methods. Among other elements was the multiple party line. This paper, which is printed in full in the Western Electrician of September 21, 1899, after discussing the advantages of metallic circuits, refers to the subject of party lines as follows:

"With the extension of metallic circuits it is often asked how they may be utilized for the service of two or more subscribers on the same circuit. Probably the best results are accomplished by bridging the different instruments onto the two sides of the metallic circuit, using a ringer magnet at each instrument of high resistance and retardation. By this arrangement the electrical balance is preserved, and no alteration in the ordinary form of operating apparatus is made necessary. It has been the practice heretofore to loop intermediate sets of instruments into a circuit. At first this practice was persisted in when metallic circuits were introduced, additional instruments being looped into one side of the circuit. Such an arrangement, however, destroys the balance, and the instrument so connected will be subject to disturbance as loud as the line is capable of producing, and it will also be a source of disturbance to the other instruments in the circuits. By connecting all instruments, however, in multiple arc, bridging across the circuit, nothing is lost in transmission, if the coils have sufficient retardation, and the electrical balance necessary to the proper working of the system is preserved."

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The disclosures of these three trained men to their fellow electricians are important in this case. The long-distance lines with which they were associated represented the highest state of the art. The high impedance electro-magnet was long before known. Mr. Lockwood, in the interference case quoted elsewhere, says:

"But as early as 1884 it was seen that by properly placing the retardation coils, or coils which inclosed or were inclosed by iron in or in relation to telephone circuits, this impedance, which theretofore had been an unalloyed evil, might be made useful by causing it, in complicated systems of telephone circuits, to guide telephonic currents into routes where they were desired, and to prevent them from passing into portions of the systems of circuits where they were not desired. * * *"

But while its theoretical capacity was known, it was now being put into practical use in these metallic circuits in clearing-out drops and line annunciators. It nowhere appears that these magnets had been applied to any metallic circuit multiple party lines for individual subscribers, or, indeed, that any such lines existed. But these men, from their experience with the metallic circuits of the new era, were so confident of the possibility of applying to party lines the same general practices they had tested on the long-distance lines that they felt even then justified in confidently defining to their fellow engineers the means by which the party line problem would be worked out. At that very time they were in the midst of the advance. Mr. Pickernell says:

"Experimental drops of high resistance were first used some time subsequent to April 8, 1889. The high-resistance bridging drop at toll boards was adopted in the summer of 1889."

It is true he also says:

"High resistance magnets were first used at intermediate stations some time after November 14, 1889. I look upon the paper entitled a 'New Era in Telephony,' prepared by Messrs. Carty, Hibbard, and myself, as being in the nature of a prophecy, for I am certain that the high resistance magnets were not used prior to the above date."

But the importance of the disclosure is increased, not lessened, by the fact that it was a prophecy. The subsequent successful application of the general principles of the disclosures to successfully signal intermediate stations shows the importance and the truth of the prophecy. Now, it seems to us that the Minneapolis instructions were the lines along which Carty subsequently worked, but the way was clearly pointed out by the joint article of the three men. Mr. McBerty, as we have seen, says, "The central idea of the invention is found in the connection of the different instruments in multiple;" but this was but carrying out the Minneapolis instruction. The broad principle was embodied in the cord circuit and the long-distance intermediate station, both of which are clearly shown by the proofs to have been in use prior to Carty's alleged invention. The application of this principle to party lines lay in engineering skill, not inventive genius. Hibbard's work concerned the improvement of ringer drops, while Carty's concerned party lines. Hibbard says:

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"I was interested at that time in the development of the bridging drop, and bridging bells were first put into operation by others. * * * In this article the methods which had experimentally been found to be the best up to that time for long-distance work were recommended for local work. * * * The plan of bridging the ringers was proposed, I think, by Mr. Carty."

In view of the quite explicit directions for bridging embodied in this article, and in view of the successful use of magnets of high resistance and self-induction in the cord circuit and long-distance station, there would seem to be little question but that any one of these trained engineers if directed to correct the recognized evils of party line systems would have done so in the same engineering lines followed by Carty. If in carrying out these broader general principles he invented, as he said in his London letter, "a specially designed bridging magneto bell," he was entitled to patent protection therefor, but the invention of such a bell did not warrant him laying claim to the broad principle of connecting the different instruments in multiple. In view of the prior development of this art evidenced by the devices to which we have referred in detail, and the definite prior knowledge of the electrical profession of the principles of bridging, multiple construction, and the use of magnets of high impedance and self-induction for signaling purposes, and to prevent the shunt and loss of voice currents, we are of opinion that the combination shown in Carty's patent involved no patentable novelty. Such conclusion is not at variance with the opinion in the Millheim Case, 88 Fed. 509, or of the circuit court of appeals. Those cases were rightly decided on the facts before the courts, but the actual state of the art was not then called to the court's attention. It was there found that every element of Carty's device was, in itself and individually, considered old. The novelty lay in their combination; for it was not shown any such combination had been made before. It was said:

"The call signaling apparatus of the Carty system is so vital to its use that either it or its substantial equivalent should be found in the alleged anticipation to constitute it a real anticipation."

We now find that there were in existence in the clearing-out drops and the signaling apparatus of the long-distance lines, such application of the principles on which Carty's combination rests that their application to party lines was but the natural and to be expected advance in the progressive art to which they appertained. To use, with some changes, the language of another (Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438), we may say that the development of this, as of every great industry, has developed a constant demand for new appliances, which the ordinary skill of those versed in such branch has generally been adequate to devise, and which devising is the natural outgrowth of such development. Each forward step prepares the way for another, and to burden a great industry with a monopoly to each improver for every step thus made, except where marked by an advance greater than mere engineering skill, is unjust in principle and hostile to progress. As our conclusion that the Carty patent is invalid for lack of patentable invention goes to the root of the case and is decisive against the complainant, we

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do not think it necessary for us to discuss or pass on the other serious defenses to this bill, namely, the defense of prior use at Crown Point and Merrillsville, Ind., and on the Wilmington Coal line in Chicago, and the defense of noninfringement.

ACHESON, Circuit Judge (concurring). The final hearing of this case took place at Pittsburg, and at my request Judge BUFFINGTON sat with me, and has prepared the opinion of the court which I file herewith. I fully concur in the views Judge BUFFINGTON has expressed, and accordingly a decree will be entered dismissing the bill of complaint, with costs to the defendants.

MACON KNITTING CO. et al. v. LEICESTER & CONTINENTAL MILLS CO.

(Circuit Court, E. D. Pennsylvania. February 7, 1902.)

No. 16.

1. CONTRACTS—CONSTRUCTION—DEFENSES TO ACTION FOR BREACH.

Plaintiffs, who were owners of certain patents relating to knitting machines, entered into a contract with defendant corporation, which was a manufacturer of knitted goods, by which defendant was given an exclusive license to use the patented machines for certain purposes during the life of the patents, and to make machines for its use, plaintiffs to receive in payment stock and bonds of defendant. Plaintiffs were also to make and sell to defendant a certain number of the machines. The contract contained a clause providing that, in the event of any suit or suits by or against either of the parties involving the patents or inventions, "the costs and expenses attending such suit or suits on behalf of any or all of the parties hereto shall be borne and paid equally by the respective parties." A suit was brought against defendant, on the ground that the machines infringed another patent, and plaintiffs, by leave of court, intervened and defended the same. *Held*, that neither the fact that the machines were held in such suit to be infringements, nor that the intervention was made without consultation with defendant, which had employed counsel to represent it in the suit, relieved it from its obligation under the contract to pay one-half the costs and expenses incurred by plaintiffs in defending the suit.

2. SAME.

Defendant could not plead, as a defense to an action to recover its share of such costs and expenses, that the machines furnished by plaintiffs were not in accordance with the contract, where another suit was pending between the parties in which such matter was in issue and could be fully determined.

At Law. Rule for judgment for want of a sufficient affidavit of defense.

Hector T. Fenton, for plaintiffs.
Joseph De F. Junkin, for defendant.

J. B. McPHERSON, District Judge. This suit is brought upon a written contract, entered into on February 10, 1896, by the parties plaintiff and defendant hereto, of which the following is a copy:

"This agreement, made and entered into this tenth day of February, A. D. 1896, by and between Joseph Bennor, of the city of Macon, in the county of

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Bibb and state of Georgia, and the Macon Knitting Company, a corporation organized under the laws of the said state, and having its principal place of business in Macon aforesaid, parties of the first part, and the Leicester Mills Company, a corporation organized under the laws of the state of New Jersey, and having its principal place of business in Philadelphia, in the state of Pennsylvania, party of the second part, witnesseth: Whereas, letters patent of the United States No. 534,248, dated February 19, 1895, for an improvement in stockings and the art of manufacturing same, were granted to the said Joseph Bennor; and whereas, certain applications for letters patent of the United States were filed by the said Joseph Bennor for certain improvements in straight knitting machines for manufacturing fashioned hosiery, as follows: Serial No. 515,911, filed June 28, 1894, and allowed January 2, 1896; serial No. 517,970, filed July 19, 1894, and allowed January 2, 1896; and serial No. 566,416, filed October 21, 1895, and allowed November 18, 1895; and whereas, by an instrument of writing dated September 14, 1894, the said Macon Knitting Company did acquire from the said Joseph Bennor an undivided one-half part of the whole right, title, and interest in and to, all and singular, the said inventions and letters patent; and whereas, the party of the second part is desirous of manufacturing knitting machines containing said patented improvements in the United States, and of acquiring for the same territory the exclusive right to manufacture thereon knitted stockings of wool, worsted, and merino, but of no other material; under and in accordance with the said patent 534,248, together with other knitted goods of wool, worsted, and merino, but of no other material; and has agreed to pay the parties of the first part thereof, as hereinafter provided: now, therefore, the parties hereto, for and in consideration of the premises, and of the sum of one dollar each to the other in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, do covenant and agree to and with each other as follows, and for themselves, their respective heirs, executors, administrators, and successors: First. The parties of the first part hereby license and empower the party of the second part to manufacture in the United States of America for its own use therein, to the end of the terms for which said letters patent are or may be granted, knitting machines containing the above-mentioned patented improvements, granting it the sole right in such United States to use the said machines in the manufacture of knitted goods of wool, worsted, and merino, but of no other material, and for no other purpose or purposes. Second. The parties of the first part further agree to build and furnish to the party of the second part twenty (20) knitting machines of the construction set out in application, serial No. 566,416, aforesaid, which machines shall be built by the parties of the first part at the earliest date possible, and shall be furnished by them to the party of the second part at a price of ten per cent. (10%) above their actual cost of construction; it having been understood and agreed that the machines shall not exceed in price the sum of two hundred dollars ($200) per machine; and that the party of the second part shall have the exclusive right to use the said twenty machines in the manufacture of knitted goods of wool, worsted, and merino, but of no other material, and for no other purpose or purposes. It is fully understood and agreed that the said machines shall be practically operative machines, and shall be built in a workmanlike manner, and that the parties of the first part shall furnish a capable man to instruct a competent person designated by the party of the second part, to operate the said machines, and shall furnish all proper and necessary information for the practical disposition and erection of said machines in the mills in Germantown, Philadelphia, of the party of the second part, cost of freight and placing ready to run to be paid by the party of the second part. Third. Upon the delivery and practical operation of the said twenty (20) machines, the party of the second part agrees to forthwith assign and transfer to the parties of the first part fifty (50) shares of the capital stock of the Leicester Mills Company, par value one hundred dollars ($100) per share, together with bonds of the said company to the value of five thousand dollars ($5,000), such bonds being secured by the mortgage now held in trust by the Provident Life and Trust Company of Philadelphia. Fourth. The party of the second part shall have

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the privilege of constructing at its own expense, for the special use and purpose above recited, as many of the said machines embodying said patented improvements as it may desire to construct; and, in consideration of such privileges granted to it, the party of the second part agrees that on January 1, 1898, or prior to that time, if it shall have constructed eighty (80) of such machines, it will forthwith assign and transfer unto the parties of the first part one hundred (100) more shares of the capital stock of the said company of the said par value of one hundred ($100) per share, together with an additional amount of the said bonds thereof, to the value of five thousand dollars ($5,000). Fifth. It is further agreed between the parties hereto that, in the event of a suit or suits being brought by or against any or all of the parties hereto under or concerning the said letters patent and inventions, then and in that case the costs and expenses attending such suit or suits on behalf of any or all of the parties hereto shall be borne and paid equally by the respective parties; that is, one-half by the parties of the first part and one-half by the party of the second part. Sixth. It is mutually understood and agreed that Wilson H. Brown, of Philadelphia, Pennsylvania, vice president and treasurer of the said the Leicester Mills Company, personally guaranties to the parties of the first part, such guaranty being evidenced by his uniting in this agreement, that the aforesaid stock of the said company shall be valued at and be worth par, to wit, one hundred dollars ($100) per share, on the first day of January, 1898; and, further, that, if the parties of the first part so elect, he, the said Brown, will purchase from them at par on January 1, 1898, five thousand dollars ($5,000) of the said stock, and on January 1, 1899, five thousand dollars ($5,000) more of the said stock, and on October 1, 1899, the remaining five thousand dollars ($5,000) of the same."

In pursuance of this contract, some of the machines mentioned therein were furnished by the plaintiffs to the defendant, and other machines were built by the defendant itself, all being used for the manufacture of stockings. In 1898 the defendant was notified by John G. Powell and Edward Powell that these machines were infringing their patents, and not long afterwards a bill in equity to redress the infringement was filed by the Messrs. Powell in this court against the present defendant. Thereupon the present plaintiffs, having learned that the suit had been begun, filed the following petition for leave to intervene:

"The petition of the Macon Knitting Co., a corporation of the state of Georgia, and of Joseph Bennor, a citizen of the state of Pennsylvania, respectfully represent: (1) That on the 12th day of November, 1898, John G. Powell and Edward Powell brought their bill in equity in this court against the Leicester Mills Co., a corporation of the state of New Jersey, Wilson H. Brown, treasurer, and Everett H. Brown, secretary thereof, both residents of the city of Philadelphia, alleging in said bill that letters patent of the United States No. 510,934, dated December 19, 1893, for 'improvements in web-holding actuating mechanism for automatic knitting machines,' had been granted and issued to said complainants as assignees of said John G. Powell, the alleged inventor thereof; and charging therein that the defendants therein named had, after the grant and issue of said letters patent, made or caused to be made and used within the Eastern district of Pennsylvania web-holding mechanisms for automatic knitting machines similar to and in alleged infringement of said recited letters patent and the alleged exclusive rights of the complainants thereunder; and alleging also 'that the said defendants, without the license of the orators, and against their will, and in violation of their rights, have jointly procured and caused to be made for them, the said defendants, by the Macon Knitting Co., and one Joseph Bennor of Macon, Georgia, a large number of said infringing machines, and have used and intend to continue to use the said machines, within the Eastern district of Pennsylvania.' And your petitioners further aver that a subpœna ad respondendum issued upon said bill of complaint against said defendants named, which has been duly served, as

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your petitioners are informed and believe, and is made returnable to the first Monday of December next, to wit. December 5, 1898. (2) And your petitioners further show that prior to February 10, 1896, they were and still are the owners of several letters patent of the United States for improvements in knitting machines and in the art or process of manufacturing hosiery, inter alia letters patent of the United States No. 534,248, dated February 19, 1895, Nos. 557,638, 557,639, and 557,641, all dated April 7, 1896; that on said 10th day of February, 1896, your petitioners entered into a certain written contract of agreement and license with the Leicester Mills Co. and Wilson H. Brown, as the other parties thereto, wherein and whereby one of your petitioners, the Macon Knitting Co., agreed to make and deliver, and did during the summer and autumn of 1896, make and deliver unto the said Leicester Mills Co. twenty of said patented knitting machines, constructed and operating substantially as shown, described, and claimed in one or more of said four letters patent last above recited in this paragraph, belonging to your petitioners; and in and by said contract of license, dated February 10, 1896, the Leicester Mills Co. was authorized and licensed to use the same in its mills, and were authorized and licensed to build, for its own use, and it did subsequently build for its own use and used other like machines. (3) And your petitioners further aver that in and by said contract of license, dated February 10, 1896, the Leicester Mills Co. bound itself to pay to your petitioners, as consideration for said machines and license, certain large sums of money and other valuable securities, part of which has been delivered and paid, and part of which, to wit, the sum of fifteen thousand dollars in securities, or money to that amount, became due and payable by said defendants to your petitioners on the 1st day of January, 1898. That the said defendants defaulted in said last-mentioned delivery and payment, and your petitioners now have pending against said defendants a suit in the New Jersey chancery to enforce the defendants' compliance with said agreement and contract of license, which suit has been pending for over six months last past, is still pending, and is set for trial or hearing on the 12th day of December, 1898, next, at Trenton, in said state. (4) And your petitioners further aver that not a single one of said machines or any part thereof built for and delivered by your petitioners to said defendants, under said contract of license, or any like machines built thereafter by the defendants under said contract of license, contain any mechanism similar in whole or in part to the mechanism shown, described, and claimed in the plaintiffs' letters patent No. 510,934, on which this suit is founded, nor do said machines or any of them infringe any of plaintiffs' rights, under said letters patent or otherwise. (5) And your petitioners further aver that in and by said written agreement or license dated February 10, 1896, between your petitioners and the said defendants, it was expressly agreed, for the protection of both parties hereto, that in case any person or persons thereafter set up any claim, by suit or otherwise, that said machines to be built thereafter under said license, and which were licensed thereby, conflicted with or infringed any such rights, secured by patent or otherwise, that the same should be answered and defended at the joint expense of your petitioners and the said defendants; and your petitioners stood ready to defend against this bill of complaint in this cause and at their own proper expense, as provided and set forth in said contract of license. (6) And your petitioners further aver that they and the said defendants have a full and perfect defense to the bill of complaint in this cause, and that they have reason to fear and believe that the defendants intend to make default herein, or neglect to make defense, or by reason of negligently making less than the whole defense, and to plead such recovery against them in defense of your petitioners' claim against said defendants for the aforesaid unpaid balance of purchase money under said contract of license. (7) Your petitioners therefore pray leave to intervene in this suit, as parties defendant, and to appear and make defense, by way of answer or otherwise, both on behalf of themselves, for the causes aforesaid, and on behalf of the said defendants as their licensees under the several letters patent aforesaid."

Leave to intervene was granted by the circuit court, and thereafter the present plaintiffs defended the suit, which was so pro-

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ceeded in before the circuit court and the circuit court of appeals that a decree was finally entered in favor of the complainants, thus establishing the fact that the machines referred to in the foregoing contract infringed the patents belonging to the Messrs. Powell. The suit now in hand is brought to recover half the costs and expenses incurred in that litigation, and there is no dispute concerning the correctness of the plaintiffs' bill, nor of the reasonableness of the charge therein made. The right to recover is denied solely upon the grounds set forth in the following affidavit of defense:

"Wilson H. Brown, being duly sworn, says: I am the treasurer of the Leicester and Continental Mills Company, defendant above, and the said corporation has a just, true, and complete defense to the whole of the plaintiffs' claim, as set forth in the statement of claim filed in the said case, of the following nature: On behalf of the defendant, I deny that it is indebted to the plaintiffs in any sum whatever arising out of the cause of action therein set forth. It is true that on or about February 10, 1896, the parties plaintiff and defendant herein did enter into the contract or agreement therein mentioned, copy of which is attached to the statement of claim, and which contains the clause fifth, quoted in the statement of claim, as follows: 'Fifth. It is further agreed between the parties hereto that, in the event of a suit or suits being brought by or against all of the parties hereto, under and concerning the said letters patent and inventions, then and in that case the costs and expenses attending such suit or suits on behalf of any or all of the parties hereto shall be borne and paid equally by the respective parties; that is, one-half by the parties of the first part and one-half by the party of the second part.' Defendant admits that during the years 1896 and 1897 some of the machines mentioned in the agreement were delivered to them and some were built by them, but they deny that they were able to operate any of the same under the terms of the agreement; that they discovered shortly after they began to use them that they were not 'practical operative machines, or built in a workmanlike manner,' as required by the agreement. In addition thereto, during the early part of the year 1898, they were notified by John G. Powell and Edward Powell that such machines were infringements upon letters patent of the same parties, and that they must cease operating the same and account to them to any use of the same already had, as well as damages. A careful investigation of the claims of Messrs. Powell was made by the officers of the defendant company, and it was found to be the case by them, and they were so advised by competent authority, that the machines which the plaintiffs had delivered to them were clearly infringements of the patents of the said Messrs. Powell, and that their use of the same had been in contravention of the rights of the said Messrs. Powell, and so they informed the plaintiffs. As alleged in the statement of claim, on or about November 12 the said John G. Powell and Edward Powell filed a bill in equity against this present defendant, to No. 20 of October session, 1898, in the circuit court of the United States in and for the Eastern district of Pennsylvania, alleging their ownership of the letters patent above referred to, and that the machines which were in the defendant's possession were in infringement of their rights, and praying for an injunction and damages. Defendant denies, as alleged in the statement of claim, that the plaintiffs in this present suit, 'on being notified by the defendant of the institution of said suit in equity, obtained leave to intervene, and did intervene, therein, and defend the same,' but they allege, on the contrary, that the record of the said suit in the circuit court of the United States shows that upon November 30, 1898, the present plaintiffs filed a petition for leave to intervene, and without any consultation whatever with the defendant corporation, or its officers, a copy of which petition is hereto attached and made part hereof, marked Exhibit 'A', and that upon the same day they inclosed a copy of the same in a letter to counsel for defendant corporation, a copy of which is also hereto attached marked Exhibit 'B.' It will be observed, by reading such petition, that the present plaintiffs therein

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averred the filing of the said bill against the defendant corporation, and allege, in paragraph two of the petition, that they are the owners of certain letters patent, which are the ones specified in the said agreement between the parties hereto, of February 10, 1896, and they set up such agreement and the delivery of the machines to the defendant corporation; aver the payment of part of the consideration and the litigation concerning the balance of it; in paragraph four deny that any of such machines contain any mechanism which in any way infringes upon the mechanism of the said Messrs. Powell, and in paragraph five they aver: 'And your petitioners further aver that, in and by said written agreement or license dated February 10, 1896, between your petitioners and the said defendants, it was expressly agreed, for the protection of both parties hereto, that in case any person or persons thereafter set up any claim, by suit or otherwise, that said machines to be built thereafter under said license, and which were licensed thereby, conflicted with or infringed any such rights, secured by patent or otherwise, that the same should be answered and defended at the joint expense of your petitioners and the said defendants; and your petitioners stand ready to defend against the bill of complaint in this cause, and at their own proper expense, as provided and set forth in said contract of license. (6) And your petitioners further aver that they and the said defendants have a full and perfect defense to the bill of complaint in this cause, and that they have reason to fear and believe that the defendants intend to make default herein, or neglect to make sufficient and perfect defense herein; whereby judgment or decree may go against them by reason of such neglect to make defense, or by reason of negligently making less than the whole defense, and to plead such recovery against them in defense of your petitioners' claim against such defendants for the aforesaid unpaid balance of purchase money under said contract of license. (7) Your petitioners therefore pray leave to intervene in this suit, as parties defendant, and to appear and make defense by way of answer or otherwise both on behalf of themselves for the causes aforesaid and on behalf of the said defendants as their licensees under the several letters patent aforesaid.' Not having been aware of the fact that the plaintiffs had so intervened in the said cause of their own volition, on December 2nd the defendant notified the plaintiffs of the beginning of the said action of the Messrs. Powell, and offered them permission to intervene if they desired. It is further averred, on behalf of defendant, that it had no connection with the employment of counsel for the plaintiffs in this suit, but, previous to the filing of such petition for the intervention by the plaintiffs, did employ and retain Joseph De F. Junkin, Esq., and John G. Johnson, Esq., members of the bar of this city, in good standing, to appear and represent it in the matter, and the appearance of such counsel was duly filed of record when this petition for intervention was filed by the plaintiffs. The defendant company in no way agreed to be responsible for the plaintiffs' costs, or to pay any of the costs of such intervention, and it is advised, and so avers, that such costs and expenses as are claimed by the plaintiffs here were not within the contemplation of clause five of the agreement heretofore quoted, and upon which the plaintiffs relied. The suit by the Messrs. Powell was brought against the present defendant, and it employed competent counsel to represent it, whose appearance had been entered of record. Suit had not been brought against the present plaintiffs; they, of their own volition, intervened in the said cause, alleging, as a reason therefor, that they did so for their own protection as to some certain other cause, alleging, as quoted above, that they stood ready 'to defend against the bill of complaint in this cause and at their own proper expense.' The defendant is advised and avers that under such circumstances it is not liable for all or any of the costs and expenses incurred and alleged to have been paid by the plaintiffs, as set forth in their statement of claim. The petition for intervention was duly granted by the court, and on the return day thereof, December 5, 1898, the plaintiffs in the present cause were granted permission to intervene, without any answer being filed or opposition being made by any of the parties to the said suit. This cause was so proceeded with by the parties plaintiff and the said inter-

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vening defendant that it was fully heard and the bill of the plaintiffs has been fully sustained, and the court has finally found that their patents were valid, and that the machines sold by the plaintiffs herein to the defendant were infringements upon the patents of Messrs. Powell. The defendant is advised and avers that, under such circumstances, the entire consideration for the agreement of tenth of February, 1896, between the parties hereto, has failed, and that it cannot be held legally liable for any costs incurred by the plaintiffs herein in defense of its patents."

The defense that the machines were not operative machines, or built in a workmanlike manner, is manifestly insufficient. Another suit is pending between the parties with reference to these machines, in which this defense is set up and can be fully considered; but, in any event, even if the defense were relevant here, the averment is too vague and indefinite to prevent judgment.

The remainder of the affidavit of defense is concerned with the suit brought by the Messrs. Powell, but I do not think it contains any answer to the fifth paragraph of the agreement, upon which the suit pending is brought, unless a sufficient answer is to be found in the averment that, when the present plaintiffs presented their petition to intervene, they stated to the court that they stood "ready to defend against the bill of complaint in this cause, and at their proper expense, as provided and set forth in said contract of license." The defendant therefore argues that, by reason of this statement in the petition to intervene, it in no way agreed to be responsible for the plaintiffs' costs in the bill in equity, or to pay any of the costs of such intervention, and that such costs and expenses as are now claimed by the plaintiffs are not within the contemplation of clause 5 of the foregoing agreement. I am unable to agree that this defense is well founded. It may perhaps be true that if, when the present plaintiffs intervened in the suit in equity they had expressly agreed to be bound for the whole of the costs and expenses of that litigation, they might be compelled to make good their proposition; but it is, I think, manifest that they offered to intervene under the contract, and not in opposition to its terms. There is no doubt that they wished to be in a position to control the defense. The reasons for thus wishing are stated in the petition to intervene, and were sufficient to induce the court to grant the request; but instead of offering unqualifiedly to carry on the suit at their own expense, they immediately and expressly modified the phrase by adding, "as provided and set forth in said contract of license." This can only refer to paragraph 5, and shows that the plaintiffs had no intention to bear the pecuniary burden alone, although they were ready, and indeed desirous, to assume the whole responsibility of conducting the defense.

Neither is there any equitable reason perceptible that should move the court to relieve the defendant from keeping its contract. The suit brought by the Messrs. Powell falls expressly within the language of paragraph 5. It is "a suit * * * brought * * * against (one) of the parties hereto * * * concerning the said letters patent and inventions;" and under such circumstances the agreement plainly declares that "the costs and expenses attending

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such suit or suits * * * shall be borne and paid equally by the respective parties." It is manifest, I think, upon the face of the contract, that the present parties plaintiff and defendant were about to engage in a common enterprise, to which the patented inventions were believed to be important; and therefore, since both parties had a similar interest in the success of the enterprise, they provided that the validity of the inventions should be defended at their joint expense. It seems clear to me therefore that the present suit is well founded, and that the affidavit of defense fails to set forth a sufficient reason to prevent the entry of judgment.

The rule is made absolute.

UNITED STATES v. PRICE et al.

(District Court, S. D. Florida. December 21, 1901.)

1. BEST AND SECONDARY EVIDENCE—RES JUDICATA.
   Where the evidence shows beyond question that the records of a case have been destroyed by no fault of the defendant, oral testimony may be admitted upon the plea of res judicata.
2. SAME—SUFFICIENCY.
   The same testimony that would justify the re-establishment of a lost record should be accepted to support such plea.

Suit at Law upon Mail Contractor's Bond.

J. N. Stripling, U. S. Dist. Atty.
John W. Price, in pro. per.

LOCKE, District Judge. This suit was brought July 1, 1897, against the principal and sureties upon a mail contractor's bond executed June 25, 1867, in which the performance of the contract was to have been completed in 1871. Both sureties are now dead. The defendant pleads that the cause is res judicata, for that in the year 1873 it was finally adjudicated by this court at Jacksonville, Fla.; that suit was brought against the principal and sureties upon this bond, and judgment then and there rendered for the defendants.

It has been proven beyond any question of doubt that in May, 1891, the court house in Jacksonville, together with all of the records of the clerk's and district attorney's offices, was burned, and all the records and documents therein filed destroyed. The defendant has introduced oral testimony of the trial and determination of this case, the finding of the verdict, and entry of the judgment in his favor. If such testimony is admissible, the court must necessarily sustain the plea of res judicata.

The general rule, prohibiting the introduction of oral testimony in matters where record evidence should be produced, is well established, but to this there are numerous exceptions. Minor v. Tillotson, 7 Pet. 99, 8 L. Ed. 621; Tayloe v. Riggs, 1 Pet. 591, 7 L. Ed. 275; Greenl. Ev. § 509, and numerous cases there cited; Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390. In this case the absence of record evidence is satisfactorily accounted for, as it is

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proven beyond a possibility of a doubt that if there ever were originals of such a verdict and judgment they were destroyed and lost without any fault of the defendant.

The regular way to proceed in such an action would be to restore the lost record by a formal proceeding for that purpose. Can the effect of that lost record be reached in any other way? In the case of Hogan v. Kurtz, 94 U. S. 773, 24 L. Ed. 317, objection was made by the plaintiff that the introduction of parol evidence was permitted to establish a record of naturalization, and upon appeal the supreme court held that the assignment of error must be overruled, saying that proceedings of that kind were required to be recorded; but the records in that district had been destroyed many years ago, and whether or not the party was naturalized was properly left to the jury upon the parol evidence.

In this case a jury has been waived, and the findings of fact devolve upon the court. The parol evidence is positive in regard to the former trial, the term of the court, the circumstances and facts attending it, the evidence presented by the defendant of the performance of the contract entered into, the instructions to the jury upon which they found for the defendant, and the entry of the judgment in his favor. More than 25 years have elapsed, and both of the sureties upon the bond, and all of the witnesses by whom the performance of the contract could be proven, are dead. I consider it may well be said that, in view of the great lapse of time that the rights of the government have been permitted to rest without being enforced, the presumption is that there had been some determination of the matter, as testified to by the defendant. Had the same evidence that has been given in this case been given upon an application to re-establish the lost record of the judgment, it would have been the duty of the court to order such re-establishment. Would the law require that proceedings be instituted for the establishment of the record, where the same result could be reached by the very evidence now offered to establish the truth of that for which the record is only required? I do not consider that the prohibition against the introduction of secondary evidence demands it. It is therefore found that the oral testimony that has been offered by the defendant of the adjudication of the question now before the court, and the finding in his favor, is admissible, and sustains the plea.

This justifies a finding in favor of the defendant, and it is so ordered.

UNITED STATES v. POST.

(District Court, S. D. Florida. March 5, 1902.)

1. USE OF MAILS TO DEFRAUD—INDICTMENT.

An indictment under section 5480, Rev. St., as amended by Act March 2, 1889, which alleges that the defendant had devised a scheme to defraud by pretending and advertising that she could cure diseases and poverty by mental science, and further alleges that she was intending to induce persons to send her money for treatment, but fraudulently intending to get possession of such money, and fraudulently convert it to her own use, without rendering to the person sending the same any

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service or thing of value, is insufficient to charge a crime, unless the power to perform what she pretended she could is denied, and that she did not believe that she could, or that she did not intend to render such service.

8. SAME.
All criminal pleadings require direct, positive, and affirmative allegations of every point necessary to be proven.

8. SAME—FRAUDULENT INTENT.
In this case the dishonest and fraudulent intentions of the defendant would be the question to be passed upon by the jury, and it should be clearly charged and stated.

Upon Demurrer and Motion to Quash the Indictment.

J. N. Stripling, U. S. Dist. Atty.
Bisbee & Bedell, O. T. Greene, and T. A. Ledwich, for defendant.

LOCKE, District Judge. The indictment presented for examination, after striking out surplus words and allegations, alleges, in substance: That one Helen Wilmans Post had devised a scheme to defraud. This scheme was this: She pretended she could cure all diseases and poverty by mental science, and as a part of the scheme she advertised and represented in certain pamphlets and circulars that she possessed the power by that method to effect cures of disease, weakness, and poverty, and would treat persons in their absence, and in such advertisements requested people to open correspondence with her for the purpose of receiving treatment, intending to induce persons to send her money for treatment, but fraudulently intending to get possession of such money, and fraudulently convert it to her own use, without rendering to the person sending the same any service or thing of value therefor; which scheme was to be effected by opening correspondence with divers persons by means of the post office establishment of the United States; and that she, on the 17th day of July, 1901, having devised said scheme to defraud, in and for executing the said scheme by means of the post office department, did unlawfully receive from the post office a certain letter, which had been conveyed by mail.

Following the views of the supreme court in the case of Stokes v. U. S., 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667, it may be safely concluded that an indictment drawn under section 5480 of the Revised Statutes of the United States, as amended by Act March 2, 1889, must allege and charge three particular things: (1) That the defendant must have devised a scheme or artifice to defraud; (2) that he must have intended to effect this scheme by opening, or intending to open, correspondence with other people through the post office establishment of the United States, or by inducing other persons to open correspondence or communication with him by that means; and (3) in carrying out such scheme such person must have deposited a letter, packet, writing, circular, or advertisement in some post office of the United States, to be sent or delivered by said post office establishment, or have taken or received such therefrom.

The language of the indictment upon the second and third points is sufficiently clear, distinct, and positive to support the charge that any scheme devised was intended to be effected by opening correspondence through the post office establishment of the United States, and that a

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letter was received and taken from the mails in furtherance of said scheme; but when we come to examine the allegations of the indictment as to the first and most important requirement, "that the person charged must have devised a scheme and artifice to defraud," a more difficult question presents itself. Not only must the indictment allege that the person had devised a scheme and artifice to defraud, but it must set out clearly and distinctly what that artifice was, wherein the fraud consisted, and the facts and circumstances by which it was to be accomplished. U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

The indictment in the present instance has alleged at great length the power which the defendant pretended to possess, and that she had advertised and represented what she claimed she could do. But nowhere in the indictment is alleged or declared her inability to do and perform all that she is alleged to have pretended, nor does it in any way negative the pretense which she is alleged to have made, or her belief or knowledge as to having that power. The only allegation declaring the scheme to be fraudulent is where the indictment alleges "the said Helen Wilmans Post, in the advertisements aforesaid, requested and solicited people to open correspondence and communication with her for the purpose of procuring and receiving her treatment by the process and method aforesaid, intending thereby to induce persons to open communication and correspondence with her, and send money to her in the name of Helen Wilmans, for the purpose of receiving the treatment by the means aforesaid, but fraudulently intending to get possession of such money as should be sent to her, and to fraudulently convert the same to her own use, without rendering to the person so sending the same any service or thing of value therefor."

The well-established principle of criminal pleading, which requires direct, positive, and affirmative allegations of every point necessary to be proven, is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment, or recital, but every fact necessary to constitute the crime must be directly and affirmatively alleged. In this case, as in all offenses of this character, the intention of the defendant is the very gist and substance of the fraud which must necessarily be embodied in the scheme or artifice as a foundation for the violation of the law. Without such fraudulent intention, it would be impossible to devise a scheme to defraud. The very term necessarily implies a fraudulent intention from the very inception of the scheme, and no indictment that does not negative the good faith and honest belief of the defendant can be sufficient. No matter how fraudulent or criminal any act or series of acts may appear by implication, or how repugnant to enlightened intelligence and morality it may appear by a general statement of a case, no person should be put upon trial upon issues not clearly alleged. In this case the dishonest and fraudulent intentions of the defendant would be the question to be passed upon by the jury, and should be clearly stated. Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709.

The only direct and positive assertion of defendant's acts, made in the indictment in this connection, is that she requested and solicited

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people to open correspondence. There is no direct assertion of her intention, further than, by implication, that she was "fraudulently intending to get possession of such money and convert the same to her own use, without rendering to the person sending the same any service or thing of value therefor." The use of the word "fraudulently" is not alone a sufficient allegation of a fraudulent intent. The circumstances and declared intention must show the act to be such.

There was no pretense in the alleged advertisement or correspondence that the money received was not to be converted to the use of the defendant; therefore such conversion would not of itself be fraudulent. It was to be sent for that purpose, and other conditions must determine the integrity of such act. It was in the contemplation of the solicitation, as set forth in the scheme, that the money should be sent to the defendant for subsequent treatment to be given by her; therefore the conversion to her use without giving the treatment, or, in the language of the allegations of the indictment, "rendering any service or thing of value therefor," would not necessarily be a fraudulent practice, as it is not alleged that defendant did not intend to render any such treatment as she is alleged to have pretended she would at any time. Durland v. U. S., supra. The limitation of value, as alleged in the indictment, in which nothing of any value was to be given, attaches to the service rendered as well as to the thing, and declares no measure by which the absence of value is to be determined. The defendant could not be found guilty if a service which had been promised, and which the jury might consider of no value, was rendered, unless it should be found that the defendant also knew and believed it to be of no value. Yet there is no allegation that no service was to be rendered, or that any service which might be rendered was not believed by her to be of value.

In view of these well-established principles, the allegations of the indictment are deemed insufficient to affirmatively declare an intention to defraud, and it is therefore considered that it does not sufficiently either negative the honesty of the pretenses of the defendant, or the intention to perform what was promised, and the motion to quash must be granted, and the demurrer sustained.

WHITE v. UNITED STATES.

(Circuit Court, S. D. New York. March 12, 1902.)

No. 2,983.

CUSTOMS DUTIES—CEILINGS PAINTED ON WOOD.

Ceilings, painted on wood taken from a palace in Italy, should be classified under Acts 1897, par. 454, as paintings in oil, and not under paragraph 208, as manufactures of wood not specially provided for.

Appeal by the Importer from a Decision of the Board of United States General Appraisers.

William B. Coughtry, for the importer.
Henry C. Platt, Asst. U. S. Atty.

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COXE, District Judge (orally). The importations in question consist of three ceilings, painted on wood, taken from the Barberini Palace of Florence, Italy. They were assessed by the collector under paragraph 208 of the act of 1897 as "manufactures of wood, not specially provided for." The importer insists that they should have been classified under paragraph 454 as "paintings in oil." The evidence now before the court is practically undisputed that the ceilings in question are oil paintings on wood. The value of the wood as compared with the painting is infinitesimal. Within numerous prior decisions of this court it must be held that the importations are paintings.

The decision of the board of appraisers is reversed and the collector is advised to make a refund upon the importations in question of 15 per cent.

VEIL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 11, 1902.)

No. 3,036.

CUSTOMS DUTIES—WOOLEN BANDS.

Woolen bands intended for the use of veterinary surgeons, to be applied to lame legs, are properly assessed under Act 1897, par. 366, as manufactures of wool, and not under paragraph 447, which provides for "harness, saddles and saddlery."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.
W. Usher Parsons, Asst. U. S. Atty.

COXE, District Judge (orally). It is not disputed that the article in question is a woolen band. It was assessed by the collector under paragraph 366 of the act of 1897 as a manufacture of wool. The importer insists that it is better described by paragraph 447 of the same act, which provides for "harness, saddles and saddlery, or parts of either, in sets or in parts." I do not think it can be contended that "saddlery" is limited to articles of leather, because it appears that there is a saddle cloth and I suppose the court may take judicial notice that the surcingle is made of canvas. On the other hand I think the word "saddlery" should not be expanded to apply to these articles in suit, which belong more properly to the veterinary department. Saddlery, whatever else it may or may not mean, ought to be applied to the trappings of a well horse, a "going" horse, and not a sick one. This band is intended for the use of the veterinary surgeon to be applied to a lame leg, as a plaster might be applied to a bruise. Its use is analogous to a contrivance made to hold up a horse that has broken his leg. I do not think that it can be included within the word "saddlery."

As the importer has not succeeded in showing that the article in question can be properly classified under the term "saddlery" or parts thereof it follows that the decision of the board of appraisers must be affirmed.

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HILLS BROS. CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 11, 1902.)

No. 3,068.

CUSTOMS DUTIES—LEMON PEEL.

Where lemons cut in two and thrown into casks of brine are imported, and when the merchandise reaches this country the pulp has left half of the lemon, and the fruit has been destroyed, it is properly classified under Act 1897, par. 267, as lemon peel, preserved, and not under paragraph 559 of the free list of the same act, as fruits in brine.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Albert Comstock, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). It seems to be conceded that the importations here consist of lemons cut in two and thrown into casks of brine, and that when the merchandise reaches this country a certain portion of the pulp of the lemon has come out or, as the only witness on the subject expressed it, "sloughed away"; in other words, the pulp has left the half of the lemon where it was in the port of export. I think the question must be determined having reference to the character of the merchandise when it enters this country. The collector can only concern himself with the merchandise that reaches this port. The question is what is the importer seeking to introduce into the United States? It seems to me very clear that he has not imported a lemon or two halves of a lemon, because the fruit, the fruity part, has been destroyed during the voyage, and what actually enters here is the peel, or perhaps more properly the rind, of the lemon. That which makes the lemon a fruit is gone and nothing is left to be utilized but the lemon peel.

The collector classified this merchandise under paragraph 267 of the tariff act of 1897, as "lemon peel, preserved"; but the importer insists that it is better described by paragraph 559 of the free list of the same act as "fruits in brine." My impression is very strong that the collector's paragraph is a much clearer and more definite description. I do not see how it can be said that the rind of a lemon, the peel of a lemon, is a fruit. It is not a fruit; it is a lemon peel, preserved. It is clear that it was the intention of congress in paragraph 559 of this act to admit free of duty fruits as fruits, and not the mere peel or rind.

It follows that the decision of the board of appraisers should be affirmed.

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DE RONDE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,938.

CUSTOMS DUTIES—CLASSIFICATION—PREPARATION OF TALLOW.

A preparation of tallow used, not as an assistant or a mordant, but simply for softening cotton cloth, is classifiable under Act 1897, § 6, as an "article manufactured, in whole or in part, not provided for in this act," and not under paragraph 32, as an "alizarin assistant, not specially provided for in this act."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.
Charles D. Baker, Asst. U. S. Atty.

COXE, District Judge (orally). The collector classified the importation in question under paragraph 32 of the act of 1897, as an "alizarin assistant, not specially provided for in this act." The importers insist that it should be classified under section 6 of the same act as an "article manufactured, in whole or in part, not provided for in this act." The return of the appraiser was the only evidence presented before the board, and upon that return the board were entirely justified in finding that the collector's classification was correct. Since then, however, evidence has been taken in this court, which is wholly undisputed, and which establishes beyond doubt the fact that the collector's classification is erroneous. Upon the present testimony there can be no pretense that the importation is an alizarin assistant. It is a preparation of tallow, used not as an assistant or as a mordant, but simply for softening cotton cloth.

The decision of the board of appraisers is reversed.

BURR v. SMITH.

(Circuit Court, D. Indiana. February 18, 1902.)

No. 10,039.

1. RES JUDICATA—APPOINTMENT AND POWERS OF RECEIVER.

Where, in a suit by creditors against an insolvent corporation and its stockholders, a judgment is rendered against a stockholder who is a party and has been duly served with process, and a receiver is appointed with power to bring an action in his own name on such judgment in the courts of any other jurisdiction, as authorized by a statute of the state, the right of the receiver to sue on such judgment, as against the judgment defendant, is res judicata.

2. CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDERS—ENFORCEMENT EXTRATERRITORIALLY.

Upon the principle of comity a federal court will recognize the right of a receiver appointed by a court of another state or jurisdiction, for the purpose of enforcing the liability of a stockholder for the benefit of the creditors of an insolvent corporation, to maintain an action therein in his own name against such stockholder to effectuate the purpose of his appointment, where such appointment was made and authority

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to sue given pursuant to the statute which created the liability, and by a court of competent jurisdiction, and where such action will not violate the local policy or interfere with the rights of resident creditors.

At Law. On demurrer to complaint.

P. H. Rue and Herod & Herod, for plaintiff.
Miller, Elam & Fesler, for defendant.

BAKER, District Judge. The amended complaint, in a single paragraph, is an action on a judgment rendered by the court of common pleas of Warren county, Ohio. The complaint alleges that said court of common pleas was and is a court of general jurisdiction, duly created by the constitution and laws of Ohio; that on March 2, 1897, John, George L., and Thomas S. Harrison, partners as Harrison Bros. & Co., as creditors of the Eagle Paper Company, a corporation incorporated and organized under the laws of Ohio, for the use and benefit of themselves and all the other creditors thereof, brought an action in said court against the Eagle Paper Company and numerous other defendants, including the defendant herein, Sullivan N. Smith, which said defendants were alleged to be stockholders of said corporation, and all the stockholders thereof, and which said action was thus brought to enforce the payment by said defendants of their liability as such stockholders under the constitution and statute laws of said state for the debts of said corporation, and that the said statute laws of said state then required that such action should be brought by one or more creditors of the corporation for the use and benefit of all, and against all those liable as stockholders; that said plaintiffs afterwards caused lawful process to be issued in said action, and to be duly served on him, the said Sullivan N. Smith, on March 7, 1901, and that such proceedings were thereafter had in said action that on November 11, 1901, the said plaintiffs, for the use and benefit of themselves and all other creditors of said corporation, recovered judgment in said action against the defendant, Sullivan N. Smith, upon his liability as such stockholder, which judgment was then duly rendered and given by said court against said defendant for the sum of $10,000; that it is now and was on said last-named day provided and enacted by the statute laws of said state of Ohio that said court may, in an action therein of the kind in which such judgment was rendered against the defendant herein as aforesaid, appoint a receiver to collect and enforce the judgment rendered therein, and may also authorize and direct such receiver to prosecute in his own name as receiver and in other jurisdictions such actions as might be necessary to collect such judgments; that on November 11, 1901, the plaintiff herein was, by an order duly made by said court in said action, appointed receiver therein, and was by said order of appointment directed by said court, upon his qualification as such receiver, to proceed without delay to demand and collect said judgment so rendered against the defendant herein, and was thereby expressly authorized and empowered, among other things, to commence and prosecute in his own name as such receiver, in any court of any state or of the United States, any and all actions, suits, or proceedings

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which, in his judgment, might be necessary and proper to that end, and to report to said court his proceedings under said order without delay, and that he was thereafter and now is duly qualified as such receiver under said order of appointment; and that no part of said judgment has been paid, and there is now due thereon from the said defendant, Sullivan N. Smith, to the plaintiff herein the sum of $10,000, with interest thereon from November 11, 1901.

The constitution of the state of Ohio (article 13, § 3) provides:

"Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

The statute of Ohio (Rev. St. 1890, §§ 3258, 3259), in force when the corporation was organized, enacts:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable in addition to their stock in an amount equal to the stock by them subscribed or otherwise acquired, to the creditors of the corporation to secure the payment of the debts and liabilities of the corporation."

The statute in force at the time the action was brought in the Ohio court authorized a suit to be brought by one or more creditors to enforce such liability generally against all stockholders for the benefit of all creditors of the corporation, in which action the court is required to determine the indebtedness of the corporation and the amount payable by each stockholder. The statute in force at the time the defendant was served with process therein provided that, whenever a creditor sought to charge the stockholders on account of any liability created by law, he should file his complaint for that purpose in any common pleas court which possessed jurisdiction to enforce such liability; that the court should proceed as in other cases to cause an account to be taken of the property and obligations of such corporation, and might appoint one or more receivers; that if, on the taking of such account, it appeared that such corporation was insolvent and had not sufficient property or effects to satisfy its creditors, the court might proceed to ascertain the liabilities of the stockholders and enforce the same by its judgment; in all cases in which the stockholders were made parties to an action in which a judgment was rendered, if the property of the corporation was found insufficient to discharge its debts, the court should give notice to nonresident stockholders, as provided in sections 5048–5052, Rev. St. 1890, and should first proceed to compel each stockholder to pay the amount remaining unpaid on the shares of stock held by him. The statute (section 3260) further enacts: If the debts of the corporation remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases. The court may authorize and direct the receiver to prosecute such actions in his own name as receiver as may be necessary in other jurisdictions, to collect the amount due from any officer or stockholder.

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The defendant has demurred to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action. The defendant, in support of his demurrer, earnestly contends that the plaintiff, as a receiver by appointment of an Ohio court, cannot maintain an action upon the judgment rendered in the creditors' suit against him, citing and relying on the authority of the case of Booth v. Clark, 17 How. 322, 15 L. Ed. 164, and other cases in the state and federal courts following that decision.

The defendant was a stockholder in a corporation created under the constitution and laws of the state of Ohio. The constitution and statute laws of that state provided that each stockholder in such corporation should be liable to its creditors in an amount equal to the stock held by him. The liability of the stockholder is contractual. By the contract of subscription the stockholder impliedly agreed to pay the superadded liability if the assets of the corporation were insufficient to pay its debts. As a member of the corporation he also impliedly agreed to submit himself to the laws of the state creating the corporation. The laws of Ohio expressly provided that, in case the corporate assets proved insufficient to pay the corporate debts, the court should have the power to adjudge the amount payable by each stockholder on account of his liability as such stockholder. The statute also provided that in an action against a stockholder to enforce such liability the court should have authority to appoint a receiver, who should be empowered, in his own name, to maintain actions in other jurisdictions to collect the amount so found due and payable. The defendant was a party duly served with process in the action in the Ohio court in which the judgment in suit was rendered against him, and in which action the present plaintiff was appointed receiver, and as such receiver he was by the statute, and by the order of the court, empowered and directed, in his own name, to collect the judgment herein sued for. If the defendant conceived that that court had no rightful power to authorize the receiver then appointed to maintain a suit in another jurisdiction on the judgment then rendered against him, he ought then to have contested that question. In a court of competent jurisdiction it was adjudged that the receiver should have the right to maintain an action in his own name on the judgment in any other state or federal court. On what principle can the defendant now contest a question which, so far as he is concerned, is res adjudicata? Why is the decree of the Ohio court adjudging the plaintiff's right as receiver to maintain, in his own name, in another jurisdiction, a suit upon the judgment then rendered, less conclusive on the defendant than it is upon any other question in issue and adjudged by the court? The state of Ohio had the undoubted right to provide for the liability of the stockholders of domestic corporations, how the extent of that liability should be determined, and by whom its collection should be enforced. It has provided that this liability should be enforced by a receiver in his own name, both within and without the state. By his contract of subscription the defendant impliedly agreed that his liability might be enforced by an action in the name of a receiver duly appointed by a court of common pleas of the state of Ohio, when such receiver was clothed by the decree

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of a competent court with that authority. The court of common pleas of Warren county, Ohio, had jurisdiction of the subject-matter, and it acquired jurisdiction of the person of the defendant by service of process upon him, and, pursuant to the statute of the state, it appointed the plaintiff as receiver, and adjudged that as such receiver in his own name he should have the right to maintain an action upon the judgment here in suit in any court of competent jurisdiction without the state of Ohio. When a state by its statute creates a liability unknown to the common law, can it be successfully contended that it may not determine by whom, and in whose name, that liability may be enforced? The statute of Ohio invested the receiver, when duly appointed, with the right to maintain a suit to enforce the stockholder's liability for the benefit of the creditors of the corporation, and on what principle of justice or comity can the courts in a sister state refuse to permit the receiver to maintain an action, to enforce such liability? Such a receiver is something more than an ordinary chancery receiver appointed to take possession of the property and collect the debts owing to a corporation or an individual. The present receiver was appointed to enforce for the benefit of creditors liabilities to which the corporation had no right or title. Formerly the primary object of a receiver's appointment was to preserve the fund or property so that it might be appropriated as the final decree of the court should direct. In recent times, however, both in England and in the United States, there has been a strong tendency towards enlarging the scope of the receiver's powers. The general rule as to the receiver's title is greatly modified in the case of a receiver appointed at the suit of judgment creditors. In such cases he is appointed, not alone for the purpose of preserving the property, but also to reduce property and effects into possession, and to distribute the proceeds among the creditors. Hence the receiver is usually given authority to maintain suits in his own name to enable him effectively to carry out the purpose of his appointment. Such authority is unquestionably effective within the jurisdiction of his appointment. "The rule in this country is said to be that receivers appointed by one jurisdiction are not entitled as of right to recognition in other jurisdictions, and that courts of equity cannot acquire extraterritorial jurisdiction over property or rights by the appointment of receivers. But expressions of this character have been considered to go too far, and the correct and current doctrine appears to be that under the principle of comity the courts of one jurisdiction will recognize the authority and permit the exercise of the functions of a receiver appointed in another jurisdiction, except in those cases where a court of the former jurisdiction finds that its own policy would be displaced or the rights of its own citizens invaded or impaired, and this seems to be especially true where such receiver is, by the terms of his appointment, to gather in the assets wherever found." 20 Am. & Eng. Enc. Law (1st Ed.) 65, 66. The doctrine thus stated is supported by reason and by the great weight of authority in the courts of the United States. The nature of the union between the states as members of a common government, the intimate and vital interests and relations, commercial as well as political, which bind

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them together, should lead to a greater degree of comity between them than would be expected to exist between states wholly foreign to each other. This principle of comity between the states of the Union is now generally recognized. It is recognized by the courts of the state of Ohio. Bank v. McLeod, 38 Ohio St. 174. It is also recognized in the courts of this state (Metzner v. Bauer, 98 Ind. 425), where the court says that as a matter of comity receivers duly appointed and qualified in other states may, to the extent of their authority, maintain suits in the courts of this state. This doctrine is again affirmed in the case of Catlin v. Silver Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338, where what is conceived to be the true doctrine is thus stated:

"While there are authorities of great weight which seem to hold that a receiver appointed in one jurisdiction will not be permitted to maintain a suit in a foreign state, the generally prevailing doctrine upon which all the decisions seem to be harmonious is that upon the principles of comity the courts of the jurisdiction in which the property or fund is situated will recognize the right of the receiver so far as to aid him in reducing it to possession, unless to do so would in some way violate the local policy or interfere with the rights of resident creditors."

The present suit, if it had been brought in a court of this state, would have been maintainable by the receiver in his own name. Why should it not be maintainable in a federal court exercising jurisdiction in the same state? The requisite diversity of citizenship is shown to exist, and the amount in controversy exceeds, exclusive of interest and costs, the sum of $2,000. It was a wise policy of the constitution to give, in such cases, the plaintiff a choice of tribunals. Whenever a citizen of one state may go into the courts of another state, no reason is perceived why, if the case is one within the jurisdiction of a federal court, he may not go into that court.

But it is contended that the case of Booth v. Clark, 17 How. 322, 15 L. Ed. 164, settles the doctrine the other way, and that its authority is binding on this court. No case is binding as an authority on any inferior court except in a case presenting a substantially similar state of facts. In that case one Camara recovered judgment in the supreme court of New York against Ferdinand Clark for $4,688.40, upon which a fi. fa. was issued and returned nulla bona. Camara then filed a creditors' bill in the chancery court of New York, and upon due proceedings had therein Booth was appointed receiver August 3, 1842. Nothing was done by the receiver until 1851, when Booth, as receiver, reported that no effects of Clark had come to his knowledge except a claim upon Mexico, which had been adjudged to Clark by the United States commissioners under a treaty with Mexico, and that as receiver he was contesting it, and he asked from the court authority to proceed for that purpose, which was granted. On May 29, 1851, Booth, as receiver, filed his bill in the circuit court for the District of Columbia, reciting so much of the proceedings in the New York courts as was deemed necessary to support his bill. Clark answered the bill, and among other things alleged that, being a resident of the state of New Hampshire, he was, on March 22, 1843, on his own petition, adjudged a bankrupt, and that one Palmer was

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duly appointed his assignee, and that on the death of Palmer one Hackett was duly appointed his assignee in succession. On page 328, 17 How., 15 L. Ed. 164, the court says:

"This suit is substantially between Hackett as the assignee of Clark in bankruptcy and Booth, the receiver under Camara's creditors' bill; that it may be determined by this court which of them has the official right to the Mexican fund for the distribution of it between the creditors of Clark, or whether Booth as receiver shall have from that fund a sufficient sum to pay Camara's entire debt, leaving the residue of it for distribution between Clark's other creditors."

Upon this statement of the case, the court stated the question for decision thus:

"The leading point in the case is the effect of the proceedings under the last to give a right to the receiver in virtue of a lien which he claims upon the property of the debtor to sue for and to recover any part of it, legal or equitable, without the jurisdiction of the state of New York. In other words, as an officer of a court of chancery, for a particular purpose, will he be recognized as such by a foreign judicial tribunal, and be allowed to take from the debtor a fund belonging to the debtor for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues contesting his right to do so?"

The court correctly decided that under such circumstances the receiver could not maintain his suit. Under similar circumstances, no receiver would be permitted to maintain a suit in the courts of another jurisdiction, because to do so would be to interfere with the rights of domestic creditors. This case, however, is not authority for the doctrine that a receiver appointed for the purpose of enforcing the liability of a stockholder for the benefit of the creditors of an insolvent corporation may not maintain a suit in the courts of another jurisdiction to effectuate that purpose. What is said by Mr. Justice Wayne to the effect that a receiver cannot maintain suits in other jurisdictions was unnecessary to the decision of the case, and, on familiar principles, cannot be regarded as of binding authority. I cannot regard it as a binding authority on the question before me, because neither the policy of this state nor the interests of domestic creditors will be interfered with if it should be held that the receiver may maintain the present suit.

It would be unprofitable to comment upon or review the federal and state cases which follow the case of Booth v. Clark, cited by counsel for the defendant. The views herein expressed are supported by the recent cases of Insurance Co. v. Schultz, 25 C. C. A. 453, 80 Fed. 337; Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747; and Kirtley v. Holmes, 46 C. C. A. 102, 107 Fed. 1, 52 L. R. A. 738,—decided by the circuit court of appeals of the First, Fourth, and Sixth circuits, respectively.

It follows that the demurrer should be, and the same is, overruled, to which the defendant excepts.

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THE NATHAN HALE.

THE DORIS.

(Circuit Court of Appeals, Second Circuit. January 7, 1902.)

No. 82.

1. COLLISION—OVERTAKING VESSELS—PRESUMPTION OF FAULT.
Under article 24 of the navigation act of 1890, which provides that "every vessel overtaking any other shall keep out of the way of the overtaken vessel," where a tug with a tow saw a schooner a quarter of a mile ahead, on nearly the same course, and overtook and passed her, but the tow, which was on a 200-fathom line, did not see the schooner until within 200 feet, and struck her directly astern, negligence must be inferred on the part of both tug and tow, unless there is evidence to warrant a finding that the schooner in some way brought about the collision.

2. SAME—EVIDENCE CONSIDERED.
Evidence considered, and *held* not to sustain a claim made by a tug and tow that a schooner which they overtook, not seeing the tow, changed her course after the tug had passed and ran into its wake, thus causing by such act a collision between her and the tow, which struck her directly astern.

Appeals from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the district court, Eastern district of New York (108 Fed. 552), holding the tug and the barge both liable for damages sustained by the schooner Florence Shay in consequence of a collision with the barge while in tow of the tug about 3 a. m. of August 22, 1900, in Hampton Roads. The stem of the barge struck the schooner directly on the stern, and, the schooner coming around after the impact, her bow also came in contact with the barge. The following excerpt from the brief of the counsel for the tug briefly indicates the principal facts which are not in dispute: "The Florence Shay was a small, three-masted schooner, laden with coal, bound into Hampton Roads for an anchorage on account of the strong N. E. wind outside. The Nathan Hale was returning to the roads with the barge Doris in tow for the same reason. * * * The hawser between the tug and tow was about 200 fathoms in length, the tide was turning flood, the night good for seeing lights, and the wind moderate from the N. E. The steam tug, after passing Old Point Wharf on a course S. W. by W., and steering for the light on the Middle Ground, sighted the schooner a little upon her port bow, and about a quarter of a mile away. The schooner also sighted the steam tug over her starboard quarter, the tug showing her red and towing lights, when about a quarter of a mile away. When the steam tug observed the schooner, her course was changed to half a point to starboard, and the schooner's course was changed to half a point to port; the steam tug having the light of the Middle Ground just over her port bow, and the schooner having the same light just over her starboard bow. The tug passed the schooner on her starboard side at a distance variously estimated at from 300 feet to 300 yards. The collision occurred off Hampton Bar, the stem of the barge striking the stern of the schooner. The schooner at the time had up all her lower sails."

Samuel Park, for the Nathan Hale.
Le Roy S. Gove, for the Doris.
Nelson Zabriskie, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

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PER CURIAM. The opinion of the district judge will be found in 108 Fed. 552. It contains an exhaustive discussion of the evidence, which it seems unnecessary to reproduce here. Some of the propositions of fact which he found are controverted, and it is contended that in working out suggested movements of the vessels he overlooked some elements which should have been considered; e. g., that a luffing up by the schooner when she was going almost before the wind would have increased her speed, and that a barge as heavy as the Doris could not have swung far out of the wake of the tug without changing the tug's heading. But these minuter details of the argument contained in the opinion need not be considered. The fundamental ground for the decision is found in the opening statement of the opinion:

"The first obvious fact is that a schooner, which had been seen by those on a tug 1,500 feet away, was struck squarely in her stern by the tow, which did not see the schooner until within about 200 feet of her. From this fact negligence should be inferred both on the part of the tug and the barge, unless there is some fact which should modify or avoid that conclusion."

Article 24 of the act of 1890, as it stood when the collision happened, reads as follows:

"Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel."

Whether the distance at which the tug passed was greater or less, whether the courses were diverging or converging, whether or not the tug failed to warn its tow to follow the slight change to starboard which it made, whether the tow swung more or less out of the wake, is not material to the question presented here. The tug saw the schooner a quarter of a mile off, and saw in what direction she was going. The tow failed to see her till within 200 feet. Both tug and tow were overtaking vessels, and the latter ran squarely into the schooner's stern. In view of the rule, the only question seems to be, is there evidence which will warrant the finding that the schooner in some way brought about this catastrophe? There is some suggestion of an insufficient light astern, but, if she had none at all there, that circumstance would be immaterial, since it was so light that the schooner was visible a quarter of a mile away. That, when she sighted the tug, she changed a half point to port, is not charged as a fault. It was a change in avoidance of collision greater than she was required to make. All the rule asked of her was that she should keep her course. The tug and barge claim that the "schooner changed her course to starboard in order to approach the anchorage grounds, not having observed the barge." There is no evidence to support this proposition. The witnesses from the schooner testify that she made no such change. No witness called by either party asserts that he saw her on any such course. She was not on it when the tug passed her, nor when the tow sighted her, nor when she was struck. It is a theory advanced to account for the collision, under the assumption that the tug passed at a safe distance, and that the barge kept in her wake. The mere fact of collision, however, equally well supports the inference that claimants' witnesses are mistaken as to both these propositions. And in

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this, as in all such cases, great weight may fairly be given to the improbability that a vessel, whose master knows she is being overtaken by a vessel, which is in such a position that she cannot help but know she is herself overtaking, should make any such change, when, under the plain text of the rule, no new navigation on her part is called for, and all she has to do is to keep her course, and let all overtaking vessels keep out of her way. It is sought to overcome this suggestion by contending that, after the tug had passed, the master of the schooner, who did not see the tow, would be likely to change to starboard to make an anchorage near Hampton Bar. But in our opinion the evidence does not warrant such a conclusion. The master of the schooner testified that he was bound up towards Middle Ground for an anchorage, where there was a little shoal water, which was about two miles beyond the place of collision; that he never anchored down at the place of collision, the water being 12 to 14 fathoms there,—too deep for his class of vessel,—whereas where he usually anchored, and intended to at this time, there were four or five fathoms, right up to the north and eastward of the Middle Ground light, between Hampton Bar and Middle Ground light. The mate of the schooner, in response to a question where they intended to anchor, replied, "Oh, around Hampton Bar." The chart indicates a bar which runs from Old Point to Newport News. It is designated as "Hampton Bar," its westerly end, opposite Middle Ground light, being designated as "Newport News Bar." Between that and Middle Ground light the water is 3½ to 5 fathoms. In answer to another question, he said they intended to anchor "somewhere on Hampton Bar to the eastward,—to southeast of us." Manifestly there is some clerical error in the record. To the "eastward" or "southeast" would be water beyond which the schooner had already passed. Further on in his cross-examination he stated that they made all ready for anchoring between the Capes and the Thimble; that at the time of collision they were all ready to let go the anchor; that they could not anchor at the place of collision, because there was too deep water; that they were intending to go up to the Middle Ground to anchor,—between Middle Ground and Hampton Bar,—in about 5 or 6 fathoms; and that in order to make the anchorage they would not have to change their course until they got a mile further up ("up-channel" he evidently meant), when a change from S. W. ½ S. to W. by N. would bring them where they wanted to go. These witnesses evidently designated the whole bar as "Hampton Bar," ignoring the fact that the chart designates its westernmost end as "Newport News Bar." Reading the testimony with chart before us, we are clearly of the opinion that at the moment of collision the schooner was a mile short of the place where it would be necessary to change her course—even if there were no other vessel to be considered—in order to make the anchorage she was aiming for. In view of this circumstance, we cannot find, in the absence of any evidence of a change of course, that she turned sharply to starboard and ran into the wake of the tug.

The decree of the district court is affirmed, with interest and costs.

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THE PROTECTOR.

THE GOLDEN AGE.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 5.

1. COLLISION—ERROR IN EXTREMIS.
An error in extremis cannot be urged in exculpation of a vessel whose prior negligence has brought about the situation in which a mistake in judgment is excusable.

2. SAME—TUG AND TOW—PASSING DISABLED VESSEL.
A tug passing down a stream with a schooner in tow, *held* in fault for a collision between her tow and another tug which had become disabled and was unmanageable, because she failed to see the disabled vessel, and note her condition or hear her alarm signals, until so close upon her that the collision could not be avoided.

Appeal from the District Court of the United States for the Southern District of New York.

Chas. D. Cleveland, for appellant.
Le Roy S. Gove, for the Golden Age.
Peter Alexander, for the Protector.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The court below was of the opinion that the collision between the tug Golden Age and the schooner in tow of the tug Protector was an accident of navigation, happening without any specific fault on the part of either tug, and for that reason dismissed the libel of the schooner. Each tug alleged in its answer, and attempted to prove, that the schooner was improperly navigated, and that the collision would not have taken place if she had followed the movements of the Protector. The court below was of the opinion that these allegations were unfounded, and we are of the same opinion, being satisfied that the schooner was properly navigated. We also agree with the court below in the conclusion that the Golden Age was not at fault. The real question to be determined upon this appeal seems to be whether the Protector should be exonerated.

The collision took place in broad daylight, on Newtown creek, a stream at that part of it running east and west, and 250 feet wide. An ebb tide, setting to the westward, was running slowly. The Golden Age, a tug about 60 feet long, while backing towards mid-stream from the northerly shore, preparatory to throwing her bow around to the westerly to go down stream, caught a submerged log in her propeller, her stern being at that time about mid-channel, and distant from the drawbridge westerly something more than 150 feet. She had heard the signal indicating the intention of a vessel approaching the draw from the eastward to pass through, and when she became disabled sounded alarm whistles, and as she saw the vessel, which proved to be the Protector, entering the draw, sounded alarm whistles again. At that time the Protector was proceeding westwardly with the libelant's schooner in tow on a hawser of 60 feet. As she approached the draw she slowed down to half speed. In the meantime the Golden

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Age was being carried by her previous momentum and the ebb tide slowly to the westward, and nearer to the southerly shore of the stream. The Protector did not observe the Golden Age until she was emerging from the draw. She proceeded towards her about 100 feet without changing her course or reducing her speed, and then attempted to avoid her by putting on full steam, and making a short turn to port, in order to pass between her and the southerly shore. She herself passed the Golden Age safely, but the schooner was brought into contact with the Golden Age a few feet aft of the forechains. The shock of the blow threw the schooner's bow towards the southerly side of the creek, and her bowsprit ran into a structure which pulled it out and caused other damage. The collision occurred about 300 feet to the westward of the bridge.

The testimony of the master of the Protector was to the effect that he had heard no alarm signals from the Golden Age; that he first saw the Golden Age just as the Protector got through the draw; and that he then blew two whistles, and got an alarm whistle in return, but did not discover that the Golden Age was disabled until he proceeded 100 or 125 feet further; and that he then noticed she had some sternway, but concluded to put on full speed and go to port, so as to pass between her and the southerly shore. According to his testimony, there was room for that maneuver, and no other was practicable.

After a careful study of the evidence in the record, we cannot resist the conclusion that the Golden Age should have been observed by the Protector before the latter entered the draw. Even though the Protector was not in fault because her attention was not attracted by the alarm whistles of the Golden Age, there were no obstacles to prevent the latter from being plainly seen from the time the Protector got within 100 feet of the draw. She was practically opposite the draw, and a short distance away, and had been observed moving backwards by the men upon the schooner before their vessel emerged from the draw. These men were presumably less likely to see her than those in charge of the navigation of the Protector, upon whom rested the duty of a more diligent observation. If the Protector had observed her before entering the draw, or even when entering it, she would have had sufficient opportunity, by the time she emerged from the draw, to discover her disabled condition and realize the danger of the situation. If on emerging from the draw the Protector had reversed and taken prompt measures to hold back her tow, we are satisfied the collision could have been avoided. There would probably have been a narrow margin of safety, but it is to be remembered that the tide would have been carrying the Golden Age further away from the Protector while the latter was engaged in holding back her tow. Doubtless at the time the Protector became actually aware that the Golden Age was incapacitated it was too late to take any effective measures to save collision. But the Protector must assume the consequences of failing to discover what she ought to have discovered. She cannot escape responsibility because when it was too late to avoid a collision she did all that skillful navigation required.

The case is one where a vessel in tow, without any fault on her part, has been brought by her tug into collision with another tug, and both

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tugs have been relieved from responsibility, one upon a theory, which the facts seem to warrant, that she became disabled and was without fault, and the other upon the theory of an error in extremis. An error in extremis cannot be urged in exculpation of a vessel whose prior negligence has brought about the situation in which a mistake of judgment is excusable. The Dexter, 23 Wall. 69, 23 L. Ed. 84; The Elizabeth Jones, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812.

The circumstances impose the burden upon the Protector of exonerating herself from fault by satisfactory proof that the collision was inevitable notwithstanding the exercise of proper skill and care on her part. The proofs do not satisfy that obligation.

The decree dismissing the libel as against the Golden Age is affirmed, with costs, and as to the Protector is reversed, with costs, and with instructions to the court below to decree for the libelant.

MAURER v. DICKERSON et al.

(Circuit Court of Appeals, Third Circuit. February 5, 1902.)

No. 21, September Term, 1901.

1. PATENTS—CONSTRUCTION OF CLAIMS—CHEMICAL PRODUCT.
A claim of a patent for a new chemical product, which is described with such clear marks of identification that it can readily be recognized aside from the process by which it is made, is not limited to the product of a particular process because such a process is described in the specification and is the only known process by which it can be produced.

2. SAME—VALIDITY AND INFRINGEMENT—PHENACETINE.
The Hinsberg patent, No. 400,086, for the chemical product known commercially as "Phenacetine," largely used in medicine since its production by the patentee, construed, and *held* not anticipated, valid, and infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Hector T. Fenton, for appellant.
Livingston Gifford, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal by the defendant below from a decree (108 Fed. 233) against him upon a bill for the infringement of letters patent No. 400,086, granted March 26, 1889, to the Farbenfabriken Vormals Fr. Bayer & Co., of Elberfeld, Germany, assignee of Oskar Hinsberg. The invention covered by this patent relates to a new pharmaceutical product, a new antipyretic and antineuralgic, known commercially as "Phenacetine," and chemically as "mono-acetyl-para-mido-phenetol." The specification contains a description of the new pharmaceutical product, and of the inventor's (Hinsberg's) process of production. The patent has a single claim, which is in the terms following:

"The product herein described, which has the following characteristics: It crystallizes in white leaves, melting at 135° centigrade: not coloring on

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addition of acids or alkalies; is little soluble in cold water, more so in hot water; easy soluble in alcohol, ether, chloroform, or benzole; is without taste; and has the general composition $C_{10}H_{13}O_2N$."

In our consideration of the case we naturally first take up the 10th, 11th, 12th, 13th, 14th, and 15th assignments of error, all of which relate to the opening paragraph of the specification, which is as follows:

"My invention relates to the production of a new pharmaceutical product, a new antipyretic and antineuralgic, obtained by reducing nitro-phenetol, and melting the phenetidin-chlorhydrate thus formed with dried sodium acetate and acetic acid."

The appellant insists that this introductory paragraph must be read as comprehending the three known varieties of nitro-phenetol, namely, the meta, ortho, and para varieties, and hence that the paragraph is false and misleading, because, admittedly, only by the employment of the para variety, viz., para-nitro-phenetol, can the end product of the patent specified in the claim be obtained. But this opening paragraph does not affirm that the new pharmaceutical product can be obtained by reducing all nitro-phenetols, including the meta and ortho varieties. Nor is it open to any such interpretation when read, as it must be in connection with the context. Immediately after the introductory paragraph above quoted, we find in the specification this statement:

"In carrying out my process practically I proceed as follows: Fifty kilos of the potassium salt of para-nitro-phenol are mixed with three hundred kilos of alcohol, adding forty kilos of bromæthyl. The mixture is heated in an autoclave at a pressure of three to four atmospheres during about eight hours. At this time the reaction is finished, whereby para-nitro-phenetol is obtained according to the following equation."

And then follows a description in full, clear, concise, and exact terms of the successive steps of the inventor's process, whereby the "new mono-acetyl-para-mido-phenetol" is produced. The suggestion that the description commencing with the words, "in carrying out my process practically I proceed as follows," is only one specific example of the invention, is not to be accepted. There is nothing in the patent to support the suggestion. Undoubtedly the specification, as a whole, evinces that the invention is limited to the para product.

The expert testimony convincingly shows that it would be plain to every chemist reading this patent that the para variety of nitro-phenol is the starting material for the production of the new antipyretic and antineuralgic, mono-acetyl-para-mido-phenetol, or phenacetine, covered by the claim.

We cannot see that Matheson v. Campbell, 24 C. C. A. 384, 78 Fed. 910, decides anything favorable to the contention of this appellant. The facts there differed radically from the facts of this case. The Hinsberg patent, unlike the patent involved in Matheson v. Campbell, is distinctly limited to one individual product, fully described and unmistakably identified.

The eighth and ninth assignments of error may be considered together. They relate to the Hallock publication, and the proofs generally of the prior art, as showing (as is claimed) want of novelty

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in the product of the Hinsberg patent, and that it was the result of mere laboratory selection, and not of invention or discovery.

Prof. Sadtler, who was the principal expert witness for the defendant, and testified at length as to anterior publications and the prior art, mentioned particularly the Hallock article and a publication by Wagner. However, comparing the body referred to by Wagner (the acetyl derivative of meta-phenetidin) with the product of the Hinsberg patent, he testified thus: "The two compounds are distinct bodies, although they are isomeric, and therefore both possess the formula $C_{10}H_{13}O_2N$." And when asked (XQ. 95), "Excepting these Hallock and Wagner references, you do not know of any other description of the product claimed in United States patent No. 400,086 [the patent in suit] in the literature prior to February, 1887, do you?" Prof. Sadtler answered, "I do not." Furthermore he testified as follows:

"XQ. 93. Please examine the same references again, and point out where such a body of the formula $C_{10}H_{13}O_2N$, and having the characteristics of crystallizing in white leaves and melting at 135° C., is described, and quote the same into this record. A. I have already stated in answer to XQ. 91 that the body referred to by Wagner was a different chemical substance from phenacetine, differing not only in melting point, but, probably, in some other characteristics. The body referred to by Hallock, which I consider the same substance as that now known as phenacetine, did not have either melting point or formula directly ascribed to it by Hallock. XQ. 94. It is therefore a fact, is it not, that none of the publications prior to February, 1887, cited by you, contain any description whatever of the product itself, which is claimed in the Hinsberg United States patent No. 400,086 [patent in suit]? A. As I have stated, the Wagner reference contains the exact formula that is cited in the description of the product in the Hinsberg patent, but, with the exception of this agreement on formula, I do not know of any other correspondence in properties with those mentioned in the patent. The Hallock article, referring to the acetyl compound of para-mido-phenetol, only agrees with the description in the Hinsberg patent in mentioning the product as a crystalline solid, leaving the other physical properties entirely unnoticed."

The quoted testimony of the defendant's chemical expert, which is corroborated by other evidence, really puts out of the case the Wagner publication as a pertinent reference, and also enables us to shorten our discussion of the proofs bearing on the prior art. The Hallock article, under the title, "Note on Para-Nitro and Para-Amido Phenetol," was published at Baltimore in the American Chemical Journal of 1879–1880. The object of Hallock's note seems to have been the correction of a supposed mistake of Cahours, a French chemist, who had treated phenetol with fuming nitric acid, obtaining both a solid and a liquid product. Hallock states that he repeated Cahours' "experiments with somewhat different results." Of the product of his first reaction Hallock says, "The product consisted of a solid and a liquid in varying proportions, according to the conditions of the nitration;" but he nowhere shows the condition of nitration employed in his experiments. There is, indeed, much reason for believing that the Hallock article shows unskillful experimentation and also downright mistakes. For example, the oily liquid which Hallock assumed was para-monomido-phenetol he states boiled at 253° centigrade; but Dr. Schweitzer testifies that "para-monomido-phenetol boils at

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244° centigrade, and a liquid boiling at 9° higher must be considered an absolutely different chemical individual"; and Dr. Chandler testifies to the same effect.

The only mention which Hallock makes of the crystalline solid which it is now said was phenacetine is found in the following paragraph, near the conclusion of his article: "These crystals, when treated with potassic hydrate, yield an oily liquid resembling aniline. It boils at 253° C. (uncorrected), and is doubtless para-monomido-phenetol. A portion of the salt appears to suffer decomposition, so that the amount of oil obtained was very small. This oil combines, like aniline, directly with acetyl chloride to a crystalline solid. In combination with carbon disulphide, it also yields a solid body." Prof. Sadtler therefore was quite right in stating that the body referred to by Hallock "did not have either melting point or formula directly ascribed to it by Hallock," and that "the Hallock article referring to the acetyl compound of para-mido-phenetol only agrees with the description in the Hinsberg patent in mentioning the product as a crystalline solid, leaving the other physical properties entirely unnoted."

These statements of Prof. Sadtler are very significant. Hallock did not investigate the crystalline solid. He made no test to identify it or to determine its composition. No one could discover from his article the nature of the crystalline solid referred to. Such vague data as he furnished were wholly inconclusive. Evidently Hallock did not consider the crystalline solid as possessing any value whatever. He did not regard it as worthy of investigation. His mention of it imparted no useful knowledge to the public. Certainly Hallock's article did not give phenacetine to the world. If there was any phenacetine in the crystalline solid it was not discernible. The crystalline solid as a whole was a poisonous substance. This much can confidently be affirmed. But even with the increased knowledge of the last 20 years no one can now determine with certainty what were the constituents of the crystalline solid mentioned by Hallock. The evidence shows that it may have contained one or more of nine different substances.

We have no hesitation in holding that the Hallock publication, supplemented by the whole body of evidence of prior knowledge, did not disclose the product of the Hinsberg patent, whether that product be regarded in its relation to the art of pharmacy or as a mere chemical substance.

We are not able to accede to the proposition that the product of the patent in suit was the result of mere laboratory selection, and not of invention or discovery. From a careful study of this record, we are convinced that what Hinsberg did involved invention and discovery of a highly meritorious character. The Hinsberg patent describes and claims an entirely new pharmaceutical product, which has found a very extensive and most valuable use as a medicine. The proofs quite justify us in accepting as correct the following views expressed by the complainants' chemical expert, Dr. Schweitzer:

"Hinsberg's invention is the invention of a new product. This product had never been produced or described or known or found any application in

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the arts before Hinsberg. Concerning the process of acetylization it is true that at the date of the Hinsberg patent other amines had, of course, been subjected to processes of acetylization, and it was generally believed that amines could be acetylized if means suitable to each case could be devised. Para-mono namido-phenetol had, however, never been subjected to such a process, and when Hinsberg found his process it resulted in a new and useful result, namely, a new product of surpassing utility, which result could not have been foreseen."

The seventh and sixteenth assignments of error involve the question of the date of Hinsberg's invention. We are of opinion that the court below did not err in accepting the date of the publication in the Centralblatt, namely, February 26, 1887, as the true date of Hinsberg's invention. That publication was put in evidence by the defendant himself. He may, indeed, have intended to use it for another purpose, but the publication was in the case as evidence for every legitimate purpose. Moreover, the defendant examined Prof. Sadtler in respect to the publication, and he testified as to its contents. Among other things he said:

"Perhaps I should add that the term 'acetphenetidin' is the synonym of mono-acetyl-para-mido-phenetol, and is the name by which Hinsberg called it in his Centralblatt article in 1887, and in the same article he called it ethylated and acetylated p-amido-phenol."

Again, the defendant stipulated as to the identity of the Hinsberg of the Centralblatt article with the Hinsberg of the patent in suit. We think that the Centralblatt article, even without Prof. Sadtler's testimony, sufficiently identified the subject-matter of the Hinsberg patent.

The view we have thus expressed under this head makes it unnecessary for us to consider the publications in the Rundchau for March and April, 1887; the Pharmaceutischa Post of May and October, 1887; and the Journal of the Society of Chemical Industry of March 31, 1888.

The third and fourth assignments of error relate to the construction of the claim. The patent in suit describes a new product with such clear marks of identification that it can readily be recognized aside from the process for making it. The patent also describes a process for making it which was new, and up to the present time is the only known process by which it can be produced. Since, then, there was novelty both in the process and product, Hinsberg might have had one claim for the process and another claim for the product. Rubber Co. v. Goodyear, 9 Wall. 788, 796, 19 L. Ed. 566; Merrill v. Yeomans, 94 U. S. 568, 569, 24 L. Ed. 235. But he made the single claim quoted at the opening of this opinion. That claim, in terms, is for the described product, having certain distinguishing characteristics which are set forth in the claim with great fullness. In our judgment, it is very clear that the claim is not restricted to the product made by the described process, but covers the chemical individual, however produced. We know of no rule requiring a construction limiting a claim for a chemical product to the described process, because the evidence shows that it cannot be made in any other way than by the process recited. No warrant for such a rule is to be found either in the statute or in the decisions.

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The 17th, 18th, 19th, and 20th assignments of error relate to the tests of identity specified in the claim, it being contended by the appellant that one of these tests, namely, "not coloring on addition of acids," is false, and the patent, therefore, void. The allegation is that the color test fails under the application of nitric acid. To sustain this defense, reliance is placed mainly, if not altogether, upon the testimony of Prof. Sadtler as to tests made by him, and an article by Hinsberg (the inventor) and Autenrieth published in the Archiv der Pharmacie in 1891.

It seems to us clear, under the language of the claim, "not coloring on the addition of acids," as well as under the proofs in the case, that if nitric acid is employed as a test it should be applied in such a manner as one skilled in the art would adopt for that purpose. It would not be a fair test, within the terms of the patent, to apply nitric acid at such a degree of strength as to destroy the phenacetine. The "addition" of an acid simply as a color test negatives the idea of such excess as to work decomposition or conversion of the phenacetine. Furthermore, the color test of the patent implies the use of acids under normal conditions and in the usual way. Hot acid is not suggested or implied, nor is a protracted test. These views are not only rational in themselves, but they have the support of the complainants' expert witnesses, Dr. Chandler and Dr. Schweitzer.

In respect to the color test mentioned in the patent, Dr. Chandler testified thus:

"I understand that the product of the patent is not colored when subjected to the action of acids in general, which simply act as acids, such as sulphuric, hydrochloric, acetic, etc., and nitric acid sufficiently dilute to act merely as an acid, but not strong enough to exert a peculiar action which no other acid can exert, and which it exerts only when strong enough to produce a nitro compound, by introducing into the substance in place of an atom of hydrogen the radical nitryl (NO), which no other acid in ordinary use contains."

Now, what the character of Prof. Sadtler's treatment of phenacetine with nitric acid was will appear from the citations from his testimony given below. Upon his examination in chief he said:

"I did find that ordinary nitric acid of U. S. Pharmacopœial strength, either hot or cold, did change its color immediately. In fact, I found that ordinary nitric acid not only colors it a decided citron yellow, but it has an energetic chemical action upon it, developing heat, liberating nitrous fumes (N_2O_4), and changing it into a compound, which, upon cooling, crystallize out in yellow needle-like crystals. I also found that on a short heating with the addition of hydrochloric acid some decomposition took place with liberation of para-amido-phenotol, when the addition of a few drops of dilute solution of chromic acid caused a deep ruby color to appear."

Upon cross-examination Prof. Sadtler said:

"I have not tried it with the official dilute nitric acid of the Pharmacopœia, as far as I know. XQ. 69. Is it not true that phenacetine must necessarily be converted into a nitro compound when, under the treatment with nitric acid, the yellow color appears? A. Yes; there must be some formation of the nitro-phenacetine, as far as I know, to produce the yellow color of the product."

At a later date, upon a re-examination in chief, Prof. Sadtler testified:

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"I prepared some dilute nitric acid of the exact strength (10 per cent.) of the acidum nitricum dilutum (U. S. P.), and, putting some in a test tube, added to it some phenacetine Bayer, and, corking the tube to prevent evaporation of the liquid, left it in my laboratory in the cold. When I looked at it the next morning, it had stood seventeen hours. The liquid was yellowish throughout from the result of the action and the nitro-phenacetine dissolved, and, on examination of the portion undissolved in the bottom of the test tube, I recognized, under the lens, the change of a portion of the white phenacetine into the yellow crystals of the nitro-phenacetine. A second experiment made in a watch crystal, loosely covered, turned out the same way. Acidum nitricum dilutum will therefore act in the cold after some hours."

It is quite plain to us that these experiments of Prof. Sadtler were outside of the color test of the patent. They involved the use of strong nitric acid, which was destructive of the phenacetine, or the use of heat, or the standing of the phenacetine in cold acid for 17 hours. It is to be noted, too, that in the latter case the change of color was recognizable only under a lens.

Speaking of the color test of the patent, Dr. Schweitzer testified:

"In making this test, to add heat, or to take strong nitric acid, or to allow it to stand for seventeen hours, is, in either case, an abnormal mode of procedure, which no person skilled in the art would have adopted, and which is therefore not included within the description of the test in the claim as the same would have been understood by a person skilled in the art."

As the article in the Archiv der Pharmacie was published in 1891, subsequent to Hinsberg's assignment of his invention, and two years after the issue of the patent to his assignee, it may be doubted whether it was evidence against the complainants below for any purpose. But, waiving this point, upon an attentive reading of the article we do not see that it tends to prove the falsity of the color test recited in the claim. The article really discloses a new and additional test for the identification of phenacetine by its nitration. It states that "if finely powdered phenacetine is covered with 10 to 12 per cent. nitric acid, and heated a short time to boiling, the liquid takes a yellow to orange color, and at the same time the hitherto colorless phenacetine is changed into an intensely yellow colored nitro compound." Again, it is stated that the quantity of nitric acid thus used is about double that demanded by the theory, and that the mixture is to be heated to boiling, and shaken vigorously for some time. The article further states that the nitration can be effected by shaking up the finely powdered phenacetine with dilute nitric acid, and adding concentrated nitric acid in slight excess in small portions, and with energetic shaking. The directions in this publication, we think, show a test additional to, and not inconsistent with, the statements contained in the claim of the patent. The defense based on the alleged falsity of the tests of identity specified in the claim is not sustained by the proofs.

Under the remaining assignments of error, viz., the 1st, 2d, 5th, and 6th assignments, we are called on to consider only one other question, namely, that of infringement. That question is free from difficulty. The identity in all particulars of the article sold by the defendant with the product made in accordance with the patent in suit is clearly established by the proofs. The article sold by the de-

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fendant responds to all the tests specified in the claim of the Hinsberg patent. Upon this point there is no conflict of evidence. Infringement then is sufficiently shown, even if the claim were held to be limited, as the appellant contends it should be, to the product when made with the materials and by the process described in the specification. None the less conclusive, of course, is the proof of infringement under the broader construction we have given to the claim.

Upon the most patient investigation of the case, we are persuaded that the record is free from error, and that none of the assignments should be sustained.

The decree of the circuit court was right, and accordingly it is affirmed.

AMERICAN ELECTRICAL NOVELTY & MANUFACTURING CO. v. NEWGOLD et al.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 68.

1. PATENTS—VALIDITY—DESIGN FOR LAMP.
The Hitzelberger design patent, No. 29,939, for a portable lamp body, *held* void on the ground that the patentee was not the originator of the design shown.

2. SAME—INVENTION—ELECTRIC LAMP.
The Misell patent, No. 617,592, for an electric hand lamp, claim 8, covering a combination of devices all well known in the prior art, is void, as failing to show any patentably novel combination or element of construction.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity for infringement of patent No. 29,939, granted to Gustave F. Hitzelberger, January 3, 1899, for a design for a portable lamp body, and of patent No. 617,592, granted to David Misell, January 10, 1899, for an electrical device. See 99 Fed. 567.

Thos. Ewing, Jr., for appellant.

John Bogart, for appellees.

Before WALLACE, Circuit Judge, and TOWNSEND, District Judge.

TOWNSEND, District Judge. This is an appeal from a final decree of the United States circuit court for the Southern district of New York, which dismissed the bill. 108 Fed. 957. The bill alleges infringement of patent No. 29,939, granted to Gustave F. Hitzelberger, complainant's assignor, January 3, 1899, for a design for a portable lamp body, and of patent No. 617,592, granted January 10, 1899, to David Misell, complainant's assignor, for an electrical device. The decree dismissing the bill, in so far as the design patent is concerned, is affirmed on the opinion of the court below. Even if the article in question were the proper subject for a design patent, and if there were any patentable novelty therein, the record shows that Misell, and not Hitzelberger, was the first to make the design.

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Infringement is alleged of the third claim only of the Misell patent. Said claim is as follows:

"The combination of a tubular casing, a reflector located in and protected by one end thereof, a lamp located in front of the reflector and within the casing, having one of its filament terminals extending rearwardly through the reflector to the rear side thereof, a cover for the opposite end of the casing connected with the opposite filament terminal, and a cylindrical battery contained within the casing, the cover when shoved home making contact with one pole and end of the battery, and forcing the opposite pole and end thereof into contact with the rearwardly extending filament terminal, substantially as described."

The history of the application for this patent in the patent office, and the prior art, show that the invention, if any, is a very narrow, one, and that it consists, as stated in the specification, merely "in the way of assembling the parts and in the manner of making the electrical connections, and in other details," as described and claimed.

Prior electric batteries, electric canes, electric stands, and bicycle and other portable electric lamps, disclose every element of the patented combination. Misell assembled the devices of the prior art in a single compact tubular structure, one end of which housed and protected a reflector and lamp. His chief object was to make the operation of inserting and replacing dry battery cells therein as simple as possible. His construction differed from the prior art in this respect, and, further, in function, by reason of its compactness, the absence of awkward projections, and the consequent adaptability to a variety of useful purposes as a portable, pocketable hand flash light or lamp capable of being held and operated in one hand, the light from which could be conveniently and accurately directed in a single beam to any desired point in the direction of the axis of the casing, and used for the examination of small and confined spaces. Magee patent, No. 572,431, shows a tubular casing inclosing in one end a reflector and lamp. Crowdus patent, No. 618,057, shows a tubular casing containing a series of wet batteries, in which contact with the circuits is effected in substantially the same manner as in complainant's device. Meyer patent, No. 595,327, for an electrical lighter for burners, in shape, construction, and operation is strikingly similar to the patent in suit. If the incandescent lamp of Magee be substituted for the lighter in the Meyer device, it would practically embody the construction covered by the claim in suit. Various patents for electric canes, notably Leigh, British patent No. 8,350 of 1894, and Levi, British patent, No. 97 of 1892, show incandescent lamps in the head of the cane, with wet or dry batteries so arranged in the body of the cane as to flash or glow when the cane is placed in a certain position; and, finally, Bugg patent, No. 614,318, and Paget patent, No. 599,975, cover the identical construction of the claim in suit, except that, in order to adapt them for use on vehicles, the lamp is located at the side instead of at the end of the casing.

What change was required in these prior devices in order to produce the construction covered by the claim in suit? First, in the earlier patents, to substitute for the old wet battery the later commercial, improved dry battery, which the constructor found ready for his use. That this did not involve invention is shown by various patents. Sec-

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ond, to elongate the Magee tubular casing, or cut off the electrical cane, and insert the dry battery at the rear end, or insert the Magee reflector and lamp in Paget. Complainant's expert admits that such a lamp would be substantially the lamp of defendants herein, and would come within the terms of the claim in suit. It is true that in complainant's lamp there is greater simplicity by reason of the absence of certain connections and adjustments shown in the structures of the prior art, but this result is due, not to any inventive skill of Misell, but to the superiority of the dry battery and its capacity for adjustment.

Complainant's lamp appears to be novel and unique in the mode of construction, by means of which the user may hold and operate it in one hand by a pressure upon the bar in the side of the tubular casing. But this element is nowhere referred to in the specifications or claims, and is not found in defendants' apparatus.

The conclusion reached is that the improved construction and increased utility of function of complainant's lamp over the structures of the prior art are either such as are due to elements not claimed by the patentee, or result from the use of novel devices not invented by him, and that the claim in suit fails to cover any patentably novel combination or element of construction.

The decree is affirmed.

THE LIVINGSTONE et al.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 83.

1. COLLISION—CONTRIBUTORY FAULT—BURDEN OF PROOF.

Where fault on the part of one vessel for a collision is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel, but any reasonable doubt as to whether the fault of the latter contributed to the collision should be resolved in its favor.

2. SAME—STEAMERS MEETING—CONTRIBUTORY FAULT.

The steamers Grand Traverse and Livingstone met in Lake Erie in the early morning, shortly before daylight, being on practically parallel courses. The night was clear, and they saw each other when four miles apart. When a mile and a half apart, and again when a mile and a quarter of a mile, the Traverse signaled her intention to go to the right, each time porting half a point, but she received no answer to her signals, the last only being heard by the Livingstone, which thereupon starboarded her helm, and a collision resulted. When the last signal was given and heard the vessels were in a position of safety, and had the Livingstone ported, as she should have done, or even kept her course, there would have been no collision. *Held* that, the navigation of the Traverse having been correct in all respects, neither the fact that her port light had gone out, nor that her lookout had temporarily left his post after the vessels had sighted each other, could have misled the Livingstone or contributed to the collision, which was due solely to the Livingstone's change of course after the signal of the Traverse was heard and understood; nor was the Traverse chargeable with contributory fault in failing to stop and reverse in the brief time remaining after the unexpected change of course of the Livingstone first created a situation of danger.

Appeal from the District Court of the United States for the Western District of New York.

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This cause comes here upon appeal by the owners of the Grand Traverse from a decree of the district court, Northern district of New York, holding both vessels in fault for a collision between the steam propeller Livingstone and the steam propeller Grand Traverse, and dividing the damages. 104 Fed. 918. The Livingstone did not appeal.

Harvey D. Goulder and John G. Milburn, for appellants.
C. E. Kremer, for appellee the Livingstone.
F. H. Canfield, for appellee Insurance Co.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

LACOMBE, Circuit Judge. The general facts of the collision are succinctly set forth in the opinion of the district judge, as follows:

"The collision occurred about half past five on the morning of October 19, 1896, when the steamers were on Lake Erie about a mile N. W. of Colchester Light, Ontario. The Traverse, a propeller 182 feet long and 33 feet beam, loaded with coal and merchandise, was proceeding up the lake on a voyage from Buffalo to Green Bay, Wis. Her course was W. by N. ¾ N. Her speed was about 8½ miles an hour. The Livingstone, a propeller 280 feet in length and about 38 feet beam, loaded with corn, was proceeding down the lake on a voyage from Chicago to Buffalo. Her course was E. by S. ½ S. Her speed was about 10½ miles an hour. The two vessels were thus on substantially opposite courses. The wind was blowing fresh from the west. Though dark at the time of the collision it was clear, and objects could be seen at a considerable distance. It was almost daylight. About half a mile ahead of the Livingstone was the Peshtigo, a propeller smaller and slower than the Livingstone, bound down the lake, substantially on the same course. Just prior to the collision she passed the Traverse about a quarter of a mile to the northward. The members of her crew on watch at the time heard the signals given by the Traverse and saw the vessels when they came together. The collision occurred in the open lake, with plenty of room in which to maneuver, and with nothing in the condition of the wind or water to render navigation difficult."

As to the fault of the Livingstone, the district judge found:

"When the vessels first sighted each other they were about four miles distant. Their masthead lights were first seen. They were then meeting nearly end on, and rule 17 [which requires that each shall alter her course to starboard so that each shall pass on the port side of the other] became applicable. When about a mile and a half distant the Traverse saw the red and green lights of the Livingston, and blew one blast, as required by rule 23, to indicate that she was going to the right. She ported half a point. This was correct seamanship. The Livingstone did not answer this signal, and continued on her course. The first mate of the Livingstone, who had charge of her navigation at the time, testifies that he did not hear this signal; in fact, no one on the Livingstone heard it, if the testimony of her crew is to be accepted. There is nothing at all improbable in this story. The whistle of the Traverse was clogged with water. Her mate testifies that he blew an unusually long time before he could get a distinct response, and as the wind was blowing the sound directly away from the Livingstone it is not surprising that it was not heard. When the vessels were from three-quarters of a mile to a mile apart, the Traverse, seeing at that time only the range and red light of the Livingstone, repeated the signal, and again ported half a point. There was no response from the Livingstone. When the distance had been reduced to a quarter of a mile, the Traverse blew a signal of one blast, and ported a third time. This signal was heard by the Livingstone, but still there was no answer. Assuming the Traverse to be guilty of all the faults charged against her, what

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was the situation at the time the third signal was given? The vessels were then about a quarter of a mile apart. Each could be seen by the other without the aid of lights. The Livingstone knew that the Traverse was directing her course to starboard. She knew it from the signal, and it was perfectly obvious without the signal. * * * What then was the manifest duty of the Livingstone? There can be no doubt that she should have ported also. Even had she kept her course, there could have been no danger. There was but one thing possible for the Livingstone to do at this time to bring the boats into collision, namely, to starboard, and that was the one thing she did do. The proof establishes this proposition beyond a doubt."

It is unnecessary to discuss such proof here, for by not appealing the Livingstone has conceded that the court was correct in finding that she did starboard at this time, and that by such starboarding the collision was brought about. It was, no doubt, an amazingly stupid piece of navigation, but not unprecedented. Whether the mate called out "Starboard" when he meant to say, and possibly believed he did say, "Port," or whether the wheelsman heard the order "Starboard," and did the opposite, we do not know. Such things have happened before, and an appreciation of the extent of human infirmity, even among men experienced and ordinarily cautious, makes us unwilling to accept the theory of the court below that no navigator could have committed such an error (assuming him to be sane and not intoxicated) unless in some way or other the other vessel misled him. We approach the consideration of the faults charged against the Traverse, therefore, without the postulate that an accident of this character, where the one vessel is concededly guilty of such gross fault, "could hardly have occurred without the concurring carelessness of the other." On the contrary, we understand the rule as laid down by the supreme court to be that where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor. The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; Ludvig Holberg, 157 U. S. 60, 71, 15 Sup. Ct. 477, 39 L. Ed. 620; The Umbria, 166 U. S. 404, 409, 17 Sup. Ct. 610, 41 L. Ed. 1053.

The first fault charged against the Traverse is that she displayed no red light. The district judge discussed all the testimony on this branch of the case, and, giving the greater weight to that of the observers on the deck of the Livingstone, reached the conclusion that the Traverse was thus in fault. In our opinion, the testimony from the Livingstone is not as strong as it might be. Witnesses who observed the Traverse just after collision testified that there was no lantern before the red screen. Had they said the lantern was there and unlit, they would more strongly have corroborated the testimony of the navigator, whose evidence on other points the district court discredited, as we do. The evidence shows that the lantern was put in place at the proper hour, and was observed afterwards before collision. It may have gone out, but certainly it was not removed from the

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WESTINGHOUSE ELECTRIC & MFG. CO. v. SARANAC LAKE ELECTRIC LIGHT CO.

SARANAC LAKE ELECTRIC LIGHT CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)
No. 63.

1. PATENTS—ANTICIPATION—ELECTRICAL DISTRIBUTION.
The Kennedy reissue patent, No. 11,081 (orginal No. 407,294), for an improvement in the method of distributing and regulating alternating electric currents by secondary generators, is void because the acts and omissions of the patentee, after the date of the alleged invention, worked an abandonment and dedication of the same to the public.

2. SAME—VALIDITY—INFRINGEMENT.
The Stanley patent, No. 469,809, for a system of electrical distribution by means of an alternating current generator and converters, or secondary generators, connected with the main-line conductors in multiple, includes, as a part of the invention shown, the so-called "Stanley rule" for ascertaining the proper length of primary coil, and so construed it was neither anticipated nor lacking in invention; nor is such patent void for prior use of the device at Great Barrington, Mass., which it appears was essentially for experimental purposes. Claims 1 and 3 also *held* infringed.

3. SAME—PRIOR PUBLIC USE.
The fact that a charge is made for the product of a new device or combination where the price charged is not remunerative is not conclusive evidence of public use, although it raises a presumption against experimental use, which can be overcome only by clear and convincing evidence.

Appeal from the Circuit Court of the United States for the Northern District of New York.

These are cross appeals from a decree of the circuit court, Northern district of New York. 108 Fed. 221. Suit was brought by complainant upon reissued letters patent No. 11,031 to Rankin Kennedy, September 24, 1889, and letters patent No. 469,809, to William Stanley, March 1, 1892. The circuit court held the Kennedy patent void, and the first and third claims of the Stanley patent to be valid and infringed.

J. Edgar Bull and Fredk. P. Fish, for complainants.
M. B. Phillipp and Chas. E. Mitchell, for defendants.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

LACOMBE, Circuit Judge. The Kennedy patent is for an improvement in the method of distributing and regulating alternating electric currents by secondary generators. The patentee arranged secondary generators (transformers) in multiple. They had theretofore been arranged in series. When so arranged, they became self-regulating as to primary current and power; in other words, each transformer would take its proper share of current, varying according to the number of lights burning on it, so that the lights on one transformer were independent of the lights on another transformer. In the more technical language of the claim, the system "consists in producing in two or more derived circuits, constituting the primaries

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of two or more secondary generators, a counter electro-motive force, which, when any secondary is open, is practically equal to the applied electro-motive force in its primary, and in controlling said electro-motive force by the current flowing in the corresponding secondary, when the secondary is closed in such manner that the current in the primary shall vary with, and be approximately inversely proportional to, the resistance in the secondary."

The judge who heard the cause at circuit held, among other things, that certain acts and omissions of Kennedy, taken together, worked an abandonment and dedication of his alleged invention to the public. We fully concur in his discussion of this branch of the case, which will be found in his opinion, and deem it unnecessary to add anything further, affirming so much of the decree as disposes of the Kennedy patent upon such opinion.

The patent to Stanley deals with the same branch of the electric art, and is an improvement on Kennedy's. After Kennedy had arranged his transformers in multiple, the lights on one transformer were independent of those on another, but nevertheless the candle power on any given transformer changed as the number of lamps lighted on that transformer varied. When more lamps were turned on the candle power of all went down, and when lamps were turned off the candle power of those remaining increased. Stanley's improvement was directed toward overcoming this defect.

The specification says:

"The factors of the operation of my system of distribution are employment of an alternating current generator supplying currents of approximately constant potential, main lines extending throughout the system of distribution, converters or transformers connected thereto, and translating devices located in the secondary circuits of the transformers, by the employment of which a sympathetic relation exists between the different operations of the system, to the end of maintaining a simple and accurate self-regulation, so that the absorption of energy by the generator is proportional to the energy usefully consumed. The current developed by the dynamo may be of as high potential as desired. * * * These converters may be of any construction, but are preferably constructed to have the greatest magnetic conductivity in their magnetic circuits. There are certain principles of construction which must be adhered to in the proportioning of the parts of the converter in order to secure the desired results, and which I will now state. It is necessary, in the first place, that the conductivity for magnetic force of the magnetic circuit of the converter shall be of so great value that when subject to all degrees of magnetization accruing from the various amounts of energy transformed its conductivity for magnetic force would be approximately the same. This point of construction is important for two reasons: First, the greatest economy of conversion is obtained when the rise and fall of magnetism in the core is proportional, as nearly as possible, to the rise and fall of the current in the primary coil, and this condition is attainable only by keeping the core far below the saturation point; and, second, the same condition secures the largest possible counter electro-motive force in the primary coils of the converters. This is indispensable for regulation, as hereinafter set forth. It is impossible to state the exact relation between the weight of the core and the strength of the current. I have found the minimum amount of iron necessary to produce satisfactory results to be one pound of iron for every twenty-five watts, which amount is equivalent to two pounds of iron per lamp, with the lamps heretofore generally used by me. * * * In the construction of the coils, P and S, the following principles are to be observed: The first thing to be determined is the length of the primary wire. This should be of such

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length that, reacting self-inductively upon its own magnetic circuit, the average counter potential so produced approximately equals the potential applied to the primary circuit. When so constructed, an ammeter will practically show no current when the secondary circuit is open. To obtain these results in practice, I use the following method: I first choose the percentage of efficiency to be obtained. Then, having selected a type of magnetic circuit affording as great magnetic conductivity as possible, I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counter potential and applied potential, multiplied by the current in the converter, shall equal the predetermined loss of energy inevitable in conversion, and vary the length of primary wire until the desired results are attained. It is obvious that the coefficients of induction in the dynamo and armature and converter may be made equal by energizing each circuit with the same induction. In the carrying out of my invention, it is possible to use the same coefficients of induction in the armature and the dynamo as are present in the primary circuit of the converter; but this equality is not necessary. Having by these means determined the length of the primary coil, the secondary is adapted to it in such a manner as to secure the desired potential according to the well-known laws affecting the operation of induction coils. I have usually related the potential of the secondary to the primary in the ratio of twenty to one. The size of the wire in the primary and secondary coils is in inverse proportion to their electro-motive forces."

The claims involved are:

"(1) In a system of electrical distribution, and in combination, an alternating current dynamo and converters electrically connected with the main-line conductors in multiple arc, and organized to transform the current in the main conductors into currents of less potential and greater quantity in the secondaries, each converter made with a primary coil containing such length of wire exposed to magneto-electric induction that, when operated by the dynamo with which it is to be used with its secondary circuit open, the electrical pressure and counter pressure in its primary circuit shall be equal with incandescent lamps or other translating devices in the secondary circuits, substantially as and for the purposes set forth." "(3) In a system of electrical distribution, and in combination, an alternating current dynamo and converters organized to transform the current generated by the dynamo into currents of less potential and greater quantity at or near the points of consumption, electrically connected with the main-line conductors in multiple arc, and having their primary circuits constantly closed, each converter adapted to the dynamo operating the system by making its primary coil of such length that, when supplied with its full proportionate share of the entire normal electro motive force of the machine, its secondary circuit being open, the electrical pressure and counter pressure in its primary circuit shall be approximately equal with translating devices in the secondary circuits of the converters to be cut out of the circuit when not in use, without the introduction of any resistance in the place of them, substantially as and for the purposes set forth."

As stated before, after the Kennedy improvement, a difficulty still existed in that the candle power went up or down as lamps on any particular transformer were turned on or off. Stanley suggested that the difficulty was due to an improper length of wire on the primary, and among much else he states precisely, specifically, and exactly what that length should be. The amount of wire for a given character of current supply cannot be stated in feet and inches, because it is, to some extent, dependent upon other things, such as the quality of iron employed in the core, the quality of copper used in the coils, the shape of the transformer, and the way the coils are applied. The Stanley patent, recognizing these variable elements, gives a rule applicable to all conditions. It says you may determine the proper length of the pri-

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mary coil by connecting the transformer in circuit with the dynamo with which it is to be used, and then winding on wire until the loss indicated by the formula C^2R, with the secondary circuit open, equals a certain loss of energy.

The field of invention lies in that obscure and difficult art, which is so hard to be understood by those who have not constant practical experience with its phenomena, its laws, and its nomenclature, and deals with a branch of that art which is still evidently in dispute between those who have carefully studied it. It is fortunate, therefore, that we find the concession in defendant's brief that the rule above set forth for determining just what shall be the length of primary coil is not found in any prior patents or publications; for, with this concession, it is easy to determine from the record that there is no anticipation shown. It is contended, however, by the defendant that this so-called "Stanley rule" is no part of the invention claimed; that there is nothing in the claims requiring the rule to be considered as a part of the invention thereby covered; that it is merely in the nature of a recommendation, the patentee saying, "In practice I use the following method," being the so-called rule. The first claim (and in that respect the third claim uses similar language) prescribes for the primary coil "such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used," under certain conditions, certain results will follow. Concededly the man skilled in the art would not have found in that art anything which would have told him precisely what that length of wire should be. The claim does not give any formula for determining what it should be, and, if the specification were equally silent, there might be some question as to whether Stanley had really contributed anything of importance to the art; certainly it would yet remain for others to inform the art just how to find out a length which would operate as indicated in the claim. But when the patentee in his claim enumerates as one element of his combination a wire of a length which will accomplish the result sought to be achieved, and his patent discloses a method for determining that length with mathematical exactness, his claim may fairly be sustained for the length thus shown, although it might be that some other length covered by the language of the claim, but not of the rule, would fall outside the claim. The "length of wire exposed," etc., "operated by," etc., "substantially as set forth," is the length of wire that the specification shows as the result of a given formula. The so-called "Stanley rule" is therefore a part of the invention disclosed and claimed in the patent,—indeed, it would seem to be the main part of that invention,—and, with the patent thus construed, the citations from the prior art show neither anticipation nor lack of invention. The whole argument of defendants on that branch of the case is so interwoven with the postulate that the Stanley rule is to be eliminated from the patent that when the postulate is not granted the argument becomes wholly unpersuasive.

The application for the Stanley patent was filed August 15, 1888, and defendant contends that prior to August 15, 1886, there was a public use by Stanley, at Great Barrington, Mass., of which town he was a resident, of a system of electrical distribution embodying the

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combination of apparatus described and claimed in his patent. The testimony touching this alleged public use more than two years prior to application is voluminous, and the judge who heard the cause at circuit has reviewed it at length. The combination of apparatus was set up there, wires were strung, lights were lit in the premises of users in the town, and the plant run, with some intermissions, from March 16th to June 16th, when the dynamo broke down, and it was never operated again. A charge was made for lights, an extremely small one, insufficient to pay expenses, and intended really as a convenient way by which Stanley might avoid embroiling himself with his neighbors, as he probably would do if he gave free light to some and not to all. The plant was not large enough to furnish all the lights the town could use. The invention was of a character which required testing under conditions which could be found only when the test was made in public, and continued for a reasonable length of time, and, under the authorities, the charging of an unremunerative price for the product of the combination is not absolutely controlling, though it raises a presumption against experimental use, which can be overcome only by clear and convincing evidence. We concur with the judge at circuit in the conclusion that the use was experimental, and in the argument by which he reached that conclusion, except that we are inclined to attach little, if any, weight to the fact that the engine and generator were out of public view in an old mill, and the converters locked up. Such protection against the elements, and against tampering with important and dangerous parts of the apparatus, would be expected, even in purely commercial public use. The most persuasive evidence, in our opinion, is found in the circumstance that, when the Great Barrington plant broke down after its brief experience, the persons in control of the Westinghouse Company, for whose benefit (as assignee of the future patent) the combination of apparatus was kept at work, were still so unconvinced that the practical success of the system had been demonstrated that they expended thousands of dollars more in erecting another plant for a further use of the combination of apparatus at Lawrenceville,—a use that, concededly, was wholly experimental.

Infringement of the first and third claims is not substantially disputed, except upon the theory that the amount of iron contained in the cores of defendant's transformers is such as to take them out of the claims of the patent. The claims do not specify any particular amount of iron, but defendant contends that a statement in the specification (quoted above) to the effect that the minimum amount of iron should be "one pound of iron for every 25 watts" must be read into the claims. A careful perusal of the text of the specification shows this contention to be unsound. The patentee states that there are certain "principles of construction which must be adhered to" in proportioning the parts of the converter in order to secure the desired results; that "it is necessary" that the conductivity for magnetic force of the magnetic current of the converter shall be of so great value that, when subject to all degrees of magnetization accruing from the various amounts of energy transformed, its conductivity for magnetic force would be approximately the same; that "this point of construction is important, for

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two reasons: First, the greatest economy of conversion is obtained where the rise and fall of magnetism in the core is proportional as nearly as possible to the rise and fall of the current in the primary coil, and this condition is attainable only by keeping the core far below the saturation point; and, second, the same condition secures the largest possible counter electro-motive force in the primary coils of the converters." "This," says the patentee in his specification, "is indispensable for regulation." Having thus set forth an "indispensable principle of construction," which may fairly be read into the claim, the patentee, in quite different language, states the precise proportion of iron to current which he has used successfully. "It is impossible," he says, "to state the exact relation between the weight of the core and the strength of the current. I have found the minimum amount of iron necessary to produce satisfactory results to be one pound of iron for every twenty-five watts, which amount is equivalent to two pounds of iron per lamp with the lamps heretofore generally used by me. Thus, in constructing a converter designed to supply twenty incandescent lamps, I use a core weighing about forty pounds." We are clearly of the opinion that defendants do not escape infringement of the first and third claims by reason of their using one pound of iron, instead of two, for a 50-watt lamp, so long as they adhere to the "indispensable principle" of construction set forth in the specification. Inasmuch as the proof shows that their construction does so adhere, their device infringes.

The decree of the circuit court is affirmed, with costs.

Memorandum on Motion for Reargument.

PER CURIAM. The motion for reargument is denied. It was supposed that upon the argument defendant's counsel practically conceded that the Stanley rule, as stated by the court, was not found in any prior patents or publications. If this supposition be incorrect, nevertheless we find in the record no prior patent or publication which states that one "may determine the proper length of the primary coil by connecting the transformer in circuit with the dynamo with which it is to be used, and then winding on wire until the loss indicated by the formula C^2R, with the secondary circuit open, equals a certain loss of energy." As to infringement, this court in sustaining the circuit court did not deem it necessary to add anything to the opinion below.

In re BEAVER COAL CO.

(Circuit Court of Appeals, Ninth Circuit. March 8, 1902.)

No. 740.

BANKRUPTCY—LIENS—VALIDITY.

Bankr. Act 1898, § 67f, providing that "all levies, judgments, attachments or other liens" obtained through legal proceedings against an insolvent within four months prior to the filing of a petition in bankruptcy against him shall be void if he is adjudged bankrupt, does not

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invalidate a lien obtained by the levy of an attachment more than four months prior to the bankruptcy proceedings, though dependent for enforcement on a judgment obtained within four months.

Petition to Review the Order and Judgment of the District Court of the United States for the District of Oregon.

See 110 Fed. 630.

On December 18, 1899, Alexander H. Kerr, the appellee herein, brought an action in the circuit court of the state of Oregon for Coos county against the Beaver Coal Company to recover $4,006.41, with interest and costs, and on the same day caused a writ of attachment to be issued in said action, and under said writ the sheriff seized certain personal property of the defendant in the action. On May 19, 1900, judgment was duly rendered in favor of the plaintiff for $4,233.66 and costs and disbursements, and the judgment entry contained an order directing the sale of the attached property to satisfy said judgment. On June 21, 1900, a petition in involuntary bankruptcy was filed against the Beaver Coal Company, and on August 3, 1900, it was adjudged a bankrupt. The appellee filed his claim against the estate of the bankrupt, asserting priority against the proceeds of the attached property. It was adjudged to have such priority, and from the decision of the district court so ruling the present appeal is taken.

W. W. Cotton, J. N. Teal, Wirt Minor, and Joseph Kirk, for petitioner.

Thomas G. Greene, Cecil H. Bauer, and William D. Fenton, for claimant.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The attachment was issued and levied more than four months prior to the institution of the proceedings in bankruptcy, but the judgment was made and entered within less than four months prior to such proceedings. The question presented on the appeal is whether the appellee's lien was dissolved by the proceedings in bankruptcy, by virtue of section 67f of the bankruptcy act, which provides as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same."

The appellee undoubtedly obtained a lien by virtue of his attachment. Under the statute of Oregon, the attached property is held as security for the judgment, and the law goes so far as to provide that, as against third persons, the attaching creditor "shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached." Hill's Ann. Laws Or. § 150. Was the lien so obtained by the attachment lost or merged in the judgment, so that it can be said that the lien under which the appellee made his claim against the bankrupt estate was "obtained" by the judgment? If so, under the plain provision of the bankruptcy act it must be declared null and void. It is not disputed that, if no judgment had been taken, the attachment lien would have been at the time of the institution of the

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proceedings in bankruptcy a valid and subsisting lien, for it had been obtained more than four months prior to such proceedings. We do not think the lien thus obtained was lost by reducing the claim to a judgment. By the law of Oregon, the lien of an attachment upon personal property is enforced by a provision in the judgment entry directing the sale of the attached property. The judgment order so made does not create a new lien nor discharge the old. It directs only the enforcement of the lien. It is similar in its nature to a decree for the foreclosure of a mortgage. It sustains the attachment lien, and subjects the attached property to its satisfaction. Construing the language above quoted from section 67f, we think it refers solely to liens, and that it does not mean that all judgments rendered within four months prior to bankruptcy shall be null and void. The use of the words "judgments * * * or other liens" indicates that it was the purpose of the act to avoid liens only which were obtained by judicial proceedings within the prescribed time, and not to declare void judgments as such. This view is in harmony with other provisions of the bankruptcy law. Judgments rendered, even after bankruptcy, are sustained as determining the claim thereby adjudged. Section 63a. In brief, the intention of the act was to set aside preference liens obtained by legal proceedings within four months prior to bankruptcy. The lien in the present case was "obtained" by the attachment. The bankruptcy law recognizes all valid liens that existed four months prior to bankruptcy proceedings. The attachment lien was not discharged nor was its nature altered by the judgment. It required no judgment or levy to make it good as a lien. It would have remained a valid lien if no judgment had been taken. No lien was "obtained" by the judgment, and none was lost thereby.

We are aware of decisions which are not in harmony with this view. In re Lesser (D. C.) 108 Fed. 201, Brown, district judge, held that the provisional lien acquired by an attachment more than four months prior to the filing of a voluntary petition in bankruptcy by the defendant is discharged where the judgment is not obtained until within four months prior to the filing of the petition. The court, in reaching this conclusion, was moved by the consideration that the attachment lien, under the laws of Connecticut, was but a provisional lien, only to be made effective through a judgment, levy, or demand, and by the opinion entertained by the court that all judgments obtained within the prescribed period were within the ban of the statute, and that unless a valid judgment could be rendered, and a valid levy could be made, no method remained to enforce the provisional lien. So, in Re Johnson (D. C.) 108 Fed. 373, Wheeler, district judge, held that the lien provided for under the statutes of Vermont does not become perfect as a charge upon the attached property until the recovery of the judgment and the taking in execution, and that, since the statute declares such judgment and levy void, a creditor, without them, has no perfect lien, and that the judgment and levy are wholly inoperative to perfect what was theretofore an imperfect lien. Lowell, district judge, however, in Re Blair (D. C.) 108 Fed. 529, held that by the statutes of Massachusetts an attachment creates a lien, and that the purpose of section 67f is to declare void only liens obtained by judgments, attach-

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ments, or other legal proceedings, within the prescribed period prior to bankruptcy. Said the court:

"Where, however, the lien is created by the attachment, the judgment and levy create no new or additional lien, but only enforce a lien already existing. Hence in this case the levy and execution did not affect the property attached with a lien avoided by the bankrupt act, but only enforced a lien already existing, which lien the bankrupt act expressly protected."

With these views, and with those of the court herein appealed from, we agree.

The judgment of the district court is affirmed.

TREAT, Internal Revenue Collector, v. TOLMAN.

(Circuit Court of Appeals, Second Circuit. February 28, 1902.)

No. 61.

1. POWER OF ATTORNEY—DEFINITION.
A power of attorney is an instrument by which the authority of an attorney in fact or private attorney is set forth.

2. WARRANT OF ATTORNEY—DEFINITION.
A warrant of attorney is an instrument authorizing an attorney at law to appear in behalf of its maker, or confess judgment against him.

3. INTERNAL REVENUE—STAMP TAX—WARRANT TO CONFESS JUDGMENT.
A provision in a note authorizing any attorney at law to appear in court on behalf of its maker and confess judgment against him is a warrant of attorney, and not a power of attorney, and is not within War Revenue Act June 13, 1898, requiring stamps on powers of attorney to sell or convey real estate and perform other acts.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a judgment entered in favor of the plaintiff in a cause tried in the circuit court for the Southern district of New York (106 Fed. 679) upon an agreed state of facts, the substantial portions of which are as follows:

The defendant is the collector of internal revenue of the United States in this district. The plaintiff made loans of divers sums of money to various persons, from whom he received 1,025 instruments or memoranda in writing, commonly known as "judgment notes," of which the following is a copy in blank:

"New York, ———, 189–.

"——— after date, for value received, I promise to pay, to the order of myself, ——— dollars, at room A, St. Paul Building, 220 Broadway, with interest at 6 per cent. per annum after maturity. And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any court of record to appear for me in such court, in term time or vacation, or before any justice of the peace, at any time hereafter, and confess a judgment, without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and ten dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment; hereby ratifying and confirming all that my said attorney may do by virtue thereof.

"$———."

The action is brought to recover the sum of $269.06, with interest from August 10, 1899, paid, as alleged, under protest, to the collector of internal

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revenue by the plaintiff. It represents the value of $1,025 revenue stamps, of the denomination of 25 cents each, with interest, affixed to 1,025 instruments in writing, which the government contends contains, not only a promissory note, but a power of attorney. The plaintiff did affix a two cent stamp to each of the promissory notes, but failed to affix the 25 cent stamp to the remainder of the instrument in writing, which the government contends is a power of attorney, and therefore taxable. The demand for the payment of the sum now sought to be recovered was made by the collector of internal revenue for the Second district, under and pursuant to the provisions of the act of congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes." The specific portion of the act relied upon by the collector in exacting payment of the tax, and now relied upon by him in defending this suit for refund, is that portion of Schedule A which reads as follows: "Power of attorney to sell and convey real estate or to rent or lease the same, receive or collect rent, sell or transfer any stock, bonds, scrip, or for the collection of any dividends or interest thereon, or to perform any and all other acts not hereinabove specified, twenty-five cents: provided, that no stamps shall be required upon any papers necessary to be used for the collection of claims from the United States, for pensions, back pay bounty, or for property lost in the military or naval service." The government contended that under the provision, "or to perform any and all other acts not hereinabove specified," the defendant was justified in exacting the payment of said 25-cent stamp tax. The court held that said instrument comprised a promissory note, and a separable clause providing for the entry of judgment on said note in case of nonpayment, and that the latter was not a power of attorney, within the meaning of said section, but was rather what is known as a "warrant of attorney."

Arthur M. King, for plaintiff in error.

Before WALLACE, Circuit Judge, and TOWNSEND, District Judge

TOWNSEND, District Judge (after stating the facts). The legislative intent, as disclosed by the special provisions of said schedule, appears to have been to tax those instruments by which one individual authorizes another to act on his behalf, either at meetings of corporations, or in the transaction of certain classes of business relating to real estate or corporate securities, or claims against the United States not enumerated in said proviso. The general clause, "or to perform any or all other acts not hereinabove specified," should, therefore, be interpreted, under the doctrine of noscitur a sociis, to refer to other classes of business of the same general character as those specifically enumerated. All of the acts within the scope of this classification are such as may be performed by any layman as an attorney in fact. The acts authorized under the instrument in question are confined to the exercise by an attorney at law of a court of record of his duties as an officer of the court in the proceedings taken in such court by virtue of his retainer. Such an instrument has always been recognized as a warrant of attorney, or evidence of authority to such attorney to represent the party as such officer of court in such a proceeding. The distinction between powers of attorney and warrants of attorney is clearly set forth in text-books and the decisions of the courts. A power of attorney is an instrument by which the authority of an attorney in fact or private attorney is set forth. By attorney in fact is meant one who is given authority by his principal to do a particular act not of a legal character. A warrant of attorney is an instrument authorizing an at-

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torney at law to appear in an action on behalf of the maker or to confess judgment against him. An attorney at law is employed to appear for parties to actions or other judicial proceedings, and is an officer of the court. And. Law Dict. pp. 92–94; 18 Am. & Eng. Enc. Law, p. 871; 28 Am. & Eng. Enc. Law, p. 685; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. It would seem that congress could not have intended by such general words to impose a tax upon this class of official acts done in the course of judicial proceedings. Such a tax, for the purpose of revenue, should not be extended by general or ambiguous words to embrace transactions without its expressed scope. Boyd v. Hood, 57 Pa. 98; Smith v. Waters, 25 Ind. 397.

This conclusion is strengthened by the fact that no case has been cited in which such warrants have been taxed. The provisions of the section in question accord with the provisions of preceding acts of a similar character.

The original federal internal revenue act, in enumerating the instruments required to be stamped, says:

"Any bonds, bills single or penal, foreign or inland bills of exchange, promissory note, or other note for the security of money, * * * any letter of attorney, except for invalid pensions, or to obtain or sell warrants, for land granted by the United States as bounty for military services performed in the late war." 5th Cong. Sess. July 6, 1797, c. 11, § 1 (1 Stat. 527).

The question as to the scope of this act was raised in Davis v. Ostrander, 1 Johns. Cas. 106. The court there decided that an arbitration bond was not within the provisions of said act. A note to this case reads as follows:

"On application of the clerk for the direction of the court, on the question whether powers of attorney in suits pending in court ought to be received without being stamped, the court said that such powers need not be stamped, and that the above-mentioned act applied to general letters of attorney only."

The clause in question, then, embodies a warrant of attorney, or evidence to the court of a retainer whereby a party to a pending cause has substituted an officer of court as his representative before the court in said cause. Such a warrant does not constitute said officer of court an agent or attorney in fact to carry on business, and is not within the provisions of this statute which authorizes the taxation of powers of attorney.

The decision is affirmed.

BRADFORD GLYCERINE CO. v. KIZER.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1902.)

No. 1,024.

1. EVIDENCE—OPINION—QUALIFICATION OF EXPERT.
A professor of chemistry, otherwise qualified as an expert, is not disqualified from giving his opinion as to the cause of an explosion of nitroglycerine, in answer to a hypothetical question, by the fact that he has had no practical experience in its manufacture.

2. SAME—SUBJECTS OF EXPERT TESTIMONY—MATTERS IN ISSUE.
Whether a plaintiff was guilty of contributory negligence, under the facts shown by the evidence, is a question for the jury, and a witness

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cannot properly be permitted to express his opinion thereon in answer to a hypothetical question.

3. SAME—COMPETENCY OF EXPERT—DISCRETION OF COURT.
Whether a witness is qualified to testify to a matter of opinion is a preliminary question, the determination of which rests largely in the discretion of the trial judge, and his decision is conclusive, unless clearly shown to be erroneous in matter of law.

4. APPEAL—REVIEW—EXCEPTIONS.
A charge to which no exception was taken at the time cannot be reviewed on a writ of error.

5. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—FACTS RAISING PRESUMPTION OF NEGLIGENCE.
Where, in an action by a servant against the master to recover for an injury caused by an explosion of nitroglycerine, manufactured by defendant, it was an undisputed fact that the nitroglycerine exploded spontaneously, and there was evidence tending to show that if pure and properly made it would not so explode, but that it would if impure, it was not error to charge that, if the jury found such to be the fact, then a presumption of impurity arose from the fact of the explosion.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

The defendant in error, plaintiff below, hereafter called the plaintiff, brought this action against the plaintiff in error, defendant below, hereafter called the defendant, to recover damages sustained on account of an accident caused by the explosion of nitroglycerine. The defendant was engaged in manufacturing and exploding nitroglycerine in oil and gas wells. The plaintiff, for some time before and at the time of the accident, was at work for the defendant as an oil-well shooter. It was his duty to haul the nitroglycerine from the magazine of the defendant, where it was stored, to oil and gas wells, place it in tin shells, lower it to the bottom of the well, and there explode it by dropping a heavy weight upon it. It is necessary that such nitroglycerine should be properly manufactured, and the materials composing it should be in proper proportions, and the nitroglycerine thoroughly washed in order to prevent spontaneous combustion. The plaintiff, at the time of the accident, had removed from the wagon in which he had brought it to the well the nitroglycerine, which was contained in cans. He had put a part of it into the tin shells, which he had lowered into the well, and the cans from which this nitroglycerine had been taken were returned to the wagon. While preparing to uncork another can in the derrick he heard a hissing sound in the wagon, and, glancing up, saw a blaze coming from one of the empty cans, and ran out of the derrick just as an explosion took place, which threw him down, injuring him about the head and body, where he was struck by pieces from the exploding cans. The negligence averred is furnishing nitroglycerine which had been improperly manufactured by the defendant, and was therefore likely to explode when handled in the usual way. The defendant claimed that the plaintiff was guilty of contributory negligence in using leaky cans and allowing his wagon to become saturated with the fluid. There was evidence that impure nitroglycerine would explode spontaneously, but that pure nitroglycerine would not so explode, and four witnesses were asked the following question by plaintiff's counsel: "Supposing a nitroglycerine shooter had brought in his wagon to an oil well a number of cans of nitroglycerine, and after having emptied the nitroglycerine therefrom in the month of August, and after said cans had been so opened and emptied, and were replaced in the wagon, and without coming in contact with any substance whatever, except the air, a blaze is generated, and appears upon and issuing from said cans, and the can explodes; to what, in your opinion, based upon your knowledge and experience, as above stated by you, would said blaze and explosion be attributed?" Allowing this question to be answered is alleged as error. The defendant placed a witness on the stand, and asked him whether, in his opinion, it was ordinary care and prudence in that business for a shooter, when the

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sun was shining, to allow his wagon, in the condition it was usually in, to stand open when he had taken out the cans, and whether, in his opinion, it would be likely to cause the substance inside to take fire. The answers to these questions were excluded on the ground that the witness was not shown to be qualified to answer them, and the court's ruling in that regard is alleged as error. Exceptions were also taken to the charge of the court to the jury, which rendered a verdict for the plaintiff, and the judgment is brought here for review on writ of error.

G. Harmon, for plaintiff in error.

B. F. James, for defendant in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The assignments of error relating to the testimony of the four expert witnesses for plaintiff, except that of the witness Young, cannot be considered, as no objection was made on the trial to the testimony of two of them, and to one there was only a general objection, without giving any reason for it. The objection to the answer of the witness Young to this hypothetical question was "that the witness had not been shown to have any practical knowledge of the question." This witness, sworn as an expert, was at the time of giving his testimony, and for the preceding fourteen years had been, filling the chair of advanced chemistry in the Ohio Normal University. He showed that he had studied the subject of nitroglycerine, gave the formula by which it was manufactured, and his testimony agreed with that of the manufacturers and the other chemists, to whose testimony no objection was made. He qualified as an expert, the question asked him was a hypothetical one, and his lack of practical experience was no ground for its exclusion. Bierce v. Stocking, 11 Gray, 174; 12 Am. & Eng. Enc. Law, 433.

2. The question propounded to the witness Smith, asking whether, in his opinion, it was ordinary care and prudence in that business for a shooter, when the sun was shining, to allow his wagon, in the condition it was usually in, to stand open, when he had taken out the cans, was properly excluded, as it called for the determination of an issue which was for the jury. If he had been qualified, he could have sworn to the chemical action of the sun's rays on the nitroglycerine in the wagon, but it would not be for him to say whether such exposure was negligence, as that was an inference to be drawn from the circumstances proven. Motey v. Granite Co., 20 C. C. A. 366, 74 Fed. 155–159, and cases there cited. The other question was properly excluded on the ground that the witness was not shown to be qualified to answer it. He was a well-shooter, and had had considerable experience, but it was not shown that he had peculiar knowledge of any chemical action that might be produced by the sun's rays upon the substance in the wagon. It was urged that his long experience in handling nitroglycerine and assisting in its manufacture qualified him to express an opinion, but such qualification is a question for the trial judge, and its determination is very largely in his discretion. Mr. Justice Gray, in Manufacturing Co. v. Phelps, 130 U. S. 520–527, 9 Sup. Ct. 601, 603, 32 L. Ed.

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1035, thus tersely states the rule: "Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial, and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law. Perkins v. Stickney, 132 Mass. 217, and cases cited; Sorg v. Congregation, 63 Pa. 156." See, also, Spring Co. v. Edgar, 99 U. S. 645–658, 25 L. Ed. 487, and cases cited.

3. The defendant complains here of the charge of the court on the question of contributory negligence, but the charge given accords substantially with the request made by the defendant, and correctly stated the law; but if it had not been requested, and had not correctly stated the law, no exception having been taken at the time, it could not be reviewed here.

4. There was no proof on the subject of how the nitroglycerine in question in this case was made. A number of witnesses swore that pure nitroglycerine will not explode spontaneously, and that impure nitroglycerine will so explode. The court charged the jury that if they believed from the evidence that pure nitroglycerine would not explode spontaneously, and that this nitroglycerine did so explode, they could take the fact of the explosion into consideration in determining the question as to the purity of the nitroglycerine; but that in considering that question, if they found that pure nitroglycerine would explode as well as impure nitroglycerine, the fact of the explosion could not be considered as bearing upon the question of purity, which instruction was immediately followed by the instruction complained of, which is:

"When there is, as in this case, an explosion of this nitroglycerine, there is a presumption arises that it was from some inherent defect, something in the character of the nitroglycerine itself, due to surplus acid or some other cause, that made it explode, without the intervention of any other agency. Now, that being the presumption, unless that is explained by the evidence, you are warranted in coming to the conclusion that the defendant furnished the plaintiff with impure nitroglycerine, and in that departed from his duty as an employer."

When the jury returned for further instructions this part of the charge was practically repeated, and the defendant complains that after the fact of the explosion, which was admitted, appeared in the case, it erroneously placed upon him the burden of proving that he was free from negligence. Under the evidence in this case, there could be no claim that the cause of the accident could not be accounted for.

It was accounted for if nitroglycerine, when properly manufactured, could not explode spontaneously, and this nitroglycerine did so explode. The jury were compelled to find the other necessary facts before they could infer negligence from the explosion. When that prima facie case was made, the burden of rebutting it was upon the defendant. The case does not come within the rule that the fact of accident carries with it no presumption of negligence on the part of the employer, laid down in Railroad Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, and Patton v. Railway Co., 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361, nor within the cases in the state courts referred to in defendant's brief. Under the facts in this case, negligence in the

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manufacture of the nitroglycerine would be presumed in the absence of evidence showing care in the manufacture of it, as the explosion raises a presumption of negligence, if there is no explanation of the real cause for such explosion. Judson v. Powder Co., 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, and the note to the same case in 29 L. R. A. 718; Schoepper v. Chemical Co., 113 Mich. 582, 71 N. W. 1081.

We find no error, and the judgment is affirmed.

FONG MEY YUK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1902.)

No. 716.

CHINESE—FAILURE TO OBTAIN CERTIFICATE OF RESIDENCE—DEPORTATION—JURISDICTION.

Act Cong. May 5, 1892, gives a commissioner jurisdiction to hear the charge against a Chinaman of being in the country without a certificate of residence, though section 6, providing for issuance of such certificates to Chinamen, declares that one not obtaining a certificate within a certain time shall be adjudged to be unlawfully in the country, and shall be arrested and taken before a United States "judge"; the act, after continuing in force, by section 1, all laws prohibiting and regulating the coming in of Chinamen, and declaring, by section 2, that any Chinamen adjudged under any of said laws not entitled to remain in the country shall be deported, providing, by section 3, that any Chinaman arrested under "this act, or the acts hereby extended," shall be adjudged unlawfully in the country, unless he shall establish his right to remain to the satisfaction of "such justice, judge, or commissioner"; and Act Cong. March 3, 1901 (31 Stat. 1093), providing that the district attorney may designate the commissioner before whom a Chinaman, arrested for being unlawfully in the country or having unlawfully entered, shall be taken for hearing.

Appeal from the District Court of the United States for the Northern District of California.

The appeal in this case is taken from the judgment of the district court affirming an order of deportation of the appellant, Fong Mey Yuk, who was arrested at San Francisco on April 20, 1901, upon a warrant issued by a United States commissioner upon a complaint sworn to and lodged with said commissioner charging the appellant with being a Chinese manual laborer without the certificate of residence required by the act of congress entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892, and the act amendatory, approved November 3, 1893. On May 2, 1901, the appellant was brought to trial before said commissioner. Upon the evidence adduced, the commissioner made his findings and judgment of deportation, holding that the appellant is a Chinese manual laborer and a subject of the empire of China, and that she was found within the limits of the United States without the certificate of residence required by said acts, and that she had not shown that she had been unable to obtain such certificate for any of the reasons which the act specifies as excuses therefor.

Lyman I. Mowry, for appellant.

Marshall B. Woodworth, U. S. Atty., and Benjamin L. McKinley, for the United States.

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Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appeal presents two questions—First, had the United States commissioner jurisdiction to hear and determine the charge set forth in the complaint? And, second, was the evidence sufficient to justify his judgment? Section 12 of the act of May 6, 1882, provides that any Chinese person found unlawfully within the United States shall be deported to the country whence he came, after being brought before some "justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States." Section 12 of the act of July 5, 1884, provides substantially the same remedy as that of the act of May 6, 1882. Section 13 of the act of September 13, 1888, provides that any Chinese person found unlawfully in the United States may be arrested upon a warrant issued upon a complaint under oath "by any justice, judge, or commissioner of any United States court," and when convicted upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. Section 2 of the act of May 5, 1892, provides "that any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China." The previous acts had required that such person be removed to the country whence he came. Section 6 makes provision for the issuance of certificates of residence to Chinese persons lawfully in the United States, and enacts that "any Chinese laborer within the limits of the United States who shall neglect, fail or refuse to comply with the provisions of this act, or who after one year from the passage thereof shall be found within the jurisdiction of the United States without such certificate of residence, shall be decreed and adjudged to be unlawfully within the United States and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies and taken before a United States judge." It is contended that all the prior legislation referred to Chinese who unlawfully entered the United States, and that by the act of 1892 provision was made for the deportation of a different class,—those who, although they had entered lawfully, had failed to acquire the right to remain, and were therefore unlawfully within the United States; and it is contended that as to this second class the jurisdiction to order deportation is conferred only upon "a United States judge." Section 1 of the act of May 5, 1892, provides: "All laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act." Those laws, so continued in force, it may be conceded have reference to prohibiting and regulating the coming into this country of Chinese

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persons and persons of Chinese descent, and not the deportation of Chinese persons found to be unlawfully within the country. There would be no authority in the act of May 5, 1892, for the present proceeding, were it not for section 3, which provides as follows: "That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States." That section declares in plain terms that a proceeding may be instituted before a commissioner against any Chinese arrested under the provisions of the act of May 5, 1892. It has the effect to enlarge the provision of section 6, and to enact that the proceeding may be not only before a United States judge, but that it may be before a justice, judge, or commissioner. If there be any doubt that this is the true construction of the act, it is dispelled by the act of March 3, 1901 (31 Stat. 1093), which provides as follows: "That it shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States or having unlawfully entered the United States to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing."

We find no ground for holding that the evidence is insufficient to justify the findings, judgment, and order of deportation. The commissioner saw the witnesses, heard their testimony, and reached the conclusion that the appellant was born in China, and that she was a laborer, and that she had not procured the certificate entitling her to remain in this country, as provided by law. There is no contention that in so holding he was guided by any erroneous view of the law or the evidence. Such being the case, we would not be justified in disturbing his conclusion, even if we deemed it contrary to the weight of the evidence, which we do not. The burden of proof rested upon the appellant to prove to the "satisfaction of the court" the facts upon which depended her right to remain in the United States. This she failed to do.

The judgment of the district court is affirmed.

ST. LOUIS MIN. & MILL. CO. OF MONTANA et al. v. MONTANA MIN. CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1902.)

No. 714.

MINING—EXTRALATERAL RIGHTS.

The owner of a mining claim given by Rev. St. § 2322, the right to possession of surface and everything within his claim, except veins having their apices in the surface of another claim, and also given the right to follow into adjoining claims veins having their apices in his claim, cannot tunnel from his claim through an adjoining patented claim till he strikes a vein therein having its apex in his claim; section 2319

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declaring "the lands" in which minerals are found open to purchase, and section 2325 authorizing a patent for "any land" located for minerals, indicating that the patent is a grant of the land, with the rights incident to common land ownership.

Appeal from the Circuit Court of the United States for the District of Montana.

Toole & Bach, for appellants.

W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The St. Louis Mining & Milling Company is the owner of the St. Louis lode mining claim, and the Montana Mining Company, Limited, the appellee, is the owner of the Nine Hour lode mining claim, which adjoins the St. Louis claim on the east. The appellants were proceeding to drift a tunnel 260 feet underground horizontally from the St. Louis claim eastward, and into the Nine Hour claim, for the purpose of reaching and mining a lode which had its apex in the St. Louis claim, and which they had the right to pursue on its downward course, as it passed with its dip to the eastward out of their side line into the Nine Hour claim. It was stipulated that the tunnel, if projected in the course in which it was being drifted, would reach the vein or lode which had its apex within the St. Louis claim, and that in the course of its progress there would be encountered no other vein, lode, or ledge. At the suit of the owner of the Nine Hour claim, the circuit court enjoined the appellants from proceeding further with said tunnel. From that decree the present appeal is taken.

The case involves the interesting question whether the owner of a mining claim who has the right to pursue beyond the side lines of his claim a vein or lode which has its apex within his own claim is confined in his right to operations within or upon the vein itself, and is without authority to otherwise enter the adjoining claim. The appellants contend that a patent for a mining claim by its terms conveys only the surface of the claim, together with all veins, lodes, or ledges having their tops or apices within the surface boundaries thereof, and that the granting words of the appellee's patent circumscribe the right of the grantee thereof to the precise estate granted, and that since the mining law confers the general right to explore and purchase the mineral lands of the United States the appellants, in this instance, have the right to explore within the Nine Hour claim, and thereby to reach their own property, so long as they interfere with no right granted to the owners of the latter claim. It is true that the statute (section 2322, Rev. St.), and the patents thereupon issued, confer upon the locators of mining claims in terms only "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the

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vertical side lines of such surface locations"; and that the statute further specifies that such locators, notwithstanding their extralateral rights, shall have no authority to enter upon the surface of a claim owned or possessed by another. But the appellants must find in the same statute the full measure of their own right. What are the rights that are given by the patent to the owners of the St. Louis claim? They are given the right of possession of the surface and of everything within their own claim, except the veins or lodes therein, which may have their apices in the surface of another claim, so as to give the owner of the latter extralateral rights, and they are given the right to follow outside of their side lines and into adjoining claims all veins or lodes which have their apices in their own claims, so as to confer extralateral rights. This is their right, and no more. There is no warrant for saying that they have any general right of exploration within land of an adjoining patented claim, whether upon or below the surface. The right of exploration is given for the purpose of making discovery of mineral. Of what avail would be the right of exploration if no benefit could be obtained from discovery made thereby? The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives the appellants the right to follow the vein which they were seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws, as we construe them, grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute (section 2319) declares "the lands" in which valuable mineral deposits are found to be open to occupation and purchase; and section 2325 provides that "a patent for any land claimed and located for valuable deposits may be obtained in the following manner." These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common-law ownership. The reason for specifying in the description of the grant the "veins, lodes, and ledges" is for the purpose of defining what is granted in addition to the land, namely, the right to pursue such veins, lodes, and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In Copper Co. v. Heinze, 64 Pac. 326, 53 L. R. A. 491, the supreme court of Montana held, in substance, that the owner of a mining claim is prima facie the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said:

"Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines ex-

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tending in their own direction, when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant."

Of similar import is State v. District Court of Second Judicial Dist. of Silver Bow Co. (Mont.) 65 Pac. 1020.

In Doe v. Waterloo Min. Co. (C. C.) 54 Fed. 935, Judge Ross said:

"Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law."

In Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 63 Fed. 540, Judge Hawley said:

"Hands off of any and every thing within my surface lines, extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim."

We find no error in the decree of the circuit court. The decree is affirmed.

UNITED STATES v. VAN WINKLE.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1902.)

No. 733.

1. MINERAL LANDS—CUTTING TIMBER—CHARACTER OF LAND—DETERMINATION—MAPS—ADMISSIBILITY.
   On an issue whether public land on which timber was cut by defendant was mineral land, within Act Cong. June 3, 1878, authorizing residents of certain mineral districts to cut timber on mineral lands, a geological map of the territory in which the lands were located, issued by authority of interior department, was admissible for use in connection with the evidence of witnesses, and to show the general nature of the land described, its elevation and surroundings, and its situation with relation to lands proven to be mineral, where not in any way purporting to show the nature of the land in controversy, or to indicate that it was mineral.

2. SAME—PUBLIC RECORDS—HARMLESS ERROR.
   The admission of a certified copy of the "general description of the survey" of the township in which the land in controversy was situated, containing no reference to the particular land, but referring in general terms to the township, stating that it was mountainous, and that considerable placer mining had been done along a certain creek, and expressing the opinion that undeveloped quartz ledges existed in the ridges, even if error, could not have prejudiced plaintiff.

3. SAME—DIRECTION OF VERDICT.
   There being evidence that in cutting the timber defendant acted under what he believed to be the lawful authority of the United States, a request that the court direct a verdict for the United States for the full amount prayed for, on the ground that it had been proven that the lands were public lands, and that defendant had cut the timber without authority, was properly refused, because ignoring defendant's good faith.

4. SAME—MEASURE OF DAMAGES.
   In case defendant cut the timber in good faith, he was only liable for the value of the timber as cut, and not as manufactured.

In Error to the Circuit Court of the United States for the District of Idaho.

The United States brought an action against Isaac Van Winkle, the defendant in error, to recover the value of 90,000 feet of lumber, of the manu-

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factured value of $7 per thousand feet, which lumber and logs were alleged to have been wrongfully and unlawfully cut from the public domain of the United States in the land district of Boise, Idaho. The defendant in error set up the defense that the lands from which said lumber and sawlogs were cut was mineral land of the United States, within the meaning of the act of Congress approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada and the territories to fell and remove timber on the public domain for mining and domestic purposes," section 1 of which provides as follows: "That all citizens of the United States and other persons, bona fide residents of the states of Colorado or Nevada or either of the territories of New Mexico, Arizona, Wyoming, Dakota, Idaho or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove for building, agricultural, mining or other domestic purposes any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under the existing laws of the United States except for mineral entry, in either of said states, territories or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: provided, the provisions of this act shall not extend to railroad corporations." The jury returned a verdict for the plaintiff in error for the sum of $36.

R. V. Cozier, for the United States.

Fremont Wood and S. H. Hays, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We are precluded from considering the interesting and important question principally discussed in the brief of the plaintiff in error, whether the circuit court erred in the instructions given and refused to the jury concerning the meaning of the words "mineral lands," as used in the statute of June 3, 1878, for the reason that it appears from the record that no exception was taken to the instructions so given or refused. There remain, therefore, for our consideration, only the rulings of the court in admitting certain documentary evidence, and in denying the request of the plaintiff in error for peremptory instruction to the jury to find a verdict in its favor. The defendant in error, to support his defense, offered in evidence a geological map of Boise Basin, in which were located the lands from which the timber was cut, the map having been issued by the authority of the department of the interior as "Part III., P. 1, XCVI., 16th Annual Report of the Director of Geological Survey." It was admitted in evidence, over the objection of the plaintiff in error, that it was incompetent and hearsay. The map was identified, and shown to be substantially correct, so far as it represented the location of mines thereon. It was used in connection with the evidence of several witnesses. We think it was admissible for that purpose, as well as for the purpose of showing the general nature of the land described in the complaint, its elevation and surroundings, and its situation with relation to lands which were proven to be mineral. It does not in any way purport to show the nature of the precise land in controversy, or to indicate that it was mineral land. We are unable to perceive how its admission in evidence could have been harmful or prejudicial to the plaintiff in error.

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Error is assigned to the admission of the certified copy made by the surveyor general of Idaho of the "General Description of the Survey" of the township in which the lands are situated. The general description so admitted in evidence contains no reference to the particular land which is the subject of the suit. It refers in general terms to the township in which the land is situated, states that it is mountainous, etc., and that there has been a great deal of placer mining done along Grimes creek, and expresses the opinion that undeveloped quartz ledges exist in the ridges. We are inclined to the opinion that in an action such as this, where the nature of the land in controversy was a question in issue involved, reference might properly be had to the records of the land office as prima facie evidence, at least, of their character; but, in any view of this particular evidence, the plaintiff in error could not have been injured by its admission.

Nor was the plaintiff in error entitled to a peremptory instruction to the jury to find a verdict as requested. The request was that the court direct a verdict for the plaintiff for the full amount prayed for in the complaint, upon the ground that it had been proven that the lands were public lands, and that the defendant had not only entered and cut timber of the quantity and value manufactured, as charged in the complaint, but that he had done so without authority from the plaintiff in error, and without effort or attempt to comply with the rules and regulations of the secretary of the interior governing the cutting of timber from the public lands. This instruction, as asked for, ignores the right of the jury to take into consideration the question of the good faith of the defendant in error in cutting the timber as he did upon the public lands. There was evidence that in cutting the timber he acted under what he believed to be the lawful authority of the United States. Such being the case, it was the province of the jury to determine whether his action was in good faith, and to measure the damages accordingly. If he acted in good faith, the law required the verdict of the jury to be for the value of the timber as cut, and not as manufactured. Gentry v. U. S., 41 C. C. A. 185, 101 Fed. 51. In the charge which was given by the court, the jury was instructed that in fact the defendant had not complied with the rules and regulations of the secretary of the interior concerning the cutting of timber upon government lands. From the amount of the verdict, which was $35, it is evident that the jury found that the timber was cut in good faith.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

RABE v. CONSOLIDATED ICE CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 32.

1. MASTER AND SERVANT—GUARDING MACHINERY—FACTORY—WHAT CONSTITUTES—COMMERCIAL ICE HOUSE.

   A commercial ice house, which is extensively equipped with machinery, and in which numerous operators are employed, is a "factory," within Laws N. Y. 1897, c. 415, providing that "shafting, set screws and machinery of every description shall be properly guarded" by the owners

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of factories where machinery is used, and declaring that the term "factory" shall be construed to include also a "mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor."

2. SAME—HARMLESS ERROR.

Error in charging that the factory statute had no application to a commercial ice house was harmless, where the court further charged that it was a rule of common law, irrespective of statute, that machinery must be safe, and that in the case of a set screw (the instrument by which plaintiff was injured) it might be dangerous or safe according to its situation, and according to the parties called on to work on the machine, and therefore left to the jury to determine as a question of fact whether the screw was dangerous or safe, the state courts having construed the statute as not imposing duties on an employer greater than those imposed by the common law, etc.

In Error to the Circuit Court of the United States for the District of New York.

John S. Wolfe, for plaintiff in error.
Thomas D. Adams, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the plaintiff in the court below, and brought this action to recover damages for personal injuries alleged to have been received by the negligence of the defendant. He was an employé of the defendant, assigned to attend certain friction apparatus in the elevator room connected with the defendant's ice house. In the same room, but at some little distance from his post of duty, there was a revolving shaft having a collar and a projecting set screw. The plaintiff had no duties with respect to this part of the apparatus, or which would take him to the place at which the collar and set screw were. Nor did any of the employés have any occasion to go there except to oil or repair the apparatus when the shaft was not in motion. While the plaintiff was attending to his ordinary duties, he observed a rope winding upon the shaft near the set screw, which had been thrown there by the inadvertence or carelessness of some of the employés, and as the rope endangered the apparatus the plaintiff immediately went to it, and attempted to remove it. In the attempt he was badly hurt, the set screw being the cause, or a contributory cause, of the accident.

By statute (Laws N. Y. 1897, c. 415) it is provided, among other things, that "shafting, set screws and machinery of every description shall be properly guarded" by the owners of factories where machinery is used. The statute declares that the term "factory" shall be construed to include also "mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor."

It is insisted for the plaintiff in error that upon the trial of the action the court below erred in instructing the jury that the factory statute had no application to the case, and the only assignment of error is based upon the exception taken to that part of the judge's charge. The material part of the judge's charge was as follows:

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"The controversy upon the part of the plaintiff is based upon the negligence of the defendant in failing to guard the set screw at the free end of this revolving shaft, and in that connection the law of the state of New York of 1897 has been called to your attention, which I think has been correctly stated as providing that all set screws in manufactories where operatives are employed shall be guarded. Of course, you appreciate just what this set screw is. In this case it was placed there to fasten a collar so that it would not revolve,—so that it would stay upon the larger motive power shaft,—which, according to the testimony, was revolving at the rate of from 42 to 125 revolutions a minute. The head of the screw protrudes above the collar, and when rapidly revolving it may not be seen by the operative. It is in such a situation that it would be apt to catch upon anything that was thrown in its way. This law provides that such set screws shall be guarded, but I think I will charge you, as a matter of law, that the law of the state of New York in this regard has no application whatever to this controversy for many reasons which it is unnecessary for me to detain you with. As I have said before, it is a rule of common law, irrespective of any statute of the state, that machinery must be safe. In the case of a set screw, it may be dangerous or safe according to the locality in which it is placed, and according to the parties who are called upon to work upon the machine; and that, I think, is a question which, under all the circumstances of the case, should be submitted to you to determine. Of course, if this set screw was guarded, as some set screws are guarded, by a hood placed over it, and kept in position by a sunken screw, it could not have caught upon the rope, or the rope could not have caught upon it, and it is the contention of the plaintiff that it was the failure to provide a proper guard for the set screw that caused the accident. On the other hand, the defendant insists that this screw was guarded properly, even within the rule of the statute of the state; guarded by reason of its position; guarded because it was in a place where the plaintiff had no right or occasion to go when occupying his position by the lever, and where no one went except to oil the machinery at this particular point. There was an opening through which the elevator passed (4x6 feet), and the opening was filled with machinery to a certain extent. Upon the extreme southern end of the shed was this small platform or space 18 to 20 inches wide between the opening and the end wall. It was there that the free end of the shaft revolved, and it is said that being in that position, no one having any occasion to go there, that it was in fact guarded, and as safe as if the set screw had been on the outside of the extreme southern wall of the building. This is a question which, I think, under the evidence in the case, is for you to determine."

We think that a commercial ice house, which is extensively equipped with machinery, and in which numerous operatives are employed, is a factory, within the meaning of the statute. The purpose of the statute is to throw a safeguard around the workmen employed in business establishments where machinery is in use which may endanger those who are likely to be brought into contact with it, and to whom its presence, if it is not protected, is a constant menace. So far as is consistent with the language of the statute, that purpose should be given effect. The language is sufficiently comprehensive to include a commercial ice house. By the statutory definition, a factory includes, not only a manufacturing establishment, but a business establishment where one or more persons are employed at labor, and the particular enumeration preceding the term, "or other manufacturing or business establishments," is too meager to restrict the meaning of the term by the application of the rule ejusdem generis. We think, however, that no error prejudicial to the plaintiff was committed by the trial judge in his instructions. In Freeman v. Mills Co., 70 Hun, 530, 24 N. Y. Supp. 403, affirmed

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142 N. Y. 639, 37 N. E. 567, the court, in adverting to this statute, said:

"The duty prescribed by the statute is not more or greater than the common-law duty of an employer to employés to provide a safe place in which, and proper machinery with which, to work, and the defendant's liability to the person injured, by reason of the statute not being complied with, is not an absolute one, but is subject to the same limitations and restrictions as is the common-law liability for not furnishing a safe place and proper machinery."

In Knisley v. Pratt, 148 N. Y. 375, 42 N. E. 986, 32 L. R. A. 367, the court observed in its opinion that the statute does not "in terms give a cause of action to one suffering an injury by reason of the failure of the employer to discharge his duty thereunder. An action for such injury is the ordinary common-law action for negligence, and subject to the rules of the common law." In Glens Falls Portland Cement Co. v. Travellers' Ins. Co., 162 N. Y. 403, 56 N. E. 897, the court used this language:

"The manifest purpose of the enactment was only to give more force to the existing rule that masters should provide a reasonably safe place in which their servants are called upon to work. We think, however, that the legislature could not have intended that every piece of machinery in a large building should be covered or guarded. This would be impracticable. * * * The statute does not attempt to specify how machinery shall be guarded otherwise than as 'properly guarded.' The necessity for the guard, and the character and description of the guard, must, of necessity, depend upon the situation, nature, and dangerous character of the machinery, and in each case becomes a question of fact."

The construction placed upon the statute by the state courts is authoritative in the federal courts. Adopting this construction, it is plain that the trial judge presented to the jury as fully and adequately the rules for their proper guidance in considering the case as he would if he had instructed them that the statute was applicable. No complaint has been made of the instruction to them in regard to the duty of an employer to provide a safe place and safe machinery, and after these instructions he then left it to the jury to determine as a question of fact whether, in view of the location and circumstances, the set screw was dangerous or safe, although not specifically protected. This was equivalent to instructing them to find whether it was "properly protected," within the requirement of the statute,—a question which, according to the language of the court of appeals, depends upon "the situation, nature, and dangerous character of the machinery," and is to be decided in each case as a question of fact.

The judgment should be affirmed, and it is accordingly so ordered.

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BRADY v. WESTERN UNION TEL. CO.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

No. 1,004.

1. MASTER AND SERVANT—INJURY TO SERVANT—INCOMPETENCY OF FELLOW SERVANT.

A master owes the duty of using proper diligence in the employment of competent men to perform the duties for which they are engaged, and he cannot escape this responsibility by delegating his duty to an agent who is a fellow servant of the injured employé, and after the employment of the servant it is the duty of the master to keep himself advised as to his fitness.

2. SAME—INJURY THROUGH INCOMPETENCY OF FELLOW SERVANT—SUFFICIENCY OF PROOF.

To entitle a servant to recover from the master for an injury on the ground that it resulted from the negligence of an incompetent fellow servant, for whose employment or retention in the service defendant was chargeable with negligence, it must be definitely shown that it was in fact the negligence of such person which caused the injury. Proof which goes no further than to show his known incompetency, and that the act of negligence was committed either by him or by another fellow servant, does not warrant an inference that the negligence was his, and is insufficient to fix liability on defendant.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

The evidence in this case showed that the plaintiff was in the employ of the defendant as one of four linemen, whose business it was to carry the wire from the ground and fasten it by means of a tie wire to the glass insulators on the poles at a height of from 30 to 35 feet. It was shown that when the main wire was in position it was the duty of an employé, called a "jackman," to tighten it on receiving the proper signal from the linemen when they were ready. The manner of giving this signal was for the lineman farthest from the jackman to signal the lineman nearest to himself, who in turn passed the signal, when he was ready, to the second lineman, who, when he was prepared, signaled the lineman nearest to the jackman, from whom the jackman received the signal, which indicated that all of the linemen were ready to have the wire tightened, and upon that signal he tightened it. The evidence tended to show that the jackman was an unfit man for his position on account of having been addicted to the excessive use of intoxicating liquors for many years, and on account of his carelessness in tightening the wires on a number of occasions preceding the accident without signals from the linemen on the poles; and that the foreman, who had authority to hire and discharge the jackman, knew of his incompetency. The plaintiff on the morning of January 25, 1899, was tying the wire on the second pole from the jackman, and before he was ready, and before he had given any signal, and while reaching for his wrench, the wire was tightened, throwing into his face the tie wire, one end of which struck his eye and put it out, to recover damages for which injury this action was begun. On the conclusion of the plaintiff's evidence the trial judge directed a verdict for the defendant, and to review the judgment on that verdict the case is brought here on writ of error.

Edward McNamara (Harrison Geer and David E. Heineman, of counsel), for plaintiff in error.

C. A. Kent, for defendant in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

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WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

It is settled law in the federal courts that the master owes the duty of using proper diligence in the employment of competent men to perform the duties for which they are engaged, and that he cannot escape this responsibility by delegating his duty to an agent who is a fellow servant of the injured employé; and after the employment of the servant it is the duty of the master to keep himself advised as to his fitness, so that an incompetent person may not continue in the service to endanger the lives and limbs of his fellow servants. Railroad Co. v. Henthorne, 19 C. C. A. 623, 73 Fed. 634, and the large number of cases cited in that opinion by Judge Taft. The evidence in this case, however, does not show that the negligence of this jackman caused the injury. The plaintiff testified that he had given no signal before the wire was pulled by the jackman. But it appears that the jackman should receive the signal from the lineman nearest to him, who occupied the pole between the plaintiff and the jackman. There is no evidence showing that the lineman next to the jackman had not transmitted the signal, although the evidence is clear that he had not received the signal from the plaintiff. It is possible that the jackman did not receive this signal, but it was necessary to show that he did not before the plaintiff could recover. If he did receive the signal, it was his duty to tighten the wire, as he did, and the defendant could not be charged with negligence. It is not sufficient to show that an accident has occurred, and that it may have been caused by the negligence of an incompetent servant, for whose employment and retention in his service the master is liable, but the fact must be shown. In this case the court would not have been justified in allowing the jury to infer the absence of a signal when it could have been shown by positive proof if the signal had not been given. In Patton v. Railway Co., 179 U. S. 658–663, 21 Sup. Ct. 275, 277, 45 L. Ed. 361, the court says:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. Railway Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. * * * It is not sufficient for the employé to show that the employer may have been guilty of negligence,—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In the absence of proof of the tightening of this wire before receiving the proper signal, which was a necessary fact, the court would not have been justified in submitting the case to the jury, and it is

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not necessary to notice the other questions discussed by counsel at the hearing.

The judgment is affirmed.

In re IVES.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

No. 1,006.

1. BANKRUPTCY—MODE OF REVIEW—APPEALABLE ORDERS.
An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication in bankruptcy is not a judgment from which an appeal will lie under the provisions of Bankr. Act 1898, § 25, but is reviewable by petition under section 24b.[1]

2. SAME—COURT OF BANKRUPTCY—POWER TO VACATE ORDERS.
For the purposes of bankruptcy jurisdiction under Bankr. Act 1898 a district court is always open, and has no separate terms. The proceedings in a pending suit are therefore continuous from the filing of the petition to the closing of the estate, and at all times open for reexamination, and upon proper application and showing any order made during the progress of the case may be set aside, provided rights have not become vested under it which will be disturbed by its vacation.

3. SAME—PETITION TO VACATE ADJUDICATION—RIGHT OF CREDITOR TO MAINTAIN.
A creditor has no right to oppose an adjudication in bankruptcy except such as is expressly given him by the statute, and Bankr. Act 1898 gives him no right to contest an adjudication upon a voluntary petition. He cannot, therefore, maintain a petition to vacate an adjudication in such case after it is made.

4. SAME—LACHES.
A creditor of a bankrupt firm, even if entitled to maintain a petition to vacate the adjudication, cannot do so after the lapse of eight months, during which other rights have intervened, and without showing a good reason for the delay; and an allegation that the facts stated in the petition have become known to him "only recently" is insufficient.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Michigan, in Bankruptcy.

In the matter of the petition of Adolph Feldheim and Leo M. Butzel to review an order of the district court. 111 Fed. 495.

On September 11, 1900, a voluntary petition in bankruptcy was filed in the district court of the United States for the Eastern district of Michigan on behalf of the firm of A. Ives & Sons, which firm was composed of Albert Ives, Sr., Albert Ives, Jr., and Butler Ives. This petition was signed by Albert Ives, Jr., and Butler Ives, and by Albert Ives, Sr., by Mrs. Mary Ives Cowlan, his daughter, by authority of a power of attorney dated September 10, 1900, giving her general power to sign and execute all papers, and particularly the petition in bankruptcy which was filed. This petition asked that the firm and the individual members thereof be adjudicated bankrupts, and they were so adjudicated. One Henry A. Harman was appointed trustee, and on the 27th of October, 1900, he filed a bill in the circuit court for the county of Wayne, Mich., in chancery, setting forth the bankruptcy proceedings, and asking that a transfer of certain negotiable paper and assets placed in the hands of the petitioner Leo M. Butzel, as trustee, to secure a debt of

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[1] Appeal and review in bankruptcy cases, see note to In re Eggert, 48 C. C. A. 9.

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$25,000 to Albert Feldheim, the other petitioner here, within four months of the filing of said petition in bankruptcy, be set aside. The subpœna in that suit was served on these petitioners, who filed an answer. On March 26, 1901, Albert Ives, Sr., died, and Albert Ives, Jr., was appointed administrator of his estate. On June 5, 1901, these petitioners filed a petition in the district court, charging that Albert Ives, Sr., at the time he executed the power of attorney, and at the time of the institution of the proceedings in bankruptcy and the adjudication, was mentally incompetent, and for that reason the proceedings, so far as they pertain to the firm of A. Ives & Sons and to the estate of Albert Ives, Sr., are void, and asking that the adjudication, so far as it relates to the firm and the estate of Albert Ives, Sr., be set aside, and the appointment of the trustee vacated. The delay in filing their petition is sought to be excused by the petitioners by saying "that the facts in reference to the matters herein contained have become known to them only recently, and they thereupon have begun this proceeding." To this petition the trustee and Albert Ives, Jr., administrator of the estate of Albert Ives, Sr., filed a demurrer, which was sustained by the court, and the petition dismissed. To review that order this petition has been filed.

H. E. Spalding, for petitioners.

Thomas A. E. Weadock, for trustee in bankruptcy.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The trustee urges in this court that the remedy of the petitioners, if any, is by an appeal from the order sustaining the demurrer, and that the 10 days provided for an appeal expired before the petition here was filed. Section 25 of the bankruptcy act of 1898 provides that appeals may be taken in bankruptcy proceedings to the circuit court of appeals from judgments adjudging or refusing to adjudge the defendant a bankrupt, granting or denying a discharge, and allowing or rejecting a debt or claim of $500 or over, and that such appeals shall be taken within 10 days after the judgments appealed from have been rendered. An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is not referred to in this section, and is not a judgment from which an appeal will lie, within its purview. It rather comes within section 24, authorizing the circuit court of appeals "to superintend and revise in matters of law proceedings of the several inferior courts of bankruptcy within their jurisdiction," which provides a summary mode of reviewing the orders of the bankruptcy courts upon questions of law on petitions filed in the appellate court by parties aggrieved. Courier-Journal Job-Printing Co. v. Schaffer-Meyer Brewing Co., 41 C. C. A. 614, 101 Fed. 699; In re Seebold, 45 C. C. A. 117, 105 Fed. 910; and the large number of cases in the note in Re Eggert, 43 C. C. A. 12–15.

2. The petition shows that several terms of court intervened between the adjudication sought to be vacated and the filing of the petition, and it is urged that an adjudication in bankruptcy is under the control of the court only during the term at which it is made, and can be set aside or modified only during that term; that it, like all other judgments, passes beyond the power of the court when the term at which it was made closes, unless steps are taken during that term to vacate

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or correct it. The supreme court of the United States has, in strong language, expressed this view in all cases coming within the principle of the cases it was considering when the expressions were made, and that view is not open to question. Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797; Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013. But in section 2 the bankruptcy act seems to contemplate that from the filing of the petition to the closing of the estate the proceeding shall be continuous, and a court of bankruptcy always open, like surrogate and probate courts, where estates are administered, and which have no terms. It provides that matters arising in a bankruptcy proceeding may be heard in vacation or term time, and orders allowing or disallowing claims may be reconsidered, closed estates reopened, and compositions and discharges set aside. It has been held by the supreme court that under the bankruptcy act of 1867 the district court, for all purposes of its bankruptcy jurisdiction, is always open, and has no separate terms; that the proceedings in a pending suit are, therefore, at all times open for re-examination upon application therefor in appropriate form, and that any order made in the progress of the case may be subsequently set aside and vacated upon proper showing, provided rights have not become vested under it which will be disturbed by its vacation; and it is held that application for such re-examination will not have the effect of a new suit, but of a proceeding in an old one. Sandusky v. Bank, 23 Wall. 289, 23 L. Ed. 155. This language used in reference to the act of 1867 was said by this court to be applicable to the present bankruptcy act in Re Lemon & Gale Co. (C. C. A.) 112 Fed. 296. We are of opinion, therefore, that the question presented by the petition was open, and the court below had power to determine it, although several terms of the district court had expired since the adjudication.

3. This brings us to the question whether a creditor may have an adjudication of bankruptcy against a firm and one of the individuals composing it, made upon the voluntary petition of all the partners, set aside, because at the time the petition was filed and the adjudication made one member of the firm was non compos mentis. Section 5c provides that "the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners, and of the administration of the partnership and individual property." The court acquires jurisdiction of the proceeding on the filing of the petition. If it is filed by all the partners, the adjudication is made at once; if by less than all, the partner who refuses to join in the petition may oppose the adjudication as he might if the proceeding was involuntary, and he may make every defense open to a debtor upon such a petition. It is open to him or his personal representatives to move to set aside an adjudication after it has been made; but a creditor has no right to oppose an adjudication in bankruptcy except such right may be expressly given to him by the statute. Under the act of 1867 it was held that in a case where the court acquired jurisdiction no creditor could oppose the adjudication nor move to set it aside. In re Bush, 4 Fed. Cas. 879 (No. 2,222); Karr v. Whittaker, 14 Fed. Cas. 133 (No. 7,613). Act 1898, § 18b, provides that

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in involuntary cases "the bankrupt or any creditor may appear and plead to the petition within ten days after the return day," thus expressly giving him the right to contest an adjudication. In voluntary cases the statute makes no such provision, and he has no such right. If he could not contest the adjudication, he had no right to petition for its vacation after it was made. We are cited to the opinion of Judge Coxe in Re Altman (D. C.) 95 Fed. 263, which, it is claimed, expresses a different view. He says: "Assuming that a creditor is in a position to raise the objection in limine that a partnership petition cannot be filed in the circumstances shown, it will be time enough to consider the question when proper papers are before the court." The question under consideration was not the same, and the dictum there is not contrary to the view here taken.

4. There is no sufficient excuse given for the delay of these petitioners in making the application to vacate the order of adjudication. That order was made on the 11th day of September, 1900. The trustee, on the 27th day of October following, filed a bill in the circuit court for the county of Wayne, Mich., in chancery, setting forth the bankruptcy proceedings, and asking that a transfer of certain property to these petitioners be set aside. On March 20, 1901, Albert Ives, Sr., died, and the petition below, setting up his mental incompetency at the time he executed the power of attorney and the institution of the proceedings in bankruptcy and the adjudication, was not filed until June 5, 1901. The only excuse given for the delay is that the facts in reference to the matters contained in the petition have become known to the petitioners only recently, without giving any date. This statement is insufficient. The petitioners must have known of the adjudication in October, 1900, and it is not shown that at that time they were not aware of the facts on which it is now sought to vacate that adjudication. Each case must be judged on its own peculiar facts, but one may not stand by and wait until his opponent has died, voidable security has become unassailable, and other rights have intervened, before making an application to set aside an adjudication in bankruptcy, even if he is in a position to make such application.

We think the petitioners had no right, as creditors, to file their petition asking that the adjudication be set aside; and, if they had had that right, they would have lost it by their unexplained delay. The order sustaining the demurrer was properly made, and is affirmed.

HILL et al. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. March 17, 1902.)

No. 695.

1. FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.

Rev. St. § 914, requiring the practice in the federal courts to conform as nearly as may be to the state practice, was not designed to abolish in the federal courts the distinction between actions at law and suits in equity.

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2. RELEASE—AVOIDANCE FOR FRAUD—CONDITIONS PRECEDENT.
A party executing a release to a railroad company for a claim for personal injuries cannot avoid it, as obtained by false and fraudulent representations, unless he first returns or offers to return the money received as the consideration for its execution.

In Error to the Circuit Court of the United States for the Northern District of Washington.

Lewis, Hardin & Albertson, for plaintiffs in error.
B. S. Grosscup, for defendant in error.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

ROSS, Circuit Judge. This was an action at law, commenced in one of the courts of the state of Washington to recover damages growing out of the death of Alexander H. Hill, who was the husband of one of the plaintiffs and the father of the other, alleged to have been caused by the negligence of the defendant railroad company, on whose motion the case was transferred to the court below. The deceased was a brakeman, and was on top of a car as the train was passing along a portion of the track between a tunnel and a snowshed, from which position he was thrown and killed in entering the shed. The defendant answered, denying any negligence on its part, alleging that the decedent's death was caused by his own negligence, and as an affirmative defense set up that on and prior to July 8, 1897, the plaintiffs' claims for damages growing out of the death of the deceased were taken up and discussed between the defendant and the plaintiff Teresa Hill, "as an individual and as the surviving widow of said Alexander H. Hill, and also as the guardian of Maud Isabel Hill" (the other plaintiff), resulting in a compromise and settlement between the parties, by the terms of which it was agreed that $700 should be paid to her as the surviving widow of the deceased, and $500 as the guardian of his minor child, Maud Isabel, in full satisfaction of all damages occasioned by the death of Alexander H. Hill, which respective sums of money were so paid by the defendant railroad company, in consideration of which the plaintiff Teresa Hill thereupon executed two releases and satisfactions in writing,—one on her own behalf, and the other for and on behalf of her ward, Maud Isabel Hill, being thereto authorized by the probate court, which had appointed her such guardian. Each of the releases expressly states that the plaintiff Teresa Hill was fully informed in respect to all of the facts attending the accident by which the deceased lost his life, which facts had been stated to counsel, who advised the compromise and settlement of the claims for damages, and that the moneys so paid by the defendant railway company and received by her were in full satisfaction of the claims. To this affirmative defense the plaintiffs filed in the court below a reply, in which was admitted the execution of the releases in pursuance of the alleged compromise agreement, and the payment and receipt of the respective sums of money as alleged in the defendant's answer, but which denied that the money was received by the plaintiff Teresa Hill, either as guardian or in her own right, "by or with the advice of counsel," or that she had at the

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time of the execution of the releases full knowledge as to the manner in which the accident occurred, and by way of new matter, and as a further and affirmative reply to the affirmative defense of the defendant company, the plaintiff alleged that after the death of her husband, acting for herself and their minor child, the plaintiff Teresa seasonably and diligently investigated to the best of her ability the facts and circumstances surrounding the accident; that she had no means at or after the time of the accident of ascertaining whether warning devices, called "telltales," were suspended in their proper place across the track of the defendant's road over which the train on which the deceased was a brakeman had to pass in going from the tunnel to the snowshed, except from the statements of employés of the defendant company, for the reason that within a few hours after the accident telltales were placed across the track at the point referred to, of which fact the plaintiffs were kept in ignorance by the express direction of the defendant company; that at the time of the accident no such telltales or other warning devices were in place, of which fact the plaintiffs were likewise kept in ignorance; that after the accident the agent of the defendant company having in charge the settlement of such claims for damages persistently sought a compromise and settlement of the plaintiffs' claims, and in so doing repeatedly represented to the plaintiff Teresa that the telltales were in their proper place at the time of the accident, and that the deceased was thereby seasonably warned of his proximity to the mouth of the snowshed, and that his death was solely due to his failure to heed the warning thus given; that these and other like representations were wholly false, and so known to be, by the defendant company's agent, and were so made for the fraudulent purpose of securing a compromise and settlement of the plaintiffs' claims; and that it was solely by reason of such fraudulent representations, relied on by the plaintiffs as being true, that the settlement was agreed to and the releases executed. The reply also alleges that the proceedings in the probate court in respect to the authorization and confirmation of the settlement of the claim of the minor plaintiff for damages were taken by the attorneys for the defendant company, and were never examined by any attorney for either of the plaintiffs. It admits it to be true that the plaintiff Teresa Hill consulted counsel shortly after the accident in regard to the liability of the defendant company, and that "upon the facts of the case as they then appeared to her, and as they had been represented to her" by the defendant, her counsel advised that it was doubtful whether the defendant was liable; but that the true facts were not then known to her or her counsel, and were not discovered until a few days before the commencement of this action. The reply of the plaintiffs to the affirmative defense of the defendant contains no averment of a tender of the money received by them upon the compromise and settlement, nor any offer to return the money so received, but does aver a willingness on the part of the plaintiffs "to deduct from the amount to which they are entitled by reason of their damages as set forth in the complaint (alleged to be $20,000 in all) said sum of $700 and said sum of $500, together with interest thereon at the legal rate from July 8, A. D. 1897, and hereby credit said sums, with interest, upon their claims against said defendant for the afore-

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said damages." The court below (104 Fed. 754) sustained a demurrer to the reply, which ruling presents the question for decision.

It is conceded that under the provisions of the statute of the state of Washington, as well as a number of other states, a release of a right of action may be avoided in an action at law by showing that it was obtained by means of false and fraudulent representations; and the position is taken on behalf of the plaintiffs in error that the same right exists in the federal courts by virtue of section 914 of the Revised Statutes, which provides that:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit and district courts are held, any rule of court to the contrary notwithstanding."

It is thoroughly settled that it was not the design of this section to abolish, in the federal courts, the distinction between actions at law and suits in equity. Robinson v. Campbell, 3 Wheat. 212, 4 L. Ed. 372; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; Sheffield v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; Lindsay v. Bank, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505; Shampeau v. Lumber Co. (C. C.) 42 Fed. 760; Johnson v. Granite Co. (C. C.) 53 Fed. 569; Messinger v. Insurance Co. (C. C.) 59 Fed. 529; Vandervelden v. Railroad Co. (C. C.) 61 Fed. 54; In re Foley (C. C.) 76 Fed. 390; Kosztelnik v. Iron Co. (C. C.) 91 Fed. 606. It is true that in an action at law in a federal court a release, with or without seal, or any deed to which the plea of non est factum may apply, is subject to annulment upon proof of fraud in the execution of the instrument; and in the late case of Wagner v. Insurance Co., 33 C. C. A. 121, 90 Fed. 395, the circuit court of appeals for the Sixth circuit held that where, as in the present case, the issue involves simply a question of fraud between the parties, it is proper, in an action at law, for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution or in misrepresentation as to material facts inducing the execution. That ruling seems to be in conflict with the cases of George v. Tate, 102 U. S. 564–570, 26 L. Ed. 232; Hartshorn v. Day, 19 How. 211, 222, 15 L. Ed. 605; Ivinson v. Hutton, 98 U. S. 82, 25 L. Ed. 66; Shampeau v. Lumber Co. (C. C.) 42 Fed. 760; Johnson v. Granite Co. (C. C.) 53 Fed. 569; Vandervelden v. Railroad Co. (C. C.) 61 Fed. 54; Kosztelnik v. Iron Co. (C. C.) 91 Fed. 606,—relied on, among others, by counsel for the defendant in error. We find it unnecessary in this case to decide whether the question of fraud leading up to and inducing the execution of such instruments may be inquired into and determined in an action at law in a federal court, for the reason that, conceding that it may be, good faith and fair dealing would require the plaintiff, as a condition precedent to the presentation and maintenance of such an issue, to return or offer to return the money received in consideration of the instruments. In considering a similar question the court, in the case of Barker v. Railroad Co. (C. C.) 65 Fed. 460, said:

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"But there is another insurmountable obstacle in the complainant's way upon this feature of this case, and that is, although she desires to set aside the contract of release, she still retains the consideration and has never offered to return it. Where a party attempts to rescind a contract, the rescission must be complete. He cannot affirm it in part and reject it in part. Common honesty would require him, seeking to escape the burdens of the contract, to return the benefits which he has received. This is not only a rule of common honesty and fairness, but has been recognized by the courts from time immemorial. There are some few exceptions where railroads have been involved, but they simply illustrate that courts sometimes give way to sentiment, and allow compassion and sympathy to rule, instead of tranquil judgment; and these offers of restitution should come promptly, not reluctantly or tardily. To withhold a restitution is to exhibit a want of confidence in the integrity and justness of his case, who complains of a contract, and seeks to set it aside because of fraud. Vandervelden v. Railroad Co. (C. C.) 61 Fed. 54; Johnson v. Granite Co. (C. C.) 53 Fed. 569; Gould v. Bank, 86 N. Y. 75; Cobb v. Hatfield, 46 N. Y. 533; Thayer v. Turner, 8 Metc. (Mass.) 550; Kimball v. Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Doane v. Lockwood, 115 Ill. 490, 4 N. E. 500; Railway Co. v. Hayes (Ga.) 10 S. E. 350; Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692; Bain v. Wilson, 1 J. J. Marsh. 202; Jarrett v. Morton, 44 Mo. 275; Hart v. Handlin, 43 Mo. 171; Estes v. Reynolds, 75 Mo. 563; Kerr, Fraud & M. 366."

And in Vandervelden v. Railroad Co. (C. C.) 61 Fed. 54, the court applies the general rule, and refers to a class of cases where it may not be necessary, by reason of the peculiar facts, to enforce it strictly. It is there said:

"It is not questioned that the general rule is that where a party seeks to rescind a contract on the ground of mistake or fraud, and thereby seeks to relieve himself of the burdens imposed by the contract, he should not be permitted to retain the benefits of the contract to the detriment of the other party to the transaction. Seeking equity, he must do equity. Therefore the ordinary rule is that as a prerequisite to invoking the action of the court for the purpose of setting aside a contract, and thereby being relieved of the burdens thereof, the plaintiff must, so far as is reasonably within his power, place or offer to place the other party in the position he would have occupied if the contract had not been entered into. In short, if he would escape the burdens, he must give up the benefits, of the contract. The acts to be performed in the observance of this general rule are, of necessity, dependent upon the circumstances of the particular case. A court of equity is not insistent as to matters of form, if the substance of the duty is performed, and, furthermore, a court of equity can give due weight to exceptional cases which may demand an exceptional rule. The purpose of the general rule is to enable the court to do justice to both parties, so that, if the contract is set aside at the request of one party, the court may be able to restore the other party to the position he occupied before the contract was entered into, or otherwise the court may be made the instrument whereby great wrong may be wrought, in that the one party is freed from the performance of the contract on his part without being compelled to restore or account for the money or other thing of value which he received by means of the contract which he now repudiates. If the contract is of such a nature that by means thereof one party thereto is induced to pay a given sum of money to the other, which he would not have paid except for the inducement of the contract, and, after the payment of the money, the party receiving the money seeks to rescind the contract, it is clear that in justice and equity he should be required to repay the money as a condition of rescission. There is a class of cases wherein the facts are such that the court, without a repayment or tender on part of the plaintiff, has it within its power to protect fully the interests of the other party in case of rescission, and in such cases the court may proceed to a hearing without requiring repayment or a tender. Illustrations of this class of cases may be found in Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486, and Billings v. Smelting

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Co., 3 C. C. A. 69, 52 Fed. 250. * * * If the judgment was adverse to him on that question, he would still have in his possession the money paid him to procure a settlement, and thus, in effect, the company would have been deprived of all the benefits of the settlement, without having secured to it the return of the money which it paid to secure the settlement. Cases have been cited in which it seems to be held that of this result the company cannot complain, upon the theory that the company had agreed that the plaintiff should in any event receive the sum paid him. This theory is not sustainable upon any fair consideration of the facts, nor in accordance with the well-recognized principles touching the settlement of disputed claims."

No fact is alleged in the reply that brings this within the case of Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486, and like cases. Whatever exceptions there may be to the general rule certainly should not embrace a case like the present one, where a trial might establish that the plaintiffs have no valid claim, and at the same time leave the defendant's money in the plaintiffs' pockets.

The judgment is affirmed.

KAUFMANN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 123.

1. WASHED REVENUE STAMPS—SALE—EVIDENCE—SUFFICIENCY.

One whom defendant knew to be a dealer in washed revenue stamps asked him to assist in finding purchasers for stamps which such dealer said were a part of the estate left by his deceased uncle. Defendant repeatedly declared he would have nothing to do with washed stamps, and was assured that they were genuine. Defendant found a man who agreed to assist in selling the stamps at 50 per cent. discount, after such dealer had furnished three "samples" which were genuine. The dealer gave defendant an envelope said to contain $663 in stamps, for which $331.50 was expected, and defendant handed the envelope, unopened, to the one who had agreed to assist in selling. The stamps were then taken to another man, who was about to sell them, when they were seized. Defendant was indicted for knowingly having in his possession and offering for sale washed and restored revenue stamps. There was some testimony that it is a custom for genuine stamps to be sold in the neighborhood when these were offered at large discounts. *Held*, that the evidence was sufficient to justify a conviction.

2. SAME—INSTRUCTIONS—SOURCE OF INFORMATION.

Defendant's requests to instruct the jury that, before they could render a verdict of guilty, they must be satisfied beyond a reasonable doubt that he had inspected the stamps, and had seen that they were canceled and washed, or else there must be proof that such dealer had told defendant that the stamps were washed and canceled, were properly refused.

3. APPEAL—EXCEPTIONS—GENERAL.

An exception reserved "to the court's refusal to charge such of the requests as were not charged" does not raise any point for review as to any of the charges so refused.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of conviction of the circuit court for the Southern district of New

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York, entered upon the verdict of a jury rendered October 15, 1901, upon an indictment charging defendant with the crime of knowingly having in his possession washed and restored adhesive documentary revenue stamps, and of willingly and knowingly offering the same for sale.

Chas. A. Bacon, for plaintiff in error.
W. N. Parsons, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The brief filed for defendant concedes that there is no dispute upon the substantive facts. Defendant, not long before the transaction on which the indictment was founded, met and had several interviews with one Miller, whom he had met before. According to his story, in one of these interviews Miller asked him if he did not have an acquaintance among the members of the Exchanges who used revenue stamps, and if he could not dispose of some revenue stamps owned by him. The explanation that Miller gave to Kaufmann for his possession of them was that he had obtained them from the estate of a deceased uncle. He further told Kaufmann, as defendant testified, that the stamps were in the original form in sheets, that some of them were in full sheets as they came from the government, that none of them were unattached, and that they were in the original form, with the original gum. Thereupon defendant had an interview with one Groff, manager of a broker's office in New York City, and asked him if he could dispose of some revenue stamps on the Consolidated Exchange. After one or more interviews with the two men separately, in which Miller agreed to sell at a discount of 50 per cent., and Groff said he could dispose of them at that figure, defendant, at Groff's suggestion, asked Miller to furnish samples. The latter gave them two $3 stamps and one $1 stamp, which he examined and showed to a stamp dealer, and which apparently were genuine. On March 5, 1901, Miller met defendant and one McComish, who had agreed to assist in selling the stamps, at the entrance of No. 47 Broadway, and Miller and defendant then crossed the street to No. 60 Broadway (the Consolidated Stock Exchange), where Miller handed an envelope or package to defendant, who thereupon handed the same to McComish; Miller informing McComish that the same contained $663 in stamps, and that he expected to receive $331.50 for the same. McComish took the stamps to one Casper Hauser, who inspected the stamps and was about to sell them, when they were seized by a revenue officer. There was uncontradicted and satisfactory evidence that in said envelope or package were washed and restored adhesive documentary revenue stamps.

Defendant's counsel frankly concedes that the only matter in dispute is whether or not defendant knew, or was bound by the circumstances to know, that the stamps contained in said envelope or package were washed and restored adhesive documentary revenue stamps. The jury found that he knew, or was bound to know, that the stamps were of that character. That verdict was rendered after a charge which instructed them that this was the vital point in the

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case, and that they must find beyond a reasonable doubt with reference to every element of the charge named. Over and over again they were instructed that they could not convict unless they were satisfied beyond reasonable doubt that the defendant had committed the precise offense. The very last instruction was a request to charge, submitted by defendant, and charged as requested:

"The jury must be satisfied beyond a reasonable doubt that the said stamps were canceled before the delivery to Groff; and if the jury are not so satisfied, but are satisfied only that the defendant believed that there was something wrong about the said stamps, then the defendant must be acquitted."

An exception was duly reserved to a refusal to direct a verdict of acquittal, and the point is thus presented here.

Some effort is made in the brief to sustain the proposition that the evidence fairly warranted a conclusion that defendant was innocently ignorant of the fact that there was anything wrong with the stamps, and that he believed they were genuine, and their purchase and sale at 50 per cent. discount a perfectly legitimate transaction. In support of this reference is made to Miller's story of his deceased uncle, to the genuineness of the three stamps he offered "as a sample," and to some testimony to the effect that it is a custom for good genuine original stamps to be sold in the neighborhood of broker's offices at large discounts. The jury evidently apprehended quite accurately what this testimony of men who had bought stamps at a discount really imported. It is unnecessary to discuss the proposition whether or not any intelligent mind could be reasonably credited with the belief that genuine stamps would be offered at 50 per cent. discount and required for their sale the amount of secret negotiation which characterized this transaction. It is suggested, however, that defendant supposed that the stamps which Miller had for sale were stolen, rather than washed. Of course, if he really believed they were stolen, it cannot be said he knew they were washed; and, if the circumstances were such as to warrant either belief equally, the jury would not be warranted in finding that he entertained the one, rather than the other. But we entertain no doubt at all, upon the evidence, that defendant really believed, as he had good grounds to believe, that the stamps were washed and restored.

At the outset it must be assumed that he knew there was something wrong with them,—that they were either forged, or stolen, or washed. The proposition that he supposed otherwise is absurd. The circumstances so challenged his intellect that he could not dull it sufficiently to reject the conviction thus forced upon him. It is to be expected, from the difficulties and dangers attending their production, that forged revenue stamps are less likely to be met with than stolen or washed ones. The three offenses of which the stamps might have been the corpus are of very different grade in the opinion of the average man. There are individuals who would not plunder their neighbors by stealing their property, but who would be troubled with no more conscientious scruples about restoring a used stamp than they would about deceiving a customs inspector. That defendant must have known there was something wrong with the stamps hardly admits of

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question, and it was far more natural that he should suppose them to be washed stamps, rather than stolen or forged stamps. If this were all, it would, perhaps, not warrant a jury in holding that the element of precise knowledge was established beyond reasonable doubt; but the statements made by the defendant on the witness stand so clearly indicate what was really in his mind at the time of his receipt and delivery of the envelope as to eliminate all doubt. He had heard general talk around the streets about washed stamps, the papers were full of it, there had been several convictions for dealing in them, and he knew the selling of washed stamps was going on. He knew Miller dealt in washed stamps, because he first made his acquaintance in Ludlow Street jail, where Miller was incarcerated "for something in connection with washed stamps." He knew Miller had been convicted of the offense. At the very outset, and repeatedly during his interviews with Miller, he told the latter "he would have nothing to do with a washed revenue stamp." He told him he "didn't want to have anything to do with washed stamps, and told him so in terms he could not have misunderstood." He admitted that he himself would not know a good stamp from a washed one. His volunteered protest against washed stamps shows that it was just such stamps that he was expecting to get from Miller. He testified, further, that he relied entirely on Miller's statements that these were genuine unused stamps which had come to the latter from his uncle's estate, and which were in sheets (a statement defendant seems to have been careful not to try and verify); but the jury was under no obligation to credit these latter statements. We are troubled with no more doubt than they were in reaching the conclusion that, knowing Miller to be a dealer in washed stamps, he expected to get washed stamps from him, and that, despite all his protestations against having anything to do with them, he really believed such stamps were in the package he handled.

Error is assigned to the refusal of the court to charge certain requests. The general form of the exception reserved at the trial would fairly preclude any discussion of these assignments. They are, however, without merit. The second request reads as follows:

"The jury must be satisfied from the testimony beyond a reasonable doubt that the defendant had inspected the said stamps, and had seen that they were canceled and washed, prior to the delivery of said stamps to the witness Groff, before they can render a verdict of guilty against the defendant."

The seventh request reads:

"The jury must be satisfied beyond a reasonable doubt that the defendant either actually inspected the stamps before he delivered them to Groff, and thus knew them to be washed and canceled, or else there must be proof that Miller had told him that the said stamps were washed and canceled before he delivered them to Groff."

The difficulty with both these requests is that defendant might have acquired knowledge as to the character of the stamps otherwise than by himself inspecting them or by the statements of Miller.

Error is assigned that the judge, having charged the fifth request as prayed, further charged the jury as to defendant's means of knowledge. No exception raises this point; the only one reserved being

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"to the court's refusal to charge such of the requests as were not charged."

The judgment is affirmed.

MANHATTAN OIL CO. v. RICHARDSON LUBRICATING CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

Nos. 78, 79.

1. CONTRACTS—MUTUALITY.
A contract whereby defendant agreed to sell, and plaintiff agreed to buy, all the oil "they may require for their own use for a period of twelve months from the date hereof," was not void for want of mutuality.[1]

2. SAME—CERTAINTY.
The fact that the quantity of oil to be sold and bought was not definitely determined at the date of the contract, but was to be ascertained by extrinsic evidence, was immaterial.

3. SAME—CONSTRUCTION.
The contract obligated defendant to sell only so much oil as plaintiff might require for its own use for the purpose intended within the year, and not as much as it might require within a reasonable period after the expiration of the year.

4. REFUSAL OF NEW TRIAL—REVIEW.
The circuit court of appeals cannot review the discretion of the court below in refusing a new trial sought on the ground that the verdict was against the evidence.

In Error to the Circuit Court of the United States for the Southern District of New York.

Chas. De H. Brower, for plaintiff.
Delos McCurdy, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The Richardson Lubricating Company, the plaintiff in the court below, and the Manhattan Oil Company, the defendant in the court below, have each brought a writ of error to review a judgment for the plaintiff rendered upon the verdict of a jury.

The action was brought to recover damages for the breach by the defendant of a written contract between the parties dated December 30, 1898, the material provisions of which read as follows:

"The Manhattan Oil Co. agrees to sell to the Richardson Lubricating Co., and the Richardson Lubricating Co. agrees to buy of the Manhattan Oil Co., all the 28° and 30° paraffine oil and asphalt oil they may require for their own use for a period of twelve months from the date hereof. Quality of the oil is to be of the Manhattan Oil Company's best grade; price to be 3½ cents per gallon and 28 gravity paraffine oil, 3 cents for 30 gravity paraffine oil, and 2 cents for asphalt oil, free on board cars at Gallatea, Ohio, in bulk; payments to be made 60 days from the date of invoice; shipments to be made in the tank cars of the Manhattan Oil Co. within six days of the receipt of the order, or earlier if possible."

[1] Mutuality in contracts, see note to Oil Co. v. Kirk, 15 C. C. A. 543.

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Plaintiff was a manufacturer of lubricating greases and compounded oils, and during the year preceding the contract had purchased oils of the defendant for its manufacturing uses.

It was proved upon the trial that the defendant complied with the contract and made deliveries of oil as ordered by the plaintiff until November, 1899, but thereafter refused to deliver 1,020,000 gallons ordered within the year. Evidence was given for the plaintiff of a tender of the contract price and a formal demand for the delivery of the oil made on the 29th day of December, 1899, and a refusal by the defendant. Evidence was also given for the plaintiff showing the daily capacity of its concern for the consumption of such oil as was ordered, and the market price in December, 1899.

The defendant did not introduce any evidence, and, at the close of the plaintiff's case, requested the court to instruct the jury to render a verdict for the defendant. This was refused, and the defendant excepted. The trial judge instructed the jury, in substance, that the defendant was entitled to recover the difference between the contract price of the oil ordered and the market price at the times when the oil should have been delivered, but that plaintiff was only entitled to order such quantity as it could use within the year ending December 30, 1899, and that, according to the true construction of the contract, the defendant did not undertake to sell any oil which might be required by the defendant for its use after the expiration of the year, but did undertake to sell the quantity their business would require for the 12 months. The plaintiff requested an instruction that "the only limitations upon the amount of oil which the plaintiff was entitled to order for its own use were the ability of the plaintiff to pay therefor, and the capacity of the plaintiff's works to use within a reasonable period after December 30, 1899." The instruction was refused, and the plaintiff excepted.

The exceptions which have been referred to are the basis of the assignments of error of the respective parties, and the rulings to which they were taken may properly be considered in the order in which they were made. It is insisted for the Manhattan Oil Company that the contract was invalid for want of mutuality, and consequently that the trial judge should have directed a verdict for the defendant. If the contract did not obligate the plaintiff to take any specified quantity of oil, manifestly there was no consideration for the promise of the defendant. But in consideration of the defendant's promise to sell, the plaintiff promised to buy all the oil it should require for its own use for a specified period of time. Read in the light of the previous business relations of the parties, it is plain that by this was meant that it should buy what oil it should require for its use in its manufacturing business. This is a very different promise from one to buy what it might desire, or from a mere option to buy. If it had bought oil from any other dealer for use in its business during the 12 months, its promise would have been broken, and the defendant could have recovered damages for any loss accruing. The mutual obligation of the parties to perform the contract constituted a consideration for the promise of each. It is quite immaterial that the quantity of oil to be sold and bought was not definitely determined at the date of the con-

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tract, but was to be ascertained by extrinsic evidence. The contract is quite analogous to that which was considered in Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218. In that case the plaintiff made a proposition by letter to the defendant to furnish all the steamers of the defendant's line with coal for a designated period at a specified price per ton, and the defendant accepted the offer; and, although the quantity to be furnished was not otherwise designated, the court declared that, notwithstanding the quantity was indefinite at the time of the contract, it was nevertheless determinable by the terms of the contract, and therefore certain, within the maxim, "certum est quod certum reddi potest."

We are satisfied that the trial judge placed a proper construction upon the contract in his instructions to the jury when he limited the obligation of the defendant to one to sell the plaintiff only so much oil as the plaintiff should require for use in its manufacturing business within the year. To have extended it to an obligation to sell as much as the plaintiff might require to use within a reasonable period after the expiration of the year would have been to make a new contract for the parties. By the contract the plaintiff was at liberty to use more or less, so long as it observed good faith, and did not reduce or increase its consumption beyond the legitimate requirements of its manufacturing business. National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427; Staver Carriage Co. v. Park Steel Co., 43 C. C. A. 471, 104 Fed. 200. The terms of the contract in this respect were wide, and placed the defendant measurably at the mercy of the plaintiff, and they ought not to be enlarged beyond their necessary import. The adjudications cited by counsel in support of a different construction (Barber Asphalt Pav. Co. v. Standard Asphalt Co., 39 App. Div. 617, 58 N. Y. Supp. 405, and Whitehouse v. Gas Co., 17 Law J. C. P. 237) are not instructive, as the different phraseology of the contracts differentiates each of those cases from the present.

The assignments of error which have been considered are the only ones that merit notice. The rule that this court cannot review the exercise of discretion by the court below in refusing a new trial because the verdict was against the weight of evidence has been so frequently reiterated that it would seem that assignments of error based upon the denial of such a motion should no longer be urged.

The judgment is affirmed.

HUGHES v. PENNSYLVANIA R. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 88.

COLLISION—FOG—TUG AND TOW—NEGLIGENCE OF TUG.

A tug, having in charge eight canal boats in three tiers, tied them up on reaching a pier in the East river at about 1 a. m., to await a favorable condition of the tide before proceeding further. The night was then clear, and the tug left the tow to engage in other work. At 3 o'clock a fog came on, and later in the morning became very dense. The canal boats, when left, tailed down the river with the ebb tide, but

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when the tide rose gradually swung out across stream, and, while lying thus, about 6:30 a. m., a ferryboat collided with one of the canal boats and injured it. When the fog began to rise, the tug was a very short distance from the tow, and had only two light boats in charge, and could have returned to the tow. *Held* negligence on the part of the tug, and that it was liable for the injury.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal by both respondents from a decree of the district court (93 Fed. 510) holding the defendant railway company solely responsible for the damages resulting from a collision between libelant's canal boat F. B. Morris and a ferryboat alleged to be owned by the Pennsylvania Annex. The appeal of the last-named respondent was evidently taken through some oversight, inasmuch as the district court dismissed the libel as to it. It was not argued here, and may be disregarded.

H. G. Ward, for appellants.
Le Roy S. Gove, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The facts are as follows: The libelant's canal boat F. B. Morris, loaded with coal, and bound from South Amboy to 138th street, Harlem river, was in tow of the Pennsylvania Railroad Company's tug Media on February 9, 1898. There were eight boats in the tow in three tiers, and the Morris was the outside port boat in the second tier. At about 1 a. m., the tide being then ebb, the tug tied up the flotilla at Pier 5, East river, by fastening the head tier, leaving the tow tailing down the river on the ebb tide. Thereupon the tug left the tow in order to engage in other work, picking up light boats, and towing them down to a stake boat off Liberty Island. It was the intention of the master of the tug to return to the tow after the tide turned, and avail of the flood to take it to its destination. While the tug was thus absent, the tide turned, and in consequence the tow, instead of tailing down stream, gradually swung out across stream, and the Morris, which had been an inshore boat, became outside boat lying out in the river more than the length of the first tier beyond the end of the dock. It was foggy when the tow began to swing outward, and the fog subsequently grew very dense. While lying thus, about 6:30 a. m., the ferryboat Annex No. 5, running around the Battery on her way to Brooklyn, collided with the Morris. The district judge held the ferryboat free from fault, and no appeal challenges the accuracy of that conclusion. The claim against the tug is for negligent towage, for not showing the proper measure of care for the boats in her charge. As to the tying up of the tow at the pier to await favorable tide, it is urged that it is the practice and custom of tugs so to do; that it was what the tow expected would be done; and that it was for the benefit of both parties that during the interval the tug should go about other business, because by thus using all her time it is to be assumed that towing is made cheaper. It is not necessary to discuss these propositions, because, conceding them to be correct, the tug was nevertheless negligent under the facts of this par-

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ticular case. When the tow was tied up at 1 a. m., the weather was clear and fine. So long as the tow remained tailing down so as to be close to the ends of the piers, it was in a position of safety. Even after it had swung out into the stream it would probably meet with no misadventure so long as the weather continued clear, so that it could be seen by navigating vessels. But if, while it was thus swung out, it should become shrouded in fog, its position would be perilous. When the tug left the tow at about 1:30 a. m., the night was clear, and the tide was ebb. The only evidence in the record indicates that the tide began to change about half past 3 or 4 in the morning. Whether it turned then or later, the master of the tug knew it would turn, and further knew that, when it did turn, the tow, being fastened only at the head, would inevitably swing out across the stream. The evidence shows that indications of fog began about 3 a. m.; that the fog gradually increased; that at 3:30 it was thicker, but objects could still be seen; that by 4 a. m., or shortly after, it had increased so much as to make navigation dangerous. The tug went off, as was said before, in search of light boats. It found one at 55th street, another somewhere else in the North River, and when it began to get foggy in the North river, the tug, with these two light boats in tow, was about opposite the Pennsylvania ferry at Cortland street. The master thereupon proceeded with the two light boats to the stake boat off Liberty Island. He arrived there about 4 a. m., by which time it was very thick, and getting thicker; so bad that he did not think it safe to run, wherefore he remained at the stake boat (the fog continuing) until he turned in at 7 a. m. When the fog began to rise and thicken, the tug was a very short distance from where it had left the flotilla. It had only two light boats in charge. The weather was still clear enough to navigate with safety. The master knew that the turn of the tide would swing the flotilla out into the stream, and that the fog, should it continue to thicken, would put the boats composing it in a position of peril. He might have tied up the light boats, or have carried them with him, and, returning to Pier 5, East river, have then either tied up the boats so they would not swing, or have expedited the swing till they tailed up stream, or have stood by them and sounded signals, which would have secured their safety. His failure to do so under the circumstances shows a lack of ordinary prudence, which abundantly sustains the charge of negligence in looking after the tow. When the colliding ferryboat was held to be free from fault, the question whether some one or other of the boats in the flotilla should have made her presence known by sound signals of some kind became an academic one, and need not be discussed.

The decree of the district court is affirmed, with interest and costs.

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STEWART, HOWE & MAY CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 28.

CUSTOMS DUTIES—VELVET CORD—CORDUROY.

A pile fabric, commercially known as "velvet cord," "ribbed velvet," or "corded velvet," is not "corduroy composed of cotton or other vegetable fiber," within Tariff Act 1897, par. 315, and is not assessable as such.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The case comes here upon appeal from a decision of the circuit court, Southern district of New York (107 Fed. 267), affirming a decision of the board of general appraisers which sustained the action of the collector of the port of New York in classifying certain cotton goods for duty.

A. P. Ketchum, for appellant.

Chas. D. Baker, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The relevant paragraph of the tariff act of 1897 reads as follows:

"(315) Plushes, velvets, velveteens, corduroys and all pile fabrics, cut or uncut; any of the foregoing composed of cotton or other vegetable fiber, not bleached, dyed, colored, stained, painted or printed, nine cents per square yard and twenty-five per centum ad valorem; if bleached, dyed, colored, stained, painted or printed, twelve cents per square yard and twenty-five per centum ad valorem: provided, that corduroys composed of cotton or other vegetable fiber, weighing seven ounces or over per square yard, shall pay a duty of eighteen cents per square yard and twenty-five per centum ad valorem: provided further, that manufactures or articles in any form, including such as are commonly known as bias dress facings or skirt bindings, made or cut from plushes, velvets, velveteens, corduroys, or other pile fabrics composed of cotton or other vegetable fiber, shall be subject to the foregoing rates of duty, and in addition thereto ten per centum ad valorem: provided further, that none of the articles or fabrics provided for in this paragraph shall pay a less rate of duty than forty-seven and one-half per centum ad valorem."

The goods weigh over seven ounces per square yard. It is not disputed that they are pile fabrics, and dutiable under the first part of this paragraph, if they are not dutiable under the proviso, as corduroys. They are invoiced as "black cotton velvet cords," are made of cotton, with a fine rib, and are chiefly used for women's skirts, sometimes for making women's jackets, and also for boys' wearing apparel. They have been imported for the past ten years, and have been sold variously under the names of "velvet cords," "ribbed velvets," or "corded velvets." The board found the evidence conflicting, and held that it would seem to be better capable of being harmonized on the theory that a "velvet cord" is a species of corduroy, and the circuit court concurred with them. We are unable to reach the same conclusion. If the evidence of the retail salesmen be disregarded,—and certainly it is unpersuasive, since their transactions are not with the trade, but

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only with the consumer, who is ignorant of trade names and trade classification,—the evidence will not be found to be so conflicting. Morrison v. Miller (C. C.) 37 Fed. 82; Hills Bros. Co. v. U. S., 39 C. C. A. 500, 99 Fed. 264. These goods are never bought or sold as corduroys, though that circumstance would be immaterial if they were in fact corduroys. They are not within the definition of "corduroy" given in the Century Dictionary, which describes a thick stuff especially used for the outer garments of men engaged in rough labor, field sports, and the like. These goods are never so used, and are not fit for such use. It seems to have been assumed below that the word "cords" is an abbreviation of "corduroy," the latter word being a generic term covering a group of several species. Reference to these words in the New English Dictionary of the Philological Society, however, shows that "cords" came first into use, and "corduroy" or "corde du roy" was a term of subsequent invention. The specifications of Woostenholm's patent, No. 1,123, of 1776 (cited in this dictionary), speaks of "velveteen cords," and of nearly everything of the fustian kind, but does not mention corduroy. The first use of the latter word seems to be more than 10 years later. Evidently the broader word of the two is "cords." The most significant fact in proof—and it is not disputed—is that the goods imported (Exhibit 1) differ from what all concede to be a corduroy (Exhibit A), not only in the kind of yarn and thread used, the width of the goods, and the quality of the cotton, but also in the method of manufacture. They are made on different looms. The corduroy is cut by machinery; the velvet cord, by hand. Velvet cord is made on a velvet loom. A loom used to make corduroys could not be used to make ribbed velvets "without considerable alteration, which would be very costly, and would not be worth while doing. It is not done." Exhibit 1 is made on an ordinary velvet or velveteen loom. Exhibit A is made on a corduroy loom,—a much heavier loom. Corduroys, in fact, are not made by the manufacturers who make velvet cords, nor velvet cords by the manufacturers who make corduroy. The evidence shows them to be different articles, the dictionaries do not indicate that the same word covers both, and we do not find the evidence persuasive to the conclusion that commercial usage knows the velvet cord as a variety of corduroy.

The decision of the circuit court is reversed.

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SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO. v. STANISLAUS COUNTY et al.

(Circuit Court, N. D. California. January 6, 1902.)

No. 12,257.

1. STATES—LIMITATION OF POWERS—REPEAL OR AMENDMENT OF CORPORATION LAWS.

The power of a state, reserved by its constitution, to alter, amend, or repeal general laws concerning corporations, is subordinate to, and limited by, the provisions of the federal constitution inhibiting laws impairing the obligations of contracts, depriving persons of property without due process of law, or denying the equal protection of the laws. Rights acquired and capital invested by a corporation or its stockholders in the lawful exercise of powers conferred by such laws are within the protection of such constitutional provisions, and cannot be arbitrarily destroyed by subsequent state legislation.

2. IRRIGATION COMPANIES—REGULATION OF RATES—CALIFORNIA STATUTES.

Act Cal. May 14, 1862 (St. 1862, p. 540), amending the general incorporation law of 1853, and providing for the "incorporation of canal companies and the construction of canals," gives companies incorporated thereunder the right to charge and collect rentals or tolls for water, subject to regulation by county boards, but provides that the rates shall not be reduced by such boards so low as to yield to the stockholders less than a certain per cent. "upon the capital actually invested." Act March 12, 1885 (St. 1885, p. 95), to regulate and control the sale, rental, and distribution of appropriated water in the state, requires county boards, on petition, to fix rates to be charged by any distributer of water in the county, outside of cities and towns. It provides that the board shall "estimate the value of all property actually used and useful to the appropriation and furnishing of such water," estimate the reasonable annual expenses of the person or corporation whose franchise is controlled, and adjust the net annual receipts and profits so that they may be not less than 6 nor more than 18 per cent. "upon the value of property actually used and useful." It further provides that in fixing rates "said board may take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that such rates shall be equal, reasonable, and just, both to such corporations and to said inhabitants." *Held*, that assuming that under the later act the value to be estimated by the board was the actual cash value at the time, thus fixing a different basis for the rates established than that provided by the earlier act, it could not be construed, as applied to a corporation organized under the act of 1862, to authorize the board to ignore the capital "actually invested," which would result in many cases in impairing the obligation of the contract created by the company's charter, as well as depriving it of property without due process of law, but that as to such companies it was the duty of the board, under its power to take into estimation all other pertinent facts, to consider the capital actually invested, at least in the property actually used and useful, and to fix such rates, within the limits prescribed by the act, as should be reasonable with reference to such investment.

3. CORPORATIONS—CHARTER RIGHTS—EFFECT OF NONUSER.

A statutory right embraced in the charter of a corporation must be reduced to possession to secure the constitutional protection against alteration or repeal. Where an irrigation company, organized under Act Cal. May 14, 1862 (St. 1862, p. 540), which provided that county boards should not reduce the rates of such companies "so low as to yield to the stockholders less than 1½ per cent. per month upon the capital actually invested," in fixing its own rates, which it did for 25 years, never made them so high as to yield such per cent. to its stockholders,

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its constitutional rights are not impaired by a subsequent statute authorizing county boards to fix rates below the minimum prescribed in the incorporation act.

In Equity. Suit to enjoin the enforcement of water rates established by the board of supervisors of defendant county, to be charged by complainant. On final hearing.

G. W. McEnerney and W. B. Treadwell, for complainant.
C. A. Stonesifer and L. W. Fulkerth, for defendants.

MORROW, Circuit Judge. This is a suit in equity, brought on September 29, 1896, to enjoin the defendants from enforcing an order of the board of supervisors of Stanislaus county fixing the rates to be charged by the complainant for water distributed by it, and to declare said order null and void. It is alleged in the bill that the complainant is a corporation organized under the laws of California in September, 1871, in accordance with the provisions of an act of the legislature of the state of California entitled "An act to provide for the formation of corporations for certain purposes," approved April 14, 1853 (St. 1853, p. 87), as amended by the act approved May 14, 1862, entitled "An act to authorize the incorporation of canal companies, and the construction of canals" (St. 1862, p. 540); that the defendant the county of Stanislaus is one of the political subdivisions of the state of California and within the Northern district of California; that the board of supervisors of said county of Stanislaus is the governing or legislative body of said county, and that the defendants George W. Toombs, Charles H. Osler, James Alfred Davis, Thomas J. Carmichael, and Joseph P. Barnes were at all the times stated in the bill the duly elected, qualified, and acting members of the said board, and citizens and residents of the Northern district of California. It is alleged that for more than 10 years past the complainant has been engaged in the business of appropriating water for irrigation, sale, rental, and distribution, for hire, and has for the last 10 years maintained, and now maintains, a canal through the counties of Fresno, Merced, and Stanislaus, in the state of California, in which it carries its water to the takers and consumers thereof; that complainant is now, and for 10 years last past has been, the owner of the right to take the whole flow of water of the San Joaquin river through the left bank of said stream at its junction with Fresno Slough, and has for the last 10 years appropriated said water, for sale, rental, and distribution to its customers, by means of a canal running from the point of appropriation through the counties of Fresno and Merced and a large part of the county of Stanislaus, which canal was, on January 1, 1896, and now is, including its lateral and parallel branches, 120¾ miles in length; that of this length of canal 11 7/10 miles are within the boundaries of the defendant county of Stanislaus. It is alleged that the reasonable value of these canals, ditches, flumes, water chutes, and other property actually used in the appropriation and furnishing of said water is of the amount of $1,000,000; and that the right of appropriation of said water acquired by the complainant more than 20 years ago, ever since held by it, and necessary to enable it to sup-

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ply water to its customers in the counties aforesaid, is of the reasonable value of $500,000. It is further alleged that the complainant has a capital stock of 100,000 shares of the par value of $100 per share, on each of which the sum of $10 has been paid up, and which stock is held by divers persons; that on January 1, 1896, and thereafter until the adoption of the pretended regulation by the defendants, the rates charged by complainant to its customers in the said counties were as follows: For irrigating alfalfa, trees, and vines, $2.50 per acre per annum; cereals, $2 per acre; gardens, $5 per acre; for water for sheep, hogs, or goats, $10 per 1,000 per month; for horses, cattle, mules, and live stock generally, $40 per 1,000 per month. After setting out the total gross receipts and expenditures of the complainant for the years 1887 to 1895, inclusive, the bill alleges that the average gross receipts of the complainant during the said nine years have been $54,734.15 per annum, and the average cost of the maintenance of the said property $22,045.16 per annum; that the net returns for the said nine years have amounted to a fraction over 2 per cent. per annum on the value of the property actually and necessarily used in appropriating and furnishing such water by complainant to its customers, have never reached 3½ per cent. of such value, and have never amounted to 5 per cent. per annum on the value of the canals, ditches, flumes, water chutes, and all other property actually used in the appropriation and furnishing of such water exclusive of the value of the right of appropriation. It is alleged that the operations of the complainant in the conduct of said business have been characterized by the strictest prudence and economy, and that the rates charged to its customers were and are fair and reasonable. It is further alleged that on March 10, 1896, a petition was filed in the office of the board of supervisors of the county of Stanislaus, signed by 25 persons claiming to be inhabitants and taxpayers of said county, asking the said board to regulate and control the rates of compensation to be collected by complainant from the sale, rental, and distribution of the water owned by complainant to the inhabitants of Stanislaus county. This petition was filed pursuant to the provisions of an act of the legislature approved March 12, 1885, entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use." St. 1885, p. 95. It is alleged that all of the proceedings taken by the board of supervisors with reference to this petition were under the pretended authority and direction of this act; that on June 24, 1896, said petition came on to be heard by said board, and the individual defendants, as members of said board, proceeded to fix the following rates to be thereafter charged by the complainant for the use of its water in the county of Stanislaus, namely: For irrigating alfalfa, perennial grasses, and cereals $1.50 per acre per annum, for trees and vines $2 per acre, for gardens $3.50 per acre, for water for sheep, hogs, or goats $6 per 1,000 per month, and for horses, cattle, mules, and other live stock $25 per 1,000 per month; that the said board also estimated and fixed as reasonable annual expenses of repairs and management the sum of $22,000. It is averred that the

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rates so fixed by said board are grossly unfair and unreasonable, and, if applied to the complainant's whole business, will not realize to complainant more than $40,000 gross per year, or less than 1⅘ per cent. upon the value of the canals and other property actually used in the appropriation and furnishing of the water, exclusive of the value of the right of appropriation thereof and that, including the value of said right of appropriation, will not yield to complainant more than 1⅘ per cent. per annum; that in fixing these rates the defendants acted in willful violation of complainant's rights; that defendants estimated the value of the property used in and useful to the appropriation of said water by complainant at the sum of $337,000, excluding as one of the items of such property the complainant's right of appropriation; that such estimation was arbitrarily made, without receiving any evidence of the value of said property, the said defendants well knowing that the value of said property, exclusive of the right of appropriation of said water, was far in excess of the sum of $750,000. It is averred that there is no reason to believe that the value of complainant's business will or can be increased by reason of the reduced rates so fixed and established, but on the contrary, there will be no compensatory increase whatever; that the expenses of operating its business cannot be diminished, and, if said reduction be applied to complainant's whole business, the net receipts will not amount to or exceed 3 per cent. per annum upon the value of the property used. It is further alleged that said act under which it is claimed that said rates have been fixed is in violation of and repugnant to section 1 of the fourteenth amendment to the constitution of the United States, in that by the provisions of said act it is declared that rates shall be fixed and established without reference to the value of the right of any person, corporation, or association to receive compensation for or a return upon the value of any right by it held or owned to appropriate any waters of this state for sale, rental, and distribution to the inhabitants thereof. It is alleged that, unless immediate relief is granted, complainant will be harassed by a multiplicity of suits to compel it to furnish water at the rates fixed by the defendants; that the upholding of said rates will amount to a deprivation by the defendants of complainant's property without due process of law, and a denial to complainant of its rights under section 1 of article 14 of the amendments to the constitution of the United States. An injunction is prayed for restraining the defendants from enforcing said order fixing rates, and a decree asked adjudging said order to be null and void, and that complainant is entitled to have its rates for supplying water to its customers so fixed as to return a reasonable and just compensation for services rendered.

This bill was demurred to on January 2, 1897, for want of jurisdiction and of equity. It was urged that the absence of diversity of citizenship of the parties was fatal to federal jurisdiction. The demurrer was overruled by this court (90 Fed. 516) on the ground that the averments of the bill presented a federal question, which is of itself a sufficient source of jurisdiction without the coexistence of diversity of citizenship. The federal question was determined to be contained in the allegations that the acts of the defendants, if unrestrained,

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would result in the practical deprivation by defendants of the complainant's property without due process of law, and the denial to complainant of the equal protection of the laws vouchsafed by the fourteenth amendment to the constitution of the United States. The answer of the defendants was filed on July 20, 1898. In it the defendants deny that the complainant had ever been the owner of the right to take the whole flow of water of said river at any point of diversion. It is denied that the property of the complainant used in the appropriation and furnishing of water was ever of a higher value than $251,000, that the alleged right of appropriation has ever had any value, or that complainant's capital stock has a value of more than $3 per share. Defendants aver that during said period of nine years complainant has received net returns upon the value of all its property actually and necessarily used and useful in the appropriation and furnishing of water to its customers, together with the right to appropriate said water, amounting to more than 9 per cent. per annum on the average, and some years as high as 14 per cent., and that with prudent management such net returns would have been doubled. In this behalf it is averred that the receipts of the complainant have been greatly reduced by the fact that the firm of Miller & Lux, of which the president of the complainant corporation is a member, annually irrigate many thousand acres of their land from complainant's canal free of charge, and that water has been furnished to said firm by complainant at one-half the rate charged to other customers. In regard to the proceedings in connection with the said petition of March 10, 1896, to the board of supervisors of Stanislaus county, the defendants aver that the complainant appeared before the said board by counsel on June 10, 1896; that on June 24, 1896, all parties being ready, the matter proceeded, evidence was introduced, argument made, and after due and careful deliberation an order was made by the said board fixing the rates as aforesaid. There is also set up in the answer the report of an expert civil engineer and the deputy county surveyor, alleged to have been appointed by the defendants to report upon the estimated cost of the canal, ditches, and all other property used in complainant's business, upon which report it is averred that the said board of supervisors estimated the property of complainant to be worth $337,000, and the reasonable annual expenses of management $22,000. They further aver that the resolution fixing the said rates was and is the act of the said board, according to its best judgment and discretion, within its jurisdiction, and not subject to review by any court. It is denied that said rates are unfair or unreasonable, and it is averred that they will yield to complainant more than 9 per cent. upon the value of its property used in the carrying on of the said business, including the value of the right of appropriation under prudent and careful management. Defendants deny that the act of the legislature under which the said board acted in fixing the said rates is repugnant to section 1 of the fourteenth amendment to the constitution of the United States, and also deny generally the allegations upon which complainant applies for relief to this court. They aver that the functions of said board ended upon the making of said order on June 26, 1896; that said board has become functus officio with respect to the

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said order and all matters in connection therewith, and the same is to be enforced, if at all, by other officers of the state of California, not now before the court, and in other proceedings before the state courts of this state; that under the constitution and laws of California permitting complainant to exercise its franchise and to appropriate and sell the waters of the state, the right was reserved by the state to regulate and control the sale and distribution of such appropriated waters; and complainant, having acted under and by virtue of such laws, cannot now be heard to complain that the laws of the state providing for such regulation and control are not binding upon complainant; wherefore defendants ask that complainant's bill be dismissed.

On June 8, 1899, an amendment to the bill of complaint was filed by the complainant, adding thereto the allegation that by section 3 of the aforesaid act of May 14, 1862, it was provided that "every company organized as aforesaid shall have power, and the same is hereby granted, * * * to establish, collect, and receive rates, water rents, or tolls, which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one-half per cent. per month upon the capital actually invested." St. 1862, p. 541. It is alleged that prior to March 1, 1885, this complainant and its stockholders actually invested, under the authority of the said act, a capital amounting to $971,113.13 in money, all of which was actually and necessarily expended by the complainant in the purchase and construction of canals and other property used in and useful to the appropriation and furnishing of the water aforesaid, which property was on March 1, 1885, and still is, of the reasonable value of $971,113.13; that, though the defendants aver and claim that the said provisions were repealed by the act of March 12, 1885, hereinbefore referred to, complainant avers that such a construction is in violation of and repugnant to the provisions of section 10 of article 1 of the constitution of the United States, in this: that it would impair the obligation of the contract between the state of California and this complainant made and entered into under the authority of said section 3 of said act of May 14, 1862. For the purpose of limiting the question in this case, complainant's counsel at the hearing withdrew the claim for the value of the right of appropriation of the water of the San Joaquin river in estimating the value of the property used and useful in the appropriation and furnishing of said water.

The first question to be determined is the effect of the incorporation of the complainant under the act of the legislature of April 14, 1853, providing "for the formation of corporations for certain purposes," as amended by the act of May 14, 1862, providing for the "incorporation of canal companies and the construction of canals." It is contended on behalf of the complainant that, as it was organized as a corporation in 1871 under the act of 1853, as amended by the act of 1862, section 3 of the latter act, limiting the right of the board of supervisors to reduce rates so as to yield to stockholders not less than 1½ per cent. per month on the capital stock actually invested, was a contract with the state for the time for which the corporation was

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organized. It is contended on the other hand, on behalf of the defendants, that the act of the legislature approved March 12, 1885 (St. Cal. 1885, p. 95), entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," repealed all prior acts in conflict therewith, and in section 5 authorized the board of supervisors of the state to regulate and control the water rates that might be charged by any person, company, association, or corporation, and provided that such rates should be reasonable and just, and so limited that the annual receipts and profits thereof should be not less than 6 nor more than 18 per cent. upon the value of all the property actually used in and useful to the appropriation and furnishing of such water, as estimated by the said board of supervisors. It is objected on the part of the complainant that the act of 1885 in no way changes or affects its rights which prior to that time had been acquired and fixed by contract with the state under the act of 1862, and that in so far as the act of 1885 repealed or amended the act of 1862, such repeal or amendment was void as against the complainant's rights, as impairing the obligation of a contract. The constitution of this state adopted in 1849 provided in article 4, § 31, that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." Article 12, § 1, of the constitution adopted in 1879, provides: "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time, or repealed." This provision of the constitution of the state is, however, qualified by another provision of the same instrument adopted pursuant to a requirement of the constitution of the United States, providing that no law impairing the obligation of a contract shall ever be passed. Article 1, § 16, Const. Cal.; article 1, § 10, Const. U. S. There is also involved in this controversy the prohibition of paragraph 1 of the fourteenth amendment of the constitution of the United States, providing:

"Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Have the provisions of the act of the legislature of March 12, 1885, impaired the obligations of any contract entered into by the complainant with the state under its incorporation under the act of May 14, 1862? And does the enforcement of the act of March 12, 1885, by the board of supervisors of Stanislaus county in the manner and under the circumstances disclosed by the evidence in this case, deprive the complainant of property without due process of law, or deny to it the equal protection of the laws? The act of May 14, 1862, provided that a canal company organized under its provisions should have the power: (1) To make rules and regulations for the management and preservation of its works not inconsistent with the laws of the state,

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and for the use and distribution of the waters and the navigation of the canals. (2) To establish, collect, and receive rates, water rents, or tolls, which should be subject to regulation by the board of supervisors. (3) Such rates, rents, or tolls should not be so low as to yield less than 1½ per cent. per month upon the capital actually invested. The act of March 12, 1885, regulating and controlling the sale, rental, and distribution of appropriated water in this state, provides that, after proper petition for regulation of water rates, the board of supervisors shall—(1) Estimate the value of all property actually used and useful to the appropriation and furnishing of such water. (2) Estimate the annual reasonable expenses of each person or corporation whose franchise shall be controlled, including repairs, management, and operating of such works. (3) The board may establish different rates for different uses, such as mining, irrigating, domestic, etc., but such rates, as to each class, shall be equal and uniform. (4) Adjust the net annual receipts and profits so that they may be not less than 6 nor more than 18 per cent. upon the value of property actually used and useful. (5) But in such estimation of net receipts and profits the cost of extensions, enlargements, or other permanent improvements shall not be included as part of expenses, but, when completed, shall be included in the present cost and cash value of such work. (6) In fixing said rates within limits aforesaid, said board may take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that such rates shall be equal, reasonable, and just, both to such corporations and to said inhabitants. The act of 1862 requires the board of supervisors to regulate water rates and tolls of corporations organized under the provisions of the act upon the basis of the "capital actually invested." The act of 1885 requires the board of supervisors to adjust the net annual receipts and profits "upon the value of all the property actually used and useful to the appropriation and furnishing of such water." It will be assumed that this last provision means the cash value of the property at the time the estimate is made by the board of supervisors. As thus construed, these provisions of the two statutes might in some instances produce the same results, but it is clear that with respect to corporations organized under the provisions of the latter act the purpose of the legislature was to furnish a better-defined, if not a different, basis from that provided in the act of 1862 for estimating the capital or value of the property of the corporation with respect to which rates were to be fixed. What effect has this statute upon corporations organized, as was the complainant, under the prior act? The act of 1862 is not in terms repealed, but the act of 1885 provides that all water appropriated for irrigation, sale, rental, or distribution in the state is a public use, and the right to collect rates or compensation for use of such water is a franchise; and, except when furnished to a city, city and county, or town, or the inhabitants thereof, must be regulated and controlled by the several boards of supervisors of the counties in the manner provided by the act. But how regulated and controlled? Must the adjustment of rates for the purpose of determining the net annual receipts and profits which the corporation may retain as income be limited absolutely to the value of the property actually

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used and useful to the appropriation and furnishing of such water? In other words, assuming as we have, that this provision of the statute means the value of the property at the time the rates are fixed by the board, is this present cash value of the property the limit of the power of the board in determining the basis with respect to which rates shall be regulated and controlled? Manifestly not, for the statute provides further that the board, in fixing rates, may take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that such values shall be equal, reasonable, and just, both to such corporations and to the inhabitants. Why, then, is it not within the power of the board in fixing rates to consider the capital actually invested in the property of the corporation, subject only to the limitation that such property is actually used and useful to the appropriation and furnishing of water? It is certainly a most important fact, recognized by constitutional and statute law in determining whether any given rate is equal, reasonable, and just as between the corporation and the rate-paying public, and there appears to be no answer to the claim of the complainant that it is entitled to such consideration, based not only upon reason and justice, but upon a legal right created by a contract under a prior statute. To hold that under this statute the capital actually invested in the property of the corporation under the act of 1862 may be entirely disregarded by the board of supervisors in fixing water rates under the act of 1885, would be to encounter the constitutional provision that no law impairing the obligation of a contract should be passed, and this interpretation of the statute would be subject to the further objection that the state cannot deprive the complainant of its property without due process of law, or deny to it the equal protection of the laws. These constitutional provisions cannot be held subordinate to the constitutional power conferred upon the state legislature to alter, amend, or repeal general laws concerning corporations. As said by the supreme court of the United States in Shields v. Ohio, 95 U. S. 319, 324, 24 L. Ed. 357:

"The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers the vested rights of property of corporations in such cases are surrounded by the same sanctions, and are as inviolable as in other cases."

It will not be necessary to refer to the long line of cases in the highest courts of the nation where these constitutional questions have been elaborately discussed, and the rights of property carefully defined, in controversies arising out of legislation affecting corporate rights. It will be sufficient for the present purpose to refer to the case of Hill v. Railroad Co. (C. C.) 41 Fed. 610, 616, where Judge Jackson, of the United States circuit court of Kentucky (afterwards a judge of the supreme court of the United States), stated the law of these cases in very clear terms. He said:

"The principle of these and other decisions upon the subject of amending or repealing charters under a reservation of power so to do is that the legislature may change or modify the privileges and franchises which the state

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has granted to the corporation, and which concern the interests of the public; but dealing with what it has bestowed, either by way of withdrawal or of alteration, the state may not go further, and so legislate as to disturb, affect, or impair rights either of the corporation or of its shareholders, previously acquired, while the corporate functions were being lawfully exercised. All rights thus acquired, of whatever character, are surrounded and protected by constitutional sanctions and guaranties higher and superior to the legislative power of amendment or repeal."

Applying this constitutional principle to the provisions of the act of 1885, it must be held that it was not intended by the legislature to repeal the act of 1862, certainly not with respect to corporations organized under the prior act; and that with respect to such corporations the two acts were to be construed together. What, then, was the duty of the board of supervisors in this case? Money paid by stockholders to the capital of a corporation is unquestionably property of the corporation. Whether this capital or the property acquired by it has been actually invested and used or made useful in the operation of the franchise of the corporation, is a question of fact to be determined upon proper investigation. It follows that it was the duty of the board of supervisors to ascertain the amount of capital actually invested in the corporation—that is to say, the amount of capital actually paid in and invested in constructing the canals and acquiring other property used and made useful in supplying water to the customers of the corporation in Stanislaus county, and this fact should have been considered by the board in fixing water rates which the complainant was entitled to charge—under the statute. It appears from the evidence that on March 10, 1896, 25 persons, claiming to be inhabitants and taxpayers of the county of Stanislaus, filed a petition with the board of supervisors of that county, praying the board to regulate and control the rates and compensation to be collected by the complainant for the sale, rental, or distribution of the appropriated water of said company to the inhabitants of said county. After notice and a hearing upon said petition, the board, on June 26, 1896, made the following order:

"Pursuant to an act of the legislature of the state of California entitled 'An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use,' approved March 12, 1885 (St. 1885, p. 95), the board regularly proceeds to the hearing of the petition of C. C. Eastin et als., presented herein, praying for the regulation of the rates and compensation to be collected by the San Joaquin and Kings River Canal & Irrigation Company for the sale, rental, or distribution of its appropriated water to any of the inhabitants of Stanislaus county, under and pursuant to said act, and evidence having been introduced by and on behalf of the petitioners herein and by and on behalf of the said San Joaquin and Kings River Canal & Irrigation Company; and, the same being closed, and the matter submitted to the board for its consideration and decision, and the board being fully advised in the premises, the board does hereby estimate, as near as may be, the value of the canal, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation of the appropriated waters of said company, belonging to and possessed by it, at the sum of $337,000."

The remainder of the order is immaterial to the present controversy. This estimate of the value of complainant's property appears to have been based mainly upon a report by R. H. Goodwin, consulting

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engineer, and E. D. Grove, deputy county surveyor, experts employed by the board, and whose report was made to the board under date of June 10, 1896. This report contained, among other things, the following estimate of cost of construction of complainant's canal:

"The following is an estimated cost of construction of the above-mentioned canal, taking in consideration the different widths, cross-sections, grades, materials, and appurtenances based on the prices of materials, supplies, and labor of the present date:

Earth excavation, 2,966,125 yards, at 6½ c.	$192,798 10
Lumber in head, regulating, distributing, waste, and inlet gates, boxes, bridges, etc., 1,689,410 feet B. M., in place.	55,536 50
Six station buildings	4,000 00
Telephone line 70 miles	4,900 00
Engineering, superintendence, offices of company, stationery and printing, law expenses, and other incidentals	25,723 40
Right of way, first 30 miles, 900 acres, at $3	2,700 00
Right of way, balance distance, 1,068 acres, at $25	26,700 00
Total cost	$312,358 00

"We place the present cash value of the above-mentioned canal and works at $251,000.00."

To this estimated cost of construction at that date, to wit, $312,358, the board added the sum of $24,642, making the total of $337,000. It nowhere appears that this addition of $24,642 to the estimated cost of construction at that date as made by the experts employed by the board had any relation to the amount of capital actually invested in the corporation by the shareholders. On the contrary, the testimony indicates that this element in the valuation of the property was entirely ignored. Upon this valuation of $337,000 the board fixed the following rates: For irrigating alfalfa, all perennial grasses, and all cereals, $1.50 per acre per annum; for irrigating trees and vines, $2 per acre per annum; for irrigating gardens, $3.50 per acre per annum; for water for sheep, hogs, or goats, $6 per 1,000 per month, and at the same rate for a less number; for water for horses, cattle, mules, and other live stock, $25 per 1,000 per month, and at the same rate for a less number. Prior to this order of the board of supervisors the rates which had been fixed by the complainant and charged to consumers of water in the counties of Fresno, Merced, and Stanislaus, were as follows: For irrigating alfalfa, $2.50 per acre per annum; for irrigating cereals, $2 per acre per annum; for irrigating trees and vines, $2.50 per acre per annum; for irrigating gardens, $5 per acre per annum; for water for sheep, hogs, or goats, $10 per 1,000 per month, and at the same rate for a less number; for water for horses, cattle, mules, and other live stock, $40 per 1,000 per month, and at the same rate for a less number. For the purposes of this case it is conceded by the complainant that the rates per acre per annum for irrigating alfalfa, $2.50 per acre per annum, and cereals, $2 per acre per annum, are the only rates that are material to be considered in this case, for the reason that the water supplied to consumers at the other rates constitutes but a very insignificant portion of the business of the complainant. The damage to the complainant arises out of the fact that, but for this order of the board of supervisors of June 26, 1896, fixing the rate that complainant might charge

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for water supplied to consumers in Stanislaus county for irrigating alfalfa and perennial grasses and cereals $1.50 per acre per annum, complainant would have continued to charge such consumers for irrigating alfalfa $2.50 per acre per annum, and for irrigating cereals $2 per acre per annum. The evidence shows that the rate fixed by the board of supervisors reduces the income of the company considerably below 6 per cent. upon the capital actually invested in the property of the corporation, and, if a corresponding reduction were made in Fresno and Merced counties, its income would, under the most favorable conditions, be reduced to less than 5 per cent. per annum on the value of the property as estimated by the board of supervisors. Is this valuation of complainant's property correct?

It appears from the evidence that the canal owned and maintained by the complainant is on the west side of the San Joaquin river; that this canal has its head at the junction of the San Joaquin river with Fresno Slough, in Fresno county, and runs down the west side of the San Joaquin valley through the counties of Fresno and Merced into the county of Stanislaus. The total length of the canal is 120¾ miles, of which 42.9 miles are in the county of Fresno, 66.15 in the county of Merced, and 11.7 miles in the county of Stanislaus. A branch of the main canal in Fresno and Merced counties, called the "Dos Palos Branch," is 23 miles in length, but, as this branch is not used to supply water in the county of Stanislaus, it may be disregarded in this controversy. The complainant is a corporation organized in September, 1871, under the laws of the state of California. The capital stock of the corporation is divided into 100,000 shares of the par value of $100. Upon 85,000 shares of this stock calls amounting to $10.15 per share were made, and $862,750 paid in. The remaining 15,000 shares were involved in the transaction of purchase under which they were issued nonassessable until calls to the amount of $7.50 per share had been paid upon the other stock. The calls upon this stock amounted to $2.65 per share, and $39,750 paid in. There was also an additional amount of $1.45 per share, on 8,500 shares of this stock paid in, amounting to $12,325; making a total of $914,825 paid by the shareholders upon the stock of the company. The complainant commenced operations in 1871 by purchasing from another corporation known as the San Joaquin & Kings River Canal Company all the property, vested rights, surveys, and works acquired by that company since the date of its incorporation in 1866. The complainant proceeded with the work of constructing this canal. The date of its completion is a subject of controversy, but need not be determined. The claim of the defendants in this respect may be accepted for the purposes of this case. It appears that in the course of construction the complainant distributed water for irrigating purposes to consumers along the line of the canal, and derived an income from that source up to the year 1886 amounting to $60,349.20. This money was not, however, distributed in dividends, but was used by the company in construction. From 1886 to 1898 the net profits of the corporation were $158,112.58, and of this amount $134,893.38 was used by the company in the work of construction, making the total amount contributed to the capital of the corporation from 1871 to 1898 the sum

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of $1,110,067.58. There is, however, to be deducted from this amount the sum of $60,000 realized by the corporation from the sale of a tract of land which it owned. This sum was distributed to the stockholders as a dividend, and must be deducted from the capital stock of the corporation, leaving the net amount of capital the sum of $1,050,067.58. The books of account and vouchers of the complainant during its entire existence, and the books of account of the former company, were produced as evidence before the examiner. A statement of the cost of construction of the canal and irrigation works up to November 25, 1895, as shown by these books, was prepared by the complainant, and introduced in evidence as "Exhibit 2." It is as follows:

Paid San Joaquin & Kings River Canal Company, cost of works to date of purchase	$ 119,335 29
Paid John Bensley et al. in stock (15,000 shares at $7.50) for remainder of property of old company	112,500 00
Paid by this company for construction performed by itself from date of purchase from old company to February 28, 1885	739,277 84
Paid by this company for construction from March 1, 1885, to November 25, 1895	84,685 51
Total	$1,055,798 64

This exhibit was subject to the objection that complainant's books prior to 1886 did not distinguish between the cost of maintenance and the cost of construction. The complainant accordingly made a second statement, in which the cost of maintenance was excluded. This revised statement was introduced as "Exhibit 12," and was headed:

"Statement of cost of construction of San Joaquin Canal to December 31, 1873, and betterments since constructed therein, with cost of construction of parallels and extensions. This includes only items actually charged to construction, and which can be identified from the accounts as properly belonging thereto, and does not include any charges for construction which cannot be positively so identified from the accounts alone."

The items of cost were given in greater detail in this statement than in Exhibit 2, and amount to $798,429.61. It is evident that this last statement shows the actual cost of complainant's canal and works more accurately than the preceding one, but it is not necessary for the court to determine that it is in fact correct, or that it shows the actual value of the property used and useful in supplying water to the inhabitants of Stanislaus county. It is not the duty of the court to estimate the value of complainant's property or fix the water rates it may charge; but this statement, as well as the one relating to the amount of capital paid into the corporation by the stockholders, can only be considered, with the other testimony in the case on behalf of complainant, as evidence tending to establish the fact that when the board of supervisors estimated the value of the canal, ditches, flumes, water chutes, and all other property belonging to the complainant, and actually used and useful to the appropriation of water by the company, no consideration was given by the board to the evidence showing the amount of capital actually paid into the corporation or the actual, reasonable, and proper cost of the works. The court finds that the evidence in the case does establish the fact that the board failed to

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perform its duty in this respect. It follows that the value of complainant's property made by the board of supervisors and the water rates fixed by the board with respect to such estimate did deprive the complainant of property without due process of law, and denied to it the equal protection of the laws.

The question as to the amount of income which the complainant is entitled to receive on account of the capital actually invested remains to be considered. The act of 1862 provides that the board of supervisors should not reduce the water rates, rents, or tolls "so low as to yield to the stockholders less than one and one-half per cent. per month upon the capital actually invested." Prior to June 26, 1896, and for a period of more than 25 years, the complainant fixed its own rates for water supplied to consumers, but at no time did it fix rates so high as to yield 1½ per cent. per month upon any estimate of the value of the property or capital actually invested. This, then, was a right under the statute which the complainant never claimed and never reduced to possession, either before or after the act of 1885. In the Sinking Fund Cases, 99 U. S. 700, 720, 25 L. Ed. 496, Mr Chief Justice Waite, speaking of the power of congress to make such alterations and amendments of the charter as come within the just scope of legislative power, used language appropriate to this question. He said:

"That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive corporations of the fruits actually reduced to possession of contracts lawfully made."

This statement was not necessary to the determination of the question before the court, but it appears to be sound in principle. The qualification that a statutory right embraced in the charter of a corporation must be reduced to possession to secure the constitutional protection against alteration and repeal is unquestionably a law of the grant. It is perhaps true that there might be cases where a corporation of the character of the complainant, having invested capital in good faith, would not be held to have waived its ultimate right to the limit of income provided in its charter by the acceptance of a smaller income during the progress of construction, or perhaps even longer, until its system of irrigation had brought prospective tracts of land under successful cultivation. But the evidence in this case does not justify the complainant in making that claim. It had waived its right to an income of 1½ per cent. per month by not making rates to secure that income during any part of its term of existence prior to the passage of the act of 1885, and this act providing that the net annual receipts as adjusted by the board of supervisors should not be less than 6 nor more than 18 per cent. per annum, is therefore properly applicable to the regulation of complainant's rates.

Let a decree be entered in favor of the complainant in accordance with this opinion.

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In re CLAFLIN et al.

(Circuit Court, D. Massachusetts. February 10, 1902.)

No. 1,087.

CUSTOMS ADMINISTRATION—SUFFICIENCY OF PROTEST.

Paragraph 439 of the tariff act of 1897 provides that "gloves made wholly or in part of leather * * * shall pay duty at the following rates, * * * namely." Then follows paragraph 440, which enumerates several kinds of gloves, among which are Schmaschen gloves, and the rates of duty on each. *Held*, that a protest filed by an importer under the customs administrative act of 1890 against the classification of gloves as lambskin, under paragraph 441, on the ground that they should be "assessed under paragraph 439 as Schmaschen gloves," was sufficient, and distinctly informed the collector of the position of the importer, since paragraphs 439 and 440 must necessarily be construed together, and although Schmaschen gloves are not mentioned in the former the duty is assessed thereunder.

Petition for Review of Decision of Board of General Appraisers.

Charles P. Searle, for the importers.
William H. Garland, Asst. U. S. Atty.

COLT, Circuit Judge. The only question which arises on this petition for review is the sufficiency of the protest. Act June 10, 1890, § 14 (26 Stat. 137).

The collector found the goods were lambskin, and dutiable at $2.50 per dozen pairs under paragraph 441, and 40 cents additional under paragraph 445, of the tariff act of 1897 (30 Stat. 192), and assessed the duties accordingly; whereupon the petitioners made the following protest:

"Boston, Jan. 24, 1900.

"Hon. Collector of the Port of Boston—Dear Sir: We hereby respectfully protest against your action in assessing and exacting duty on 4 cases leather goods, C. Y. & S. 53/56, imported into this port on the 2nd day of January, 1900, per Str. 'Turcoman,' at the rate of $2.90 per dozen, but claim they should be assessed under Schedule N, paragraph 439, as Schmaschen gloves dutiable at $2.15 per dozen. We pay the additional sum exacted by you in order to get possession of the goods, but claim and respectfully ask to have the amount refunded to us.

"We inclose a sample of the goods for your consideration, claiming they are commercially known as Schmaschen goods and not lamb gloves.

"Very respectfully yours, Claflin, Young & Stanley."

The case then went to the board of general appraisers for decision. As a result of the evidence taken before the board of general appraisers, the government abandoned its contention that the goods were lambskin gloves, and admitted that they were Schmaschen gloves. The government then took the position that the protest was insufficient, and the board of general appraisers sustained this position, and affirmed the decision of the collector on this ground.

The object of the statute in requiring a protest is to inform the collector distinctly of the position of the importer. Technical precision is not required, nor is brevity fatal. U. S. v. Salambier, 170 U. S. 621, 626, 18 Sup. Ct. 771, 42 L. Ed. 1167, and cases cited.

In U. S. v. Salambier the protest did not refer to any paragraph of

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the tariff act, but briefly stated "that the said goods under existing laws are dutiable at 2 cts. per lb., and the exaction of a higher rate is unjust and illegal." This protest was held sufficient, although there were two paragraphs relating to the class of goods in question, under either of which the duty was two cents per pound. The court said:

"In this instance, it was impossible for the collector to have read the protest without perceiving that his classification of the merchandise, as dutiable under paragraph 239 of the tariff act at fifty per cent. ad valorem was objected to, and that the importer claimed that, under the law, the goods were dutiable at two cents per pound. The collector could not have been perplexed by the omission to name the specific paragraph which the importer sought to have applied, for there were but two paragraphs, besides 239, which dealt with the subject, namely, paragraphs 318 and 319, and under either of them the duty was that claimed by the importer, two cents per pound." 170 U. S. 626, 18 Sup. Ct. 773, 42 L. Ed. 1167.

In the case at bar the protest indicated distinctly and definitely the ground of the importers' objection to the duties assessed. It declares that the goods are Schmaschen gloves, dutiable under Schedule N, par. 439. Neither the collector nor the board of general appraisers had any difficulty in understanding the exact issue which the importers raised. After reading the protest, it was impossible not to perceive what the importers objected to and what they claimed under the law. In the collector's letter to the board of general appraisers transmitting the protest, with accompanying papers, he says: "The protestants have duly complied with the requirements of section 14 of the act of June 10, 1890."

It is contended that the protest is insufficient because paragraph 439 is named instead of paragraph 440, where Schmaschen gloves are mentioned. A glance at the two paragraphs, however, shows they are connected by the word "namely," and that both must be read together as one paragraph:

"439. Gloves made wholly or in part of leather, whether wholly or partly manufactured, shall pay duty at the following rates, the lengths stated in each case being the extreme length when stretched to their full extent, namely:

"440. Women's or children's 'glace' finish, Schmaschen (of sheep origin), not over fourteen inches in length, one dollar and seventy-five cents per dozen pairs; over fourteen inches, and not over seventeen inches in length, two dollars and twenty-five cents per dozen pairs; over seventeen inches in length, two dollars and seventy-five cents per dozen pairs; men's 'glace' finish, Schmaschen (sheep), three dollars per dozen pairs."

Paragraph 439 does not provide any specific rate of duty upon the articles mentioned. It simply declares that "gloves made wholly or in part of leather, whether wholly or partly manufactured, shall pay duty at the following rates, * * * namely." Then follows paragraph 440, which enumerates several kinds of gloves, among which are the Schmaschen, and the rates of duty, which are assessed under paragraph 439. Paragraph 439 refers to the succeeding paragraph, and paragraph 440 refers to the preceding paragraph. When the importers in their protest referred to paragraph 439, and at the same time mentioned Schmaschen gloves, they necessarily included paragraph 440, because the two paragraphs must be consolidated in order to subject the articles mentioned therein to any rate of duty.

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The further objection is taken that the protest names $2.15 per dozen pairs as the rate of duty, and that no such rate of duty on Schmaschen gloves is found in paragraph 439 or paragraph 440.

The reason why the importers in this protest named $2.15 instead of $1.75 as the rate of duty is apparent, and could lead to no misunderstanding as to the rate claimed. The collector had assessed a duty of $2.50 per dozen pairs under paragraph 441, and 40 cents additional duty under paragraph 445. The importers made no objection to this additional assessment under paragraph 445, and they therefore added this 40 cents additional duty to $1.75, which is the duty mentioned in paragraph 440 on the Schmaschen gloves in question. Under these circumstances, it was unnecessary for the importers to refer in their protest to this additional duty under paragraph 445, because they made no objection to this further assessment; and the statement in their protest of the rate of $2.15 per dozen becomes perfectly intelligible, in view of the collector's action and their own position.

In my opinion, and for the reasons already given, this is not a case where the importers claim in their protest that the merchandise is dutiable under a specific paragraph, and are now seeking to classify the merchandise under a different paragraph, and therefore the two cases on which the government relies are not in point. In re Sherman (C. C.) 49 Fed. 224; In re Austin (C. C.) 47 Fed. 873.

I am satisfied that the ruling of the board of general appraisers in this case was wrong, and that their decision should be reversed, and judgment entered for the importers; and it is so ordered.

Judgment for petitioners.

BLISS v. REED.

(Circuit Court, W. D. Pennsylvania. February 8, 1902.)

No. 14, Nov. Term, 1898.

PATENTS—SUIT IN EQUITY FOR INFRINGEMENT—ATTACKING JURISDICTION AFTER DECREE.

Where a suit in equity for infringement of a patent has been heard on the merits, and a decree for complainant entered, which has been affirmed on appeal, in the regular course of procedure the question of jurisdiction is not thereafter open, and defendant will not be given leave to bring forward, by a supplemental bill in the nature of a bill of review, a foreign patent to the same patentee, for the purpose of showing that by reason of the expiration of such patent the one in suit had expired prior to the commencement of the suit; and the court was therefore without jurisdiction in equity, where the identity of the invention claimed in the two patents is so doubtful that bad faith cannot be imputed to the patentee.

In Equity. Suit for infringement of patents. Sur defendant's petition for leave to bring forward by supplemental bill, in the nature of a bill of review, a Canadian patent.

J. H. Whitaker and Lysander Hill, for petitioner.

John R. Bennett and H. H. Bliss, for defendant.

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ACHESON, Circuit Judge. The entire subject-matter of this suit belongs to a class over which equity has general jurisdiction, and the case proceeded on the merits to a decree against the defendant (102 Fed. 903), which has been affirmed by the United States circuit court of appeals. In the regular course of procedure, then, the question of jurisdiction is not open. Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005.

This is an application by the defendant for leave to bring forward by supplemental bill, in the nature of a bill of review, a Canadian patent granted to Elward on April 23, 1881, for the term of 15 years, for the purpose of showing that, by reason of the expiration of that patent, the United States patent to Elward, embraced in this bill, had expired before the commencement of this suit, and therefore that the plaintiff should have proceeded at law as to that patent. The defendant's petition alleges that "one of the inventions contained and claimed in said Canadian patent is identical with the invention contained and claimed in Elward's United States patent." The defendant has laid before the court a copy of the Canadian patent. It contains 28 claims, but only one of these claims, namely, claim 21, is alleged to be for the invention contained and claimed in Elward's United States patent.

It is alleged that at the time of the grant of the United States patent to Elward the existence of the Canadian patent was fraudulently suppressed by Elward, and a false oath was made by him that the invention had not been patented to him in any foreign country. It is further alleged that the plaintiff and one of his solicitors knew of the Canadian patent, and of the expiration of the United States patent, when this suit was brought, and that they acted in bad faith in instituting this suit in equity.

I am not satisfied of the truth of any of the allegations impeaching the good faith of Elward, or of the plaintiff or his solicitor. Elward's oath was made on January 22, 1883, after his application had taken the final form in which the United States patent was issued. Now, the United States patent contains a single claim, which is for a specific combination of named elements. Claim 21 of the Canadian patent also is for a specific combination of named elements. It is by no means clear that these two claims are for the same invention. They appear to me to be for materially different combinations. The elements of the two claims, as I read the claims, differ essentially. To say the least of it, identity of the inventions covered by these two claims is so doubtful that Elward might have taken the oath he did, and the plaintiff and his solicitor have proceeded as they have done, in perfect good faith. As the element of bad faith is absent, no sufficient ground for granting this application appears. I am the more satisfied with this conclusion because, in an action at law brought now, the statute of limitations would bar the plaintiff's claim in whole or part.

And now, to wit, February 8, 1902, the application of the defendant for leave to bring forward, by supplemental bill in the nature of a bill of review, the Canadian patent recited in his petition, is denied.

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THE JOHN A. BRIGGS.

BALCH v. ONE MILLION TWO HUNDRED AND SIXTY-ONE THOUSAND FEET OF LUMBER.

(District Court, E. D. Pennsylvania. February 14, 1902.)

Nos. 57, 60.

SHIPPING—NEGLIGENT LOADING OF VESSEL—DAMAGES TO CHARTERER.

Evidence considered, and *held* to sustain the claim of a charterer that a cargo of timber was improperly stowed by the master, by reason of which the full carrying capacity of the vessel was not utilized, and the charterer, who paid a lump sum as charter hire for the voyage, sustained loss for which he was entitled to damages.

In Admiralty. Suit by charterer to recover damages for failure of ship to carry a full cargo, and cross libel for demurrage.

Horace L. Cheyney and John F. Lewis, for the John A. Briggs.
Theodore M. Etting and Jones, Carson & Beeber, for the charterer.

J. B. McPHERSON, District Judge. These cross libels disclose a dispute between a ship and her charterers, the ship being charged with improper stowage of a cargo of timber, whereby the carrying capacity of the vessel was not fully utilized; and the charterers being charged with failure to deliver the cargo properly, whereby delay occurred, and a liability for demurrage arose. The testimony is voluminous and conflicting, and will support the theory of either party. It has not been easy to reach a conclusion, but, on the whole, it seems to me that the weight of the evidence is against the ship, and I have therefore adopted, with modifications, the findings of fact proposed by the charterers. Thus modified, they are as follows:

1. The Pacific Pine Company, a California corporation engaged in the lumber business, having orders from the Atlantic seaboard for lumber of various sizes, amounting in the aggregate to 1,470,000 feet, the acceptance of which was dependent upon their ability to charter a suitable vessel, entered upon negotiations with the managing owner of the ship John A. Briggs for the charter of that vessel. The negotiations resulted in the execution of a charter party, under whose terms the vessel was let unto the Pacific Pine Company for the carriage of "a full cargo of sawn lumber and timber" from one or two safe loading places on Puget Sound, as might be ordered by the charterers, to Philadelphia or New York, the consideration being the lump sum of $23,500. The timber was to be "of such length and sizes as can be taken through vessel's present hatchways or bow or stern ports, if any, and on deck," these ports to be large enough to receive timber 24x24 inches square. The cargo was to be stowed under the captain's supervision and direction, and the stevedore employed by the vessel was to be mutually satisfactory to the captain and charterers or their agents. Thirty-two working days were allowed for loading, this period to begin "twenty-four hours after vessel is at loading place designated by charterers or their agents, her inward cargo or unnecessary ballast discharged, and she is ready to receive cargo, and captain

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has notified them in writing to that effect." For each day's detention "by default of [the charterers]," $120 in gold was to be paid.

2. The charterers divided the cargo to be shipped between two mills, one at Port Gamble and one at Port Blakeley, both on Puget Sound. A duplicate order was given to each mill, this being a customary and proper division, and Port Gamble was named as the first place of loading. On the arrival of the ship from the voyage on which she was engaged when the contract was made, she was ordered to Port Gamble, where she arrived on December 12, 1900. The charterers intended to ship from Port Gamble 735,000 feet of lumber, and of this amount 250,000 feet had been already cut, and was stored upon the wharf. The vessel did not report herself in readiness to receive cargo until December 21st, by which time the amount of lumber cut and on the wharf had increased to nearly 600,000 feet. This quantity was made up of lumber and timber of various dimensions and sizes: 125,000 feet was decking, 2x4 to 4x6 inches, averaging 32 feet in length; 75,000 feet was boards, 1x6, 12 to 16 feet long; and 535,000 feet was heavy timber, of different lengths and sizes, running from 10x12 in breadth and thickness, and 50 to 85 feet in length, to 26x26, and 40 to 50 feet in length, some sticks being even longer. When the vessel reported her readiness to receive cargo, the charterers tendered the 600,000 feet already on the wharf. All the boards and decking, and nearly all the timber of heavier and larger sizes, had been cut. About 150,000 feet was still to be cut, and this was for the most part made up of the smaller sizes of the large timber. The cargo was piled on the wharf, end on to the ship. All sizes, from 10x12 upward, were placed in one solid pile about 50 feet in length and 15 or 16 feet high. The boards and decking were intended to be used for stowage, and for loading under the poop. They were separately piled alongside the timber. Toward the eastern end of the pile some boards and decking were on top of the timber, but at least 50 feet of the timber was clear of this small lumber. The larger and heavier sizes of the timber, speaking generally, were at the bottom of the pile, and the smaller sizes on the top. It is neither practicable nor customary to pile each size separately. The larger and longer sizes are usually cut first, so that, if any imperfections appear, the timber can be cut shorter or planed down, and thus utilized for smaller sizes. The sticks are piled on the wharf as they are cut. In the present case, the practice usually observed was followed.

3. The lower hold of the ship had a carrying capacity of about 450,000 feet, and the lower between-decks could carry a similar amount. As 750,000 feet was to be shipped at Port Gamble, it was necessary to use both these spaces. Under such conditions, the proper practice would have been to load both at the same time, putting the sticks either in the hold or in the lower between-decks, as their dimensions might require, and filling up the vacant spaces with boards and decking. Captain Balch, the master of the ship, did not pursue this course for two reasons: First, he was ordered by his owners to stow the lower hold first; and, second, he himself believed—honestly, no doubt, but none the less mistakenly—that none of the timber that was on top of the pile was of such dimensions as to admit of stowage

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in the lower hold through the vessel's hatchways and ports. He therefore declared his inability to receive any part of the cargo tendered, and for three weeks he made no effort by actual experiment to ascertain whether any of the timber accessible would go into the vessel or not, but simply rested upon his belief that the timber which was on the top of the pile could not be used. On January 15th, under changed orders from his owners, for the first time he accepted the cargo, and began the loading of his vessel by putting more than 100,000 feet of the boards and decking, which had been intended for stowage, in the bottom of the lower hold and in the wings, where larger and heavier timber should have been placed. After this had been done, he then for the first time endeavored to take the larger and heavier timber, and found immediately that he had been mistaken in supposing that he could not load the timber that had been offered. Working from the top of the pile down, he had no difficulty between January 15th and February 6th in taking on board all of the timber which was on the wharf at the time when he reported his readiness to receive cargo, together with more than 150,000 feet that was cut and delivered thereafter.

4. To stow such a cargo as this properly, dunnage should be laid on top of the ballast. Heavy timber should then be placed on top of the dunnage, and the boards and decking should be used wherever the lengths of the timber sticks are such as to leave unfilled spaces. The smaller lumber—the boards and the decking—should also be used to fill the spaces between the beams that separate the lower between-decks from the lower hold. The material thus used is technically known as "beam filling." The loading of the two lower decks of the ship was nearly finished at Port Gamble. A little additional lumber was placed on these decks after she arrived at Port Blakeley.

The loading of the ship at Port Gamble was defective in the following respects:

(1) The ballast was improperly trimmed, causing the vessel to be considerably down by the stern, in consequence of which it was found impracticable to stow cargo properly under her poop deck.

(2) There was no beam filling whatever between her beams, although this might have been put in, if the stowing had been skillfully done.

(3) There were numerous empty spaces in the lower hold and the lower between-decks. The condition of the vessel on her arrival at Port Blakeley is technically known as "blown up."

In consequence of the trim of the vessel, the marine surveyors would not permit her to be loaded at Port Blakeley with her proper complement of cargo, either on deck or under the poop, and of the 735,000 feet of lumber intended by the charterers to be shipped from Port Blakeley it was found practicable to load the vessel with no more than 526,980 feet. This quantity, together with the 735,000 feet theretofore received at Port Gamble, made up a cargo of 1,261,980 feet; and this was carried by the vessel from Puget Sound to Philadelphia, and was there delivered, upon payment of the full charter money, to the persons entitled to receive it.

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5. Before the charter was agreed to, the managing owner had stated how much lumber the ship had carried on previous voyages, and upon inquiry these statements had been confirmed. Upon the voyages referred to she had carried the following cargoes of lumber:

From Puget Sound to Sydney, 1,555,823 feet.

From Puget Sound to Plymouth, 1,430,000 feet.

From Puget Sound to South Africa, 1,483,000 feet.

The lumber carrying capacity of the vessel is estimated by Capt. Balch as follows:

Lower hold	450,000 feet.
Lower between-decks	450,000 "
Upper between-decks	450,000 "
Deck load	90,000 "
Poop stowage	30,000 "
Making a total of	1,470,000 "

Upon her arrival at Philadelphia, the vessel was, at the instance of the charterers, examined by two expert stevedores. One of them examined her before any of the lumber had been discharged. The other was sent over from New York, and did not arrive until after the upper between-decks, the lower between-decks, the deck load, and the poop had been discharged. The testimony of the former witness is that, if properly laden, the ship could have carried about 238,000 additional feet of cargo. The testimony of the New York stevedore is confined to the lower hold, and to the loss occasioned by the absence of beam filling therein. This he estimated at more than 100,000 feet.

6. After the cargo had been discharged and was on the wharf, and after the vessel had been attached for improper stowage, the master of the ship brought a counter suit for delay at the port of loading. Upon this point, without referring to the evidence in detail, it seems to me to be enough to say that at no time after the vessel was reported to be ready for loading was there any delay occasioned by default of the charterers, their agents or servants. On the contrary, after deducting from the time consumed in actual loading such time as cannot properly be charged against the charterers, the cargo was put on board in less time than is allowed by the contract. As already stated, the delay of three weeks that occurred before the loading began was due to the fault of the ship.

7. If properly loaded, the ship could have carried 1,470,000 feet of lumber. The quantity actually carried was only 1,261,980 feet. There was therefore a deficiency of cargo, due to the improper disposition of the ballast and the bad stowage of the cargo, and for the loss thus occasioned the ship must be held liable.

The measure of damages is the difference between the price at Port Blakeley of the lumber that the ship could have carried if she had been properly stowed and the contract price of such lumber at Philadelphia, less the cost of carriage, with interest from the day when the contract price would have been paid. The record does not contain testimony that enables me to compute the sum due, and therefore (unless the parties can agree upon the amount) a commissioner must be appointed.

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It may be proper to add that after the dispute arose at Port Gamble the evidence shows clearly that both parties expected a lawsuit to follow, and were anxious to lose no point that might be of advantage. Either, I dare say, was willing to shift his ground if something might perhaps be gained thereby, and the correspondence shows the irritated watchfulness on both sides that might, under such circumstances, be looked for. As I regard the case, however, these maneuvers for position are not of great importance. The determining facts are the owner's mistaken direction to the master to load the lower hold first, and the master's mistaken belief that he was not able to take on board the timber that for three weeks was always at his command.

In No. 60 the libel is dismissed. In No. 57 the libelant is entitled to a decree. In view of the closely balanced testimony, the costs in both cases will be divided.

STETSON et al. v. HERRESHOFF MFG. CO. et al.

(Circuit Court, D. Rhode Island. February 17, 1902.)

No. 2,573.

1. PATENTS—SCOPE OF INVENTION—LIMITATION BY NAME.
   Where an inventor has made and patented a thing which is novel, but which performs in part the functions of each of two old structures, his selection of the name of one of them for his invention, as being approximately descriptive, should not be held a limitation which deprives him of the right to protection, save as to the features of his invention which are appropriately described by such name; nor, on the other hand, can he escape anticipation by a prior structure because it was given a different name, where the functions of the two are substantially the same.

2. SAME—ANTICIPATION—SHIPS' KEELS.
   The McIntyre patent, No. 393,713, for a ship's keelson, was anticipated by patent No. 367,828, to the same patentee, for a box keel, which describes a keel formed of a single piece of cast metal, while the later patent describes substantially the same structure, divided into sections for convenience of handling in the construction of larger vessels, the sections having end walls integral with the sides and bottom, by means of which they are bolted together when in place; the change being one which does not involve invention.

In Equity. Suit for infringement of letters patent No. 393,713, for a ship's keelson, granted November 27, 1888, to James McIntyre, assignor of one-half to John A. Stetson. On final hearing.

J. E. Maynadier, for complainants.
Walter H. Barney and Francis Colwell, for defendants.

BROWN, District Judge. This suit is for infringement of letters patent No. 393,713, dated November 27, 1888, to James McIntyre, assignor of one-half to John A. Stetson, for a "ship's keelson." The defenses are invalidity and noninfringement.

The first and fourth claims only are in suit:

"(1) In a vessel, the compound keelson herein described, made up of two or more separate sections, the side and end walls of which are integral, the

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sections being secured together end to end, substantially as and for the purpose set forth.'

"(4) In a vessel, the compound keelson herein described, made up of two or more separate sections, the end and side walls of which are integral, the sections being secured together end to end, and provided with one or more crosspieces to sustain the ribs, substantially as and for the purpose set forth."

The specification states:

"My invention consists, mainly, in a keelson made up of sections, each having one or more cross walls which are integral with its side walls, the sections being secured together end to end. * * * The sections are secured together end to end by fastenings, d, some of which consist of bolts and nuts, while others consist of clamps and keys, as shown."

A considerable amount of evidence and of argument is devoted to distinctions between a "keel" and a "keelson." Many definitions are quoted; but the distinction is pointed out sufficiently, for the purposes of this case, in the definition from the Century Dictionary:

"Keel. * * * (2) The principal timber in a ship or boat, extending from stem to stern at the bottom, supporting the whole frame, and consisting of a number of pieces scarfed together and bolted together; in iron vessels, the combination of plates corresponding to the keel of a wooden vessel.

"Keelson, Kelson. A line of jointed timbers in a ship laid on the middle of the floor timbers over the keel, fastened with long bolts and clinched, thus binding the floor timbers to the keel; in iron ships, a combination of plates corresponding to the keelson timber of a wooden vessel."

From the specification, it would seem that the structure of the patent was intended to be used in connection with a wooden keel or a keel plate. The specification says: "Of course, keel, E, may be dispensed with, if desired, in which case keel plate, D, is the keel."

Nevertheless, if we regard structural considerations, the connected sections of cast metal, called by the patentee a "compound keelson," are more analogous to the keel of an ordinary ship than is the keel plate, D, since the connected sections extending from stem to stern are the principal members of the backbone of the ship, and the keel plate, D, does not, by itself, perform the function of an ordinary keel, though it may perhaps be called a "keel" because it is at the bottom of the ship. But this case should turn upon a consideration of the patentee's structure, rather than upon distinctions between the words "keel" and "keelson," since the patent, read as a whole, clearly describes and claims the thing which the patentee desires to cover, as well as the function it is to perform.

The complainants' departure from older forms of construction has resulted in a structure to which neither the word "keel" nor the word "keelson," as defined, is strictly applicable. It would seem from the specification that the patentee intended to use his structure in conjunction with a wooden keel, or with a keel plate; but it is by no means apparent that it is impractical for use without a keel or keel plate, and the keel or keel plate is not described or claimed as a part of the patented structure.

Whether or not the defendants infringe cannot, in my opinion, be determined by considering whether the defendants use anything corresponding to the keel plate or keel, shown, but not claimed, in the patent. If the structure is patentable as a keel, the patent would prob-

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ably be infringed by using it for a keelson, and if it is patentable as a keelson it would probably be infringed by use as a keel, since the keel and keelson have a common function as co-operating parts of the ship's backbone.

I am further of the opinion that the patentee's use of the word "keelson," upon the suggestion of the patent office that this was a more appropriate word than "keel," does not amount to a voluntary limitation of the patent to the structure used in conjunction with a keel plate or wooden keel. The structure shown in the patent is the principal member of the ship's backbone. To call it a "keel" or a "keelson" does not make it otherwise.

It is by no means apparent that the examiner was correct in saying that this structure is a keelson, "as no other appears to be provided, and the part designated by the letter E is more properly the keel." It would seem that, in choosing between the two words, regard should have been had to the question whether the connected sections or the part, E, formed the principal structural member.

But it appears to me entirely immaterial whether the examiner's choice of words was correct or not, and the fact that the patentee acquiesced in the choice of words is also immaterial. While, in some cases, the voluntary choice of a name may well be regarded as imposing a limitation upon the thing or function which the patentee desires to cover, and an acknowledgment that the standard meaning of a word is an appropriate description and limitation of the thing claimed, such a doctrine is frequently abused and misapplied for the creation of verbal and meritless issues. When it appears that an art is advanced by a novel structure, which in some features resembles old and well-known things, and in other features differs from them, or which is intermediate of things respectively bearing different names, we should be slow to allow debatable implications, arising merely from the choice of a name, to override plain text and plain descriptions of things and functions.

An inventor makes a thing which is new. He must name it, and, as he cannot usually coin a new word, he must take an old one which fits it approximately. He may, like this inventor, find two old words about equally applicable, but neither of which is exactly descriptive of the invention. He chooses one. He might as well or better have chosen the other. His rights in a patent cause should not turn upon an assumption that he has thrown away all of what he describes except that which, in our opinion, is appropriately described by the general name he has chosen.

We will consider, then, whether the patent in suit discloses a patentable invention, by whatever name it may be called. The patent in suit makes reference to a prior patent, as follows:

"The keelson sections shown in the drawings are provided with crosspieces, f, to sustain the ribs, f^1, as fully explained in my patent, No. 367,828, dated August 9, 1887, and the planking, f^2, is best secured to the ribs, as explained in that patent."

The prior patent describes, among other things:

"A box keel, formed with crosspieces forming pockets for the ribs. The ribs are bolted to these crosspieces, and a very solid and firm interior con-

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nection is formed between the box keel and the ribs, without the need of bolt holes through the keel. After the ribs are in place, the spaces between the crosspieces may be filled with lead or ballast. This is very desirable for yachts. * * *" Also: "The box keel, D, is of cast metal, with or without the center-board box, E, and crosspieces, d, may be cast with the box keel, or otherwise connected to it."

Claim 2 of the prior patent reads as follows:

"(2) The box keel, D, formed of a continuous single piece of metal having crosspieces, d, at intervals to sustain the ribs, substantially as and for the purpose set forth."

Upon the complainants' brief it is conceded that the structure of the prior patent is for the same purpose as the structure of the later patent. The complainants, therefore, cannot escape anticipation by distinctions between a keel and keelson, and are not on this issue assisted by the fact that in his prior patent the patentee has claimed a box keel, and in the patent in suit a compound keelson. The considerations which are favorable to the complainants on the question of infringement must be given full force upon the question of anticipation and invention.

It is conceded that a vessel "with a foundation, which is a single casting with crosspieces to sustain the ribs," is a part of the prior art; that the fundamental idea in the prior patent is that the foundation or backbone of the vessel is a continuous single piece of metal, with crosspieces at intervals to sustain the ribs. It is contended that McIntyre, in his prior patent No. 367,828, advanced the art by teaching the construction of a new class of vessels,—that is, the class characterized by a buoyant body, mainly the ribs and skin, with the ribs held together by a single casting, forming the backbone of the vessel; and in the patent in suit, No. 393,713, he again advanced the art by teaching how that class of vessels could be constructed of much greater length than was before practical. The brief for the complainants summarizes as follows:

"Briefly, the patentee taught in his second patent that if the pattern for the cast backbone of his first patent were cut into two or three pieces, and a cross end wall added to the front end of the stern piece, a like cross end wall added to the rear end of the bow piece, and two like cross end walls added to the midship piece, the new result produced by uniting the castings from those new patterns by means of bolts through their cross end walls would be a new backbone for vessels which would be an important practical improvement over the cast backbone of his first patent."

The complainants submit that the question to be decided is whether that new backbone is an invention or not. It is important, at this point, to refer to the evidence of McIntyre, upon cross-examination:

"C. Q. I understand you to say that you consider your construction of keelson superior, because the end and side walls and crosspieces are cast integral with the bottom, and so dispense with the use of angle irons, bolts, and rivets. Do I understand you correctly? Ans. I do. C. Q. In other words, the more joints there are the more chance there is for something to give way, and so weaken or injure the vessel? Ans. Yes: C. Q. Your construction of the keelson in section is for convenience in construction and handling, and if it could be conveniently made in one section it would be preferable so to do, would it not? Ans. Yes. C. Q. Were vessels constructed with metal keels prior to the application for the patent in suit? Ans. Oh, yes.

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C. Q. And these keels were frequently made up of a number of plates fastened together. Is that not so? Ans. Yes."

It is contended that invention resides—First, in the idea of cutting up the foundation member of the 1887 patent into cross sections; second, in the idea of cross end walls, one on the after part of the prow section, one on the forward part of the stern section, and two on the amidship section; and, third, in the idea of securing those sections end to end by means of the cross walls.

Box keels formed of plates of metal were old; and to make a structure by casting, rather than by welding or riveting, does not ordinarily constitute invention. Kilbourne v. W. Bingham Co., 1 C. C. A. 617, 50 Fed. 697, 703; Gardner v. Herz, 118 U. S. 180, 6 Sup. Ct. 1027, 30 L. Ed. 158; Hicks v. Kelsey, 18 Wall. 670, 21 L. Ed. 852; Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683. But it is obvious that in the present case the complainant McIntyre cannot stand as the inventor of a box keel of cast metal, since his prior patent anticipates this. A cast box keel of metal being old, did it require invention to put three of these together? Or, to put it another way, did it require invention to cut one of these up into three sections, put end walls on the sections, and unite these three by bolting their ends together?

The only novelty shown on the complainants' theory of their patent is the division of an old device into three pieces, because it was impracticable to make or handle castings, such as those shown in the prior patent, of sufficient size for use in larger vessels. The compound feature of the construction is merely a weakness conceded to the exigencies of construction. The function of the compound structure is exactly that of the simple structure.

I am of the opinion that it was not invention to think of using three castings instead of one, and that to make the castings of such form that their ends could be bolted together was a mere mechanical change, involving no exercise of the inventive faculty, and the scantiest exercise of mechanical skill.

The question whether there is invention in the cast metal box keel of the prior patent, unless that patent be restricted to peculiar features, is not properly in this case; but, as it has been suggested that these defendants are indebted to McIntyre for features of their construction, it may be observed that twin keelsons of cast metal in box form were used by John B. Herreshoff, one of the defendants, in the yacht Triton, as early as 1872, 15 years before McIntyre's earlier patent. The keel construction of the Defender and Columbia is made up of three bronze castings, which are fastened together end to end by bolts through end flanges cast integral with the sections of the plate; to the crosspieces are bolted floor plates, a common feature in the construction of iron ships; and to these floor plates are attached the frames or ribs. This is an essentially different mode of construction from that exhibited in either of the patents of McIntyre.

McIntyre's box keel was formed with cross pieces forming pockets for the ribs. The ribs were bolted to these crosspieces, with the design of forming a very solid and firm interior connection between the box keel and the ribs. There is no such interior connection be-

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tween the box keel and the ribs in the Herreshoff construction. The ribs do not go into pockets, but are sustained by floor plates.

McIntyre was not recognized by the patent office as the inventor of a keel made of cast metal. In his original application for the prior patent, a box keel formed of continuous metal was claimed. The examiner rejected the claim, saying: "A box keel formed of continuous metal is not new, but a box keel formed of a continuous single piece of metal is new, so far as the examiner is advised." The earlier patent was allowed because the keel was simple, and not compound, and, presumably, because of the special combination of ribs and cast rib pockets. The patent in suit can derive no validity from what is in the prior patent; but, on the contrary, the prior patent, in my opinion, is a complete barrier to the claim that the present patent discloses a patentable novelty.

There are other defenses of importance, which show, among other things, that the builders of the Columbia, many years before McIntyre's first application, used metal cast in box form to stiffen the backbone of a vessel, and that in constructing their yachts they drew only on the common and recognized stock of all persons skilled in metal construction, so far as the formation of this particular portion of their vessels is concerned. It is not necessary to decide whether McIntyre's patents were anticipated by the twin box castings used in the keelson of the Triton. He was, at least, anticipated in the use of cast metal of box form to strengthen the backbone of a ship, and was thus limited, at all events, to the use of metal castings for the particular purpose, and in the particular mode, shown in his patents.

The fact that the structure of the patent in suit has never been used by McIntyre during 13 years of the life of his patent would seem to offset the complainants' contention that the patented structure is of vast importance.

It may be of importance to the defendants to use metal castings of bronze, instead of wooden timbers or metal timbers, made of plates in box form; but it is not because their construction is a development of the ideas of McIntyre, but because cast metal is stronger than wood, and apparently better for this purpose than metal plates riveted together. They have an unquestioned right to use rectangular boxes of metal plate as structural elements, and they have the right, in common with all builders, to cast their metal structural parts if they prefer to do so, rather than to make them by welding or riveting, and they have a right to use such structural elements to strengthen the backbone of a ship. In all of this they precede McIntyre. The superior qualities of their yachts are not attributable to the way in which they have constructed this particular member, nor to the appropriation of any inventive idea disclosed in the patent in suit.

The bill will be dismissed.

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H. B. CLAFLIN CO. v. MIDDLESEX BANKING CO. et al.

(Circuit Court, E. D. Arkansas, Western Division. February 19, 1902.)

No. 1,354.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—FAILURE OF ASSIGNEE TO QUALIFY —RIGHTS OF CREDITORS.

Where a trust has been created by an assignment for the benefit of creditors, a court of equity will not permit it to fail because the assignee fails to qualify as required by the laws of the state, but will either appoint a new trustee, or permit the beneficiaries to maintain a bill to execute the trust.

2. MORTGAGES—RIGHT OF REDEMPTION FROM INVALID SALE.

A suit to redeem real estate from a sale under a mortgage alleged to have been voidable for irregularities, and to constitute the purchaser and his grantees merely mortgagees in possession, may be maintained on general equitable principles, regardless of statute, by the mortgagor or any one who has succeeded to his rights in the land.

3. ADVERSE POSSESSION—GRANTEE UNDER FORECLOSURE SALE—IRREGULARITY OF PROCEEDINGS.

A deed to land executed on a foreclosure sale, which is regular and valid on its face, and purports to convey the entire title of the mortgagor, although it may be in fact voidable, constitutes color of title, and is notice to all persons that the grantee taking possession thereunder claims the absolute title adversely to the mortgagor; and, under the statutes of Arkansas, a continuance of such possession for seven years confers upon him or his grantees an absolute title, and bars an action to redeem from the mortgage.

4. LIMITATION—DEFENSES—FORMER SUIT.

A plaintiff in a suit to redeem from a mortgage is not aided, as against the bar of limitation, by the fact that a prior suit to redeem, which was dismissed, was brought within the time limited, by a different party as plaintiff, although based on the same grounds.

In Equity. On demurrer to bill.

The material allegations of the bill are that on July 28, 1890, Joe Davies and wife conveyed the lands in controversy to Harold Smith as trustee to secure the payment of a large sum of money loaned to them on that date by the defendant the Middlesex Banking Company. This trust deed was in the nature of a mortgage, with the usual powers of sale to the trustee in case of a default in the payment of the debt, and also with power to the cestui que trust to substitute a trustee in place of Harold Smith if he declined or is unable to act; that on August 7, 1894, the defendant Lee J. Lockwood was duly substituted as such trustee, and on November 21, 1894, he made a sale of the mortgaged premises, under the powers of the trust deed, and the defendant banking company became the purchaser at said sale, and received a deed for the lands from the trustee on November 27, 1894, and took immediate possession of the premises under said deed. This sale is attacked as being void for matters de hors the deed, for the reason, as charged in the bill, that the trustee had failed to give notice of the sale as required by the terms of the deed, and also a failure to have the property appraised before the sale, as required by the laws of Arkansas, although the deed from the trustee to the banking company is good on its face, and shows a strict compliance with all the requirements of the mortgage and the laws of the state. It is further charged that on January 10, 1896, the banking company sold and conveyed these lands by proper deed of conveyance to its codefendant the Southern Planting Company, and on July 13, 1897, the planting company sold and conveyed them to Walter Davies, who is now in possession, all of whom had full notice of the defects of the sale. The bill was filed and process issued on December 6, 1901. The complainant brings this suit as a creditor of the Sterling & Smith Com-

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pany, for himself and all other creditors of that corporation who are willing to join in the action for the purpose of having the deeds to the banking company and its grantees set aside, and to redeem from them as second mortgagee, claiming the right to do so by reason of the following facts: That on February 14, 1891, Joe Davies executed a mortgage to the Sterling & Smith Company to secure the payment of a debt due from him, subject to the above-described mortgage to the banking company; that at the April term, 1894, in an action instituted by the Sterling & Smith Company for the purpose of foreclosing its mortgage, the chancery court of Chicot county, state of Arkansas, rendered a decree of foreclosure, and ordered the lands to be sold, but neither the banking company nor the trustee in its mortgage were made parties to that suit. On March 18, 1895, the commissioner of the chancery court sold the lands under the decree of the court, and the Sterling & Smith Company became the purchaser of them, subject to the banking company's mortgage; the commissioner made a deed of conveyance to the Sterling & Smith Company, which is filed as an exhibit to the bill, and made a part thereof, which deed was duly approved and confirmed by the court which had, by its decree, authorized him to make the sale; that on August 14, 1899, the Sterling & Smith Company, being insolvent, conveyed these lands by deed to Perry Nugent, "In trust, however, for the benefit of the creditors of the Sterling & Smith Company, with power to lease, mortgage, and sell and to devote the net proceeds to the payment of the debts of the Sterling & Smith Company." Nugent, the trustee, filed the deed for record, but never qualified as assignee in insolvency, as required by the laws of the state of Arkansas. It is further charged that Nugent, as such trustee or assignee, in April, 1900, filed a bill in the chancery court of Chicot county against these same defendants, asking that the sales be set aside for the same reason alleged in this bill, and he be permitted to redeem; that this cause was, upon proper proceedings, removed to this court; that Nugent has since died, and that said suit abated, not having been revived. The prayer of the bill is that an account be taken of what, if anything, is due to defendants for principal and interest under the first mortgage, and also an account of the rents and profits received by the defendants, and, if anything appears to be still due on the mortgage, that the complainant is ready and willing to pay it, and that the conveyances under which defendants claim be canceled and set aside. To this bill defendants demurred, upon two grounds—First, that there is no equity in the bill; and, second, that complainant has been guilty of such laches that a court of equity should grant no relief.

P. C. Dooley, for complainant.
R. E. Craig, for defendant Walter Davies.
H. R. Boyd, for other defendants.

TRIEBER, District Judge (after stating the facts). The failure of Nugent to qualify as assignee, as prescribed by the laws of the state of Arkansas, prevents him from maintaining an action at law for the possession of the assigned estate. Bartlett v. Teah (C. C.) 1 Fed. 768; Teah v. Roth, 39 Ark. 66; State v. Dupuy, 52 Ark. 48, 11 S. W. 964. Yet a trust having been established by the conveyance to him, a court of equity will not let it fail, and will either appoint a new trustee, or permit the beneficiaries, the creditors of the assignor, the Sterling & Smith Company (one of whom the complainant is), to maintain a bill to execute the trust. Pom. Eq. Jur. § 1007; Story, Eq. Jur. §§ 1060, 1061; Batesville Inst. v. Kaufman, 18 Wall. 151, 21 L. Ed. 775; Adams v. Adams, 21 Wall. 185, 192, 25 L. Ed. 504; King v. Donnelly, 5 Paige, Ch. 46; Clayton v. Johnson, 36 Ark. 406, 38 Am. Rep. 40; Ewing v. Walker, 60 Ark. 503, 31 S. W. 45; Memphis Sav. Bank v. Houchens (C. C. A.) 115 Fed. 96. In Clay-

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ton v. Johnson, 36 Ark. 406, 38 Am. Rep. 40, the court say: "If he [the assignee] fail to comply with the requirements of the statute, the remedy by application to chancery on the part of the creditors is simple." 36 Ark. 422, 38 Am. Rep. 40.

Nor can the contention of counsel for defendants that the original mortgagor, Joe Davies, is the only person who can maintain an action to redeem, be sustained. The right to redeem in this action is not claimed under a statute, but is purely an equitable action to redeem from one who it is claimed is in possession as a mortgagee. Such a right to redeem may be exercised by assignees or grantees of the mortgagor as fully as by the mortgagor, and upon the same terms and conditions, neither greater nor less. Moore v. Anders, 14 Ark. 635, 60 Am. Dec. 551; Jones v. Matkin, 118 Ala. 341, 24 South. 242; Nesbit v. Hanway, 87 Ind. 400; Moody v. Funk, 82 Iowa, 1, 47 N. W. 1008, 31 Am. St. Rep. 455; Brown v. Bank, 148 Mass. 300, 19 N. E. 382; Shouler v. Bonander, 80 Mich. 531, 45 N. W. 487; Brewer v. Hyndman, 18 N. H. 9. The first ground of demurrer is therefore overruled.

The second ground of demurrer pleads laches. Learned counsel for the complainant, in his elaborate and able brief, concedes that a delay of seven years, which is the period of limitation in the state of Arkansas for the recovery of real estate, bars this action, but he ingeniously argues that as according to the allegations in the bill, which the demurrer admits to be true, the deed of the trustee to the banking company is void, its possession under the deed is that of a mortgagee, and not adverse to the mortgagor and those under whom complainant claims. The possession of the banking company, and afterwards its vendees, was under a deed valid on its face, and clearly adverse to the original mortgagor and all parties claiming under him or by any other title. Even if it should, on final hearing, be held that the trustee's deed is void, and that the recitals of strict compliance with the terms of the mortgage and the laws of the state of Arkansas are false, and that the defendants are, for this reason, chargeable as mortgagees in possession, the fact that the defendants have been in open, notorious, and continuous possession, not as mortgagees, but under claim of absolute ownership, under an absolute deed of conveyance, and adversely to all the world, for more than seven years, confers upon them an absolute title against all persons sui juris. Under the laws of Arkansas, as construed by its supreme court, a title by limitation is not only good as a valid defense, but amounts to an investiture of title which may be actively asserted in all respects as effectively as if acquired by deed. Jacks v. Chaffin, 34 Ark. 534; Logan v. Jelks, Id. 547; Wilson v. Spring, 38 Ark. 181; Crease v. Lawrence, 48 Ark. 312, 3 S. W. 196.

In Logan v. Jelks, 34 Ark. 549, the court, speaking through Mr. Justice Eakin, say:

"Conceding the patent from the United States to have been void, it may be, nevertheless, used to give color of title and fix the limits of possession, and a continuous adverse possession under it, or without any color at all, when the limits of possession may be shown for a period of over seven years as against parties whose rights are not saved, will create a title which may be used to maintain an action of ejectment."

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As complainant claims its rights under the mortgage of Joe Davies to the Sterling & Smith Company, the statute of limitations, when set in operation against Davies, continued as to his grantees and heirs. Clarke v. Boorman, 18 Wall. 493, 21 L. Ed. 904; Pearsall v. Smith, 149 U. S. 233, 13 Sup. Ct. 833, 37 L. Ed. 713.

The possession of the banking company, taken on the 27th of November, 1894, was adverse to the mortgagor, his grantees, and every one else. Had the banking company or its trustee taken possession of the premises as mortgagees, without the foreclosure proceeding, then the result would be different, and their possession would not have been adverse. Jones, Mortg. § 703. But when there was a foreclosure, although that foreclosure was voidable, and possession was taken under the trustee's deed, this was notice to everybody that the possession was under claim of absolute ownership, and not as a mortgagee, and such a repudiation of the trust as sets the statute of limitations in operation. The following language, used in Clarke v. Boorman, 18 Wall. 493, 21 L. Ed. 904, is applicable to this case:

"It may be conceded that, so long as a trustee continues to exercise his powers as trustee in regard to property, he can be called to account in regard to that trust. * * * But when he has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert themselves in his favor, and time begins to cover his past transactions with her mantle of repose." 18 Wall. 509, 21 L. Ed. 904.

In Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, it was held that, although the purchase by the defendant of the property of her ward at a curator's sale was void and constituted her a trustee, the statute of limitations protected her, and that it was set in motion on the day the sale was confirmed by the probate court. 54 Ark. 642, 16 S. W. 1052, 13 L. R. A. 490. See, also, McGaughey v. Brown, 46 Ark. 35; Lammer v. Stoddard, 103 N. Y. 673, 9 N. E. 328; Stewart v. Welch, 41 Ohio St. 500; Bland v. Fleeman, 58 Ark. 84, 23 S. W. 4.

Stout v. Rigney, 46 C. C. A. 459, 107 Fed. 545, decided by the circuit court of appeals for the Eighth circuit, is directly in point and conclusive of this cause. As the authorities are carefully reviewed by Judge Thayer in his opinion in that case, it is unnecessary to cite them in this opinion. The learned judge in his opinion says:

"The testimony in the case shows that the trustee's deed, which purported to convey the title in fee to Hamilton De Graw, was duly recorded in Carroll county, Mo., on the day it was executed, to wit, on December 7, 1875, when it became constructive notice to all the world of its contents; that De Graw took possession of the property under said deed on January 1, 1876; that he subsequently conveyed the land as his own to other parties; and that the title, after various transfers, became vested eventually in the defendant Stout. The proof also shows open and notorious possession of the property by De Graw and those claiming under him from January 1, 1876, until the present action was instituted, and that in the meantime there had been no assertion by the complainant of her right to redeem, or any recognition of that right by any of the successive occupants of the land. In view of these facts, we entertain no doubt that De Graw and each of his successors in interest entered into possession of the land claiming to be the absolute owners thereof. The dominion which they respectively exercised over the property is consistent with that view, and

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wholly inconsistent with the theory that they assumed possession of the property merely as mortgagees to protect a lien which they had acquired. Nor do we believe it to have been essential to render their possession adverse that they should have notified the complainant that they were holding the land adversely, and would dispute her right to redeem, inasmuch as the entry was made under a deed which purported to convey an absolute title, and which also professed to foreclose her right to redeem." 46 C. C. A. 463, 107 Fed. 549.

The fact that Perry Nugent, the assignee, had instituted a similar suit to redeem for the benefit of the creditors of the Sterling & Smith Company before the seven years had expired, does not aid complainant, and does not bring it within the rule laid down by the supreme court of Arkansas in Bank v. Magness, 11 Ark. 344, and Railway Co. v. Manees, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45, and followed in Alexander v. Gordon, 41 C. C. A. 228, 101 Fed. 91.

This is a different action by a different party as complainant, and comes within the rule laid down by the supreme court in Railroad Co. v. Wyler, 158 U. S. 292, 15 Sup. Ct. 877, 39 L. Ed. 983. Whether this action can be maintained without making the representative or heirs of Perry Nugent parties has not been raised by the defendants, and, as the demurrer to the bill on the second ground must be sustained, it is unnecessary to determine that question.

The demurrer to the bill is sustained on the second ground, and overruled on the first.

In re WELLHOUSE.

(District Court, N. D. Georgia. March 7, 1902.)

No. 456.

BANKRUPTCY—PETITION TO FORECLOSE MORTGAGE—AMENDMENT.

A mortgagee filed his petition, setting up that he had a mortgage on certain real estate owned by a bankrupt, and in the possession of his trustee, and averring that certain taxes and assessments were due, and praying that the trustee be directed to pay the same, and, further, that "he be allowed to foreclose his mortgage," with an alternative prayer for a sale by the trustee. The trustee answered, setting up that the mortgage was fraudulent, and praying that the matter be referred to a special master to take testimony. *Held*, that petitioner was thereupon entitled to amend by striking from his petition the prayer with reference to foreclosure, and the alternative prayer for sale by the trustee; it not appearing that the trustee would be prejudiced by such action.

In Bankruptcy.

Ellis, Winbish & Ellis, for Louis Strasburger.
Slaton & Phillips, for trustee.

NEWMAN, District Judge. In this case Louis Strasburger brings a petition in which he sets out the fact that he has a mortgage for $5,000 on certain real estate of the bankrupt, which is now in the possession of the trustee in bankruptcy. He further states that Alvin Strasburger has a mortgage, executed the same day as petitioner's mortgage, for $3,000, and, further, that Mrs. B. Saloshin has a mortgage for $3,000. It is further stated that certain taxes and assess-

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ments for local improvements are due against the real estate covered by the mortgages named, and that the trustee has in his hands, collected from rents on the property, a sufficient amount to pay the same, and prayed that he be required to do so. By consent of the trustee, an order has been taken authorizing the payment of these taxes and assessments, without prejudice to the rights of the trustee or of the mortgagees as to who shall be held ultimately liable for the same.

The further prayer of the petitioner is this:

"Petitioner prays that he be allowed to foreclose his mortgage on said property, and sell the same to satisfy his claim, and that the court will direct the disposition of the balance of the proceeds of said sale to the payment of the other claims according to their rank and dignity."

And this additional prayer:

"Your petitioner prays that, in the event the court shall determine that the proper proceeding is for the trustee to sell the property, that an order be passed directing the trustee to sell the property free from all incumbrance, and at such sale, if your petitioner shall become the purchaser, that he be required to pay to said trustee only such part of the purchase price as shall be in excess of the principal sum and interest due to him on such mortgage."

And then follows a prayer for general relief.

This has been answered by the trustee, who sets up the fact that the mortgage was executed in 1892, and withheld from record until 1900; that the same is fraudulent, as are the other two mortgages; and that they were made as a part of a scheme to cover up the bankrupt's property and defraud creditors. It is also set up in the answer that the Strasburgers are relatives of Henry Wellhouse; Louis being an uncle, and Alvin a cousin. The answer goes considerably into detail, but substantially it sets up what has been stated. It then concludes:

"The premises considered, your trustee prays that the matters herein set up, as well as the petition of said Strasburger, be referred to a special master, with instructions to take testimony in regard to the bona fides of the said mortgage lien, as well as the state of account between said Louis Strasburger and Henry Wellhouse and Wellhouse & Sons, and that all dealing between them be fully investigated and reported on by such special master."

The petitioner, Louis Strasburger, now presents this petition:

"Comes now Louis Strasburger, and by leave of the court amends his petition filed in the above-stated cause by striking therefrom all the prayers of said petition except the prayer that the trustee be directed to pay, out of rents collected and to be collected by him, all taxes against said property, and said claim for street improvements, and except the prayer that the trustee be served with a rule to show cause as therein stated. And petitioner will ever pray," etc.

Counsel for the trustee object to the allowance of this amendment. The effect of it will be to strike from the petition the prayer concerning foreclosure, and the alternative prayer for sale by the trustee. I am not sure whether this should be classed as an ancillary petition on the equity side of the district court, in bankruptcy, or as a petition in the bankrupt proceeding. It is not sworn to as required by the bankruptcy act, and neither is the answer. Whatever it may be, it would seem that

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the same rule should apply to it as would apply to ordinary suits at law and in equity with reference to the right of the plaintiff to dismiss. That rule, as stated in Fost. Fed. Prac. § 291, is as follows:

"The plaintiff may dismiss his bill without costs at any time before the defendant's appearance. * * * After appearance, and before decree or decretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared, but not if they, or any of them, would be injured thereby. Leave to dismiss may be refused where the defendant claims affirmative relief by cross bill, or by answer in a case where he is entitled to affirmative relief on an answer."

The same rule, I think, is stated by Judge Hammond in Stevens v. The Railroads (C. C.) 4 Fed. 97, in the conclusion of his opinion, commencing on page 109, as follows:

"The injury to the defendant must be of a character that deprives him of some substantive rights concerning his defenses not available in a second suit, or that may be endangered by the dismissal, and not the mere inconveniences of double litigation, which, in the eye of the law, would be compensated by costs."

Judge Hammond refers to a number of authorities with reference to the right to dismiss, and discusses them in his opinion, and cites a large number in a note.

Counsel for the petitioner urge that the district court is without jurisdiction to foreclose the mortgage. Without deciding this, it is sufficient to say that I am not satisfied that the trustee will be prejudiced, or his rights to defend against this mortgage in any way affected, by allowing the petitioner to dismiss so much of his proceeding as seeks to foreclose the mortgage. It is doubtful if the prayer is a prayer for foreclosure. The language would seem to indicate that it is a prayer for leave to foreclose, but as it has been considered in argument as a proceeding to foreclose, with the alternative prayer mentioned, it may be so regarded for present purposes.

The petitioner will be allowed to amend by striking so much of his petition as prays for foreclosure of his mortgage.

THE IROQUOIS.

(District Court, N. D. California. February 17, 1902.)

No. 12,364.

1. SEAMEN—INJURY IN SERVICE—DUTY OF SHIP TO MAKE NEAREST PORT.

Loss of time and risk to cargo are matters which cannot properly be permitted to outweigh the duty of a vessel to procure surgical aid for a seaman injured in the service of the vessel without his fault or negligence, when such assistance is reasonably necessary, and cannot be otherwise obtained than by putting into port. The obligation of the ship is discharged only when the master has used reasonable care to provide for the comfort and care of the seaman. Whether he is required to deviate from his course to touch at some port will depend upon the circumstances of the particular case, such as the nature of the injury, the means for treating it on board, and the probability of being able to reach a port in time for his relief. If a person of ordinary judgment would know that the injury was such as to seriously endanger the seaman's life or limb, and that he should have medical or surgical

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aid at the earliest possible moment, it is the imperative duty of the master to take the necessary steps to procure such aid, if within his power.

2. SAME.

Libelant, who was a seaman 20 years old, fell to the deck during a gale without negligence on his part, and sustained a simple fracture of the bones of one leg below the knee. There was no surgeon on board, but the master, with the assistance of others, undertook to set the bones, bound the leg in splints, and proceeded on his voyage to San Francisco, where the ship arrived in about 10 weeks, and where libelant was paid off, and went to a hospital. The bones had failed to unite, owing to improper and unskillful treatment, and, because of the lapse of so long a time, could not be made to do so, and it became necessary to amputate the leg. At the time of the injury the ship was southwest of Cape Horn, and 450 miles from a port in the Falkland Islands, where surgical aid could have been obtained, and which the ship could have reached in two or three days, although it would have required four or five weeks, owing to head winds, to put back to such port, and again recover the distance lost. *Held*, that the injury was such that the master must be presumed to have known that the services of a competent surgeon were required to make a recovery reasonably certain, and his duty required him to make an attempt to procure them by putting into port, regardless of the loss of time and expense incident to such deviation.

3. SAME.

The fact that libelant made no objection to the action taken by the master, and did not request to be taken to the nearest port, where he was not consulted, did not prejudice his rights, nor relieve the ship from liability for the failure to perform the duty which his condition demanded.

4. DAMAGES—LOSS OF LEG—AMOUNT OF AWARD.

A seaman 20 years old, strong and in good health, who lost his leg from an injury received in the service of the ship through the failure of the master to put into port where he could obtain surgical attendance, *held* entitled to damages in the sum of $3,000.

In Admiralty. Libel in rem for damages.

Walter G. Holmes and D. T. Sullivan, for libelant.
Milton Andros, for claimants.

DE HAVEN, District Judge. The libelant was a seaman on the ship Iroquois, on a voyage from New York to San Francisco; and on February 23, 1900, when in latitude 56° 50′ south, and longitude 67° 36′ west, a little south and west of Cape Horn, the libelant, while engaged in furling the mainsail during a gale, accidentally, and without any fault on his part or that of the ship, fell from the mainyard to the deck, in consequence of which he sustained a simple fracture of the bones of the right leg below the knee, and two of his ribs were also broken. The fractured bones and ribs were set by the master of the ship, assisted by the steward and the ship's carpenter. The libelant entirely recovered from the injury to his ribs, but the bones of the leg failed to unite. Neither the master nor any other person on board of the vessel had sufficient knowledge and skill to properly set the leg, or to thereafter give it necessary surgical attention. At the time of the accident the ship was about 480 miles from Port Stanley, the chief port of East Falkland Island, where surgical aid might have been obtained. The wind was fair for that port, and it could have been made in two or three days; but the testimony of the master of the

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Iroquois, which I think should be accepted upon that point, was to the effect that it would probably have taken from three to four weeks to have gone to Port Stanley and return to the place of the accident, because in returning the vessel would have had to beat against a head wind. The ship arrived at San Francisco on May 7, 1900, where the voyage ended, and the following day the libelant was paid off, and his connection with the ship terminated. On May 14th he entered the Marine Hospital at San Francisco, where, on the 16th of October following, his leg was amputated below the knee. The broken bones having failed to unite, their ends had become dead, and amputation of the leg was necessary in order to save the life of libelant. The libelant was treated with kindness by the master at all times after the accident, and had all the care that it was possible for one in his situation to receive on board of a vessel at sea, when unattended by any one possessing surgical knowledge and skill. The libelant at no time made any complaint of the condition of his leg, and made no request to be taken to Port Stanley, or to any other port; and he was not asked by the master whether he would like to be taken to some port for treatment, or whether he would be satisfied with such care as could be given upon the ship. Libelant at the time of the accident was 20 years old, and in good health. It appears from the evidence of the physicians who testified that a fracture similar to that sustained by libelant will unite, if properly treated by a surgeon, within three or four weeks after the injury is received, and that broken bones of a person of the age of libelant, other conditions being the same, will unite more readily than those of a person of mature years. The splints put around the leg at the time of the accident were allowed to remain in place without removal of the bandages for five weeks. The medical testimony is to the effect that the splints should have been removed and replaced four or five days after being first put on, and every few days thereafter, and the leg examined at such times for the purpose of determining whether the bones were properly in place and uniting. There is no reason to doubt that if libelant had received proper surgical treatment within a few days after his leg was broken the bones would have united, and there would have been no necessity for its amputation. This action is brought to recover damages against the vessel, the libel alleging that her master was negligent in not immediately after the accident proceeding to Port Stanley, or bearing away to Valparaiso, or some other port on the western coast of South America, where surgical aid could have been obtained, before it was too late to effect a union of the fractured bones, and the question thus presented is to be determined upon the facts above stated.

1. It has been often decided, and may be regarded as a settled principle of admiralty law, entering into and forming a part of the seaman's contract, that it is the duty of the vessel "to provide, for a seaman who becomes sick or wounded or maimed in the discharge of his duty, whether at home or abroad, at sea or on land,—if it be not by his own fault,—suitable care, medicines, and medical treatment, including nursing, diet, and lodging." 2 Pars. Shipp. & Adm. p. 81; Brown v. Overton, 1 Spr. 462, Fed. Cas. No. 2,024; The

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Atlantic, Abb. Adm. 451, Fed. Cas. No. 620; Whitney v. Olsen, 47 C. C. A. 331, 108 Fed. 292; Scarff v. Metcalf, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807.

The contention of the claimant is that the master of the Iroquois was not, under the rule just stated, bound to prolong the voyage three or four weeks by returning to Port Stanley for surgical aid. This contention seems to be supported by the case of Peterson v. The Chandos (D. C.) 4 Fed. 645. That was an action brought by a seaman whose leg had been broken in the service of the Chandos; the libel alleging that the leg was shortened three inches because it was not properly treated upon the vessel, and that the master was guilty of negligence in not going into Valparaiso, the nearest port, where proper surgical aid and appliances could have been obtained. The court held that the master was not negligent in this respect, saying:

"The burden of proof is upon the libelant to support his allegation that the master failed to do his duty towards him in this respect. If it had been shown that the vessel could, under the circumstances, make about ten miles an hour, and thereby have made Valparaiso in a little more than five or six days, it might have been proper for the master to have gone in there; indeed, I think it would have been his duty to do so. But, as it is, I do not think it would be safe to assume that this port could have been made in less than two weeks, and I do not think that the vessel was under obligation to make that sacrifice of time and risk of cargo for the libelant."

I am unable to concur in all of the views thus expressed by the able judge who pronounced the opinion in that case. I cannot agree to the proposition that sacrifice of time and risk to cargo are matters which can properly be permitted to outweigh the duty of procuring surgical aid for a seaman disabled in the service of a vessel, when such assistance is necessary, and cannot be obtained otherwise than by putting into port. The obligation of the ship is discharged only when the master has used reasonable care in providing for the comfort and cure of the seaman. Whether he is required to deviate from his course, and touch at some port at which the seaman can receive better attention than can be given him upon the vessel, will depend upon the circumstances of the particular case, such, for instance, as the nature of the seaman's sickness or injury, and the probability of being able to reach a port in time for his relief; but it would seem clear that if one of the crew were so ill or severely injured that any one of ordinary judgment, seeing him, would know that his life or limb was in serious danger, and that he ought to have medical or surgical aid at the earliest possible moment, then it would be the imperative duty of the master to take the necessary steps to procure such aid, if within his power. Of course, if the vessel were so far at sea as to make it uncertain whether she could reach the nearest port in time to benefit the sufferer, or if the master had no reason to believe that the sickness or injury was serious, he would not be chargeable with negligence for proceeding on his course, giving to the seaman such care as his knowledge and the conveniences on board the vessel would permit. When there is no physician to consult, the master must necessarily determine, as best he may, whether the injury or sickness is such as to endanger life or limb, and he cannot be charged with negligence simply because he erred in judgment as to the necessity for

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putting into port, when the nature of the disease or the extent of the injury was obscure, and its serious character would not have been apparent except to a physician or surgeon; but the duty of the master to exercise a reasonable judgment as to what is necessary to be done for a seaman disabled by sickness or accident, while in the service of the ship is an absolute one. Now, in the case of an injury like that received by the libelant, the master is presumed to know, because the fact is one of common knowledge, that to make a recovery reasonably certain the leg must be set with care, and receive the attention which only a person having some knowledge of surgery can give. In such a case, therefore, when there is no one on board possessing such knowledge, ordinary prudence would suggest that the services of a surgeon should, if possible, be obtained before the time has passed for a perfect union of the broken bones; and it is the duty of the master, without regard to the loss of time, or the expense incident to the deviation, to make an effort to procure such assistance by putting into some port where it can be obtained; and not to do this, if it is probable that a port can be made in time, is a failure to discharge the duty which the vessel owes to a seaman sick or disabled in its service. Certainly, to properly treat such an injury is beyond the ordinary skill of the master, and ought not to be undertaken by him without the consent of the seaman.

Upon the question involved here, the case of Whitney v. Olsen, 47 C. C. A. 331, 108 Fed. 292, is in point. That was an action to recover damages for the alleged negligence of the master of the schooner Uranus, in not taking the libelant to the nearest port for surgical treatment of an injury received by him at sea. It was shown in that case that the accident occurred when the vessel was about 500 miles from Port Townsend, the nearest port, and the injured seaman requested to be taken there. The master refused, and proceeded on his voyage. In consequence of not receiving surgical treatment in time, the bones of the leg failed to make a proper union, resulting in permanent injury to the leg. Upon this state of facts, it was held that the master was guilty of negligence in not taking the libelant to Port Townsend after the accident, the court saying:

"There might have been additional expense incurred, but this presents no excuse,—'not the least extenuation.' If the master had performed this duty, and taken the injured seaman to Port Townsend for treatment, the vessel and its owners would simply 'have been subjected to a burden which the law imposes.' No member of the crew could complain or hold the ship responsible in damages for loss of time necessarily incurred in the discharge of its duty. Necessity and humanity, as well as the principles of the admiralty law, would have amply protected the owners of the ship from such loss."

The fact that in that case the injured seaman requested to be taken to the nearest port, while in the present no such request was made, is not sufficient to make the principle upon which that case was decided inapplicable to this. The decision in that case proceeded upon the principle that the seaman, not having consented to what was done by the master of the Uranus, was entitled to maintain the action. So here the libelant did not consent to the action of the master of the Iroquois. It is not claimed that he did so expressly, and I do not

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think there is anything in the evidence from which such consent can be fairly implied. He was not consulted as to his wishes in the matter, and, such being the case, he did not waive his right to be carried to the nearest port for treatment by failing to request that this should be done. The duty devolved upon the master, without such request, to make every reasonable effort to provide the libelant with surgical aid, by taking him where it could be obtained; and the failure to discharge this duty, unless performance was waived by libelant, constitutes negligence for which the ship must respond in damages. The libelant was a minor, and, it may be, ignorant of his rights in the premises, but, whether so or not, the master was in supreme authority, and the libelant entirely dependent upon him for necessary care. The master knew of the risk which libelant would incur by reason of the constant motion of the vessel, and he also knew, or ought to have known, that he was not possessed of sufficient skill to properly treat the leg under conditions which might arise, and which often result from injuries of that character. In a matter of so much importance to him the libelant should have been consulted, and the master ought not to have assumed the responsibility of proceeding upon the voyage, and himself treating the broken leg, without libelant's consent.

2. Upon the question of damages: The libelant cannot follow the occupation of a seaman, but is not disabled from engaging in business or doing such light work as one in his crippled condition is competent to perform. His ability to earn wages, however, is not as great now as before the loss of his leg. Taking this fact into consideration, as well as the pain and suffering he has endured, and the further fact that the injury will be permanent, the libelant is, in my opinion, entitled to recover the sum of $3,000 and costs, with interest from date of decree until same is satisfied.

In re SEAY et al.

(District Court, N. D. Georgia, W. D. March 7, 1902.)

BANKRUPTCY—PREFERENCES—WHAT CONSTITUTES

A payment on a note given by an insolvent to close up an existing account with a creditor, made within four months of the filing of his petition in bankruptcy, cannot be treated as a preference with respect to a new debt afterwards created by him with the same creditor, and need not be surrendered by the creditor; nor can it be treated as a set-off against the new debt, when he seeks to prove the latter in the bankruptcy proceedings.

In Bankruptcy.

Mayson, Hill & McGill, for claimants.
Slaton & Phillips, for trustee.

NEWMAN, District Judge. This matter is before the court on exceptions to the ruling of the referee. The facts are as follows: The claimants, S. Lowman & Co., presented a claim against the estate of the bankrupt for $1,955.75, represented by four notes, dated

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August 20, 1901, and due November 11, 1901, December 10, 1901, January 10, 1902, and February 10, 1902, respectively; three of said notes being for $486.50 each, and one for $496.25. Upon the first of these notes there was a credit of $100, which amount was admitted to have been paid within four months of the adjudication. Claimants also presented an account for $1,763 for goods sold the bankrupts during September, 1901. It further appears that claimants held a note given by the bankrupts for $500, due September 4, 1901, which note was given some time during 1900, and was one of a series of notes which closed up their merchandise account for 1900. This note was paid on September 5, 1901. A petition in voluntary bankruptcy was filed November 28, 1901. The referee held that the payment of $100 on November 9, 1901, was a preference, and, being subsequent to the sale of any goods by Lowman & Co. to Seay Bros., should be returned before the claim could be allowed, which ruling was conceded to be correct. The referee further held that the payment of $500 on September 5, 1901, was likewise a preference, but on account of the fact that Lowman & Co. had sold and shipped to Seay Bros., subsequent to this payment, goods in an amount greater than $500, Lowman & Co. should be allowed to set off the payment of $500 against their account, and to prove their claim for the balance, $3,218.75. To this ruling of the referee the claimants except on the ground that the $500 was paid on a distinct and separate debt, and is not within section 57g of the bankruptcy act. This $500 note was the last of a series of notes given in 1900 for goods then purchased, and its payment closed that transaction completely. The firm of Lowman & Co. are not seeking to prove any part of that debt at all. They are proving another and distinct debt, created in August and September, 1901.

The question here presented was before the circuit court of appeals for the Second circuit in the case of In re Abraham Steers Lumber Co., 112 Fed. 406. In the opinion of the court, this is said on this subject:

"The case presents another question: The bankrupt was indebted to the creditor upon an open account, and, at a date more than four months previous to the filing of the petition, made a payment upon that account in money, and gave his note for the balance, which payment and note were treated by the creditor as full payment, and the account was balanced upon his books. The debtor was insolvent at the time, but the creditor had no reasonable cause to believe that a preference was intended. Subsequently the bankrupt contracted another debt with the creditor. The question is whether proof of that debt cannot be allowed without a surrender by the creditor of the payment received upon the previous debt. We are of the opinion that the payment notwithstanding it was a preference, being upon a distinct and independent debt from that which is sought to be proved, need not be surrendered by the creditor. We are also of the opinion that the payment cannot be treated as a set-off against the debt sought to be proved. We do not deem it necessary to enlarge upon the reasons for our conclusions in respect to these questions. These are fully discussed in the opinion by Judge Thomas, who decided the case in the court below, and we fully concur in his views."

Even if it is true, as contended by counsel for the trustee, that in this case, as shown in the decision by Judge Thomas in Re Abraham Steers Lumber Co. (D. C.) 110 Fed. 738, the facts are not entirely

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like the facts here, the opinion of the circuit court of appeals is clear that a payment on one debt is not a preference, under section 57g, as to a distinct and separate debt. If in this case there had been a running account, purchases and payments from time to time, and no distinct closing up of the older debt, the question would be different, and the rule would probably not apply. Opposed to the view of this question taken by the circuit court of appeals for the Second circuit in the Abraham Steers Lumber Company Case, supra, is the case In re Conhaim, 97 Fed. 923, decided by Judge Hanford, of the district court for the district of Washington. He holds that "the prohibition contained in section 57g is not limited by the terms of the section to the particular debt or chose in action on account of which a preference has been received, but it refers to creditors who have received preferences, and provides that the claim of such creditors shall not be allowed, unless they shall surrender the preferences received," and then quotes from Loveland, Bankr. p. 257, in support of this view. In this case the account for merchandise sold in 1900 was closed up by notes, as in the Abraham Steers Lumber Co. Case. The last of those notes was paid on September 5, 1901. That debt was then extinguished. As to the claim which Lowman & Co. presented and sought to prove, they had received no preference, except the $100 which they surrendered.

Following the decision of the circuit court of appeals for the Second circuit, which has been referred to, I think the referee erred in requiring Lowman & Co. to deduct the $500 received by them in extinguishment of the old debt from the claim which they were seeking to prove. He was right, of course, in requiring payment of the $100, and in this they acquiesced. The referee is instructed to allow proof of claim without deducting the $500.

THE MABEL S.

(District Court, D. Connecticut. February 18, 1902.)

TOWAGE—CARE REQUIRED OF TUG—INJURY OF TOW ON SUNKEN ROCK.

The master of a tug, taking his tow into a harbor and to a dock with which he is unfamiliar, is bound to exercise the highest care to protect her from injury, and his failure to either take a pilot or to inquire from persons competent to give him information renders the tug liable for an injury to the tow from striking on a sunken rock, the existence of which was known to navigators familiar with the locality.

In Admiralty. Libel in rem against tug to recover damages for injury to tow.

James J. Macklin, for libelants.
Owen & Sturges, for claimants.

TOWNSEND, District Judge. The material facts herein are undisputed, and are as follows: On March 25, 1900, the steam tug Mabel S. took in tow at Hoboken, N. J., the barge James E. English, which was loaded with pig iron, and drew about seven feet of water,

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to be towed to the Brown Cotton Gin Company's docks in New London, Conn. The tug and tow reached New London on March 26th, where the tug was taken alongside, and they then proceeded up the harbor until they came near to Scott's Wrecking Dock, about a quarter of a mile from destination. Here Capt. Eldredge of the tug hailed one of the tugs of the Scott Wrecking Company, and asked if any one would show him the way into the Brown Cotton Gin Company's dock, or whether there was anything in the way of going there; but, receiving no answer, he proceeded to Scott's dock, and made fast, and he, with Capt. Barker of the tow, went around to the Cotton Gin dock to learn whether there were any obstructions in the way. Capt. Eldredge had been in New London harbor frequently, but had never been to the cotton gin company's dock. On arriving at the office of said company, Capt. Eldredge stated to the man in charge that he had come to get information about the approach to the dock. He sent them to the stationary engineer of the company, who, he said, would tell him (Capt. Eldredge) all about it. This engineer said there was no obstruction, and that schooners drawing more water than this barge beat in and out there; and, having been told by Eldredge that the tide was rising, he said, "Come right in now from where you are, and you won't touch anything." He then told Capt. Eldredge to take the range from Scott's dock over to their dock, which, he said, was the range they all took to come in there. In conclusion, the engineer said: "I want you to understand one thing: That this company will not be responsible for any information I give you. * * * If you come in here, you come at your own risk." The tide was then rising, and the two captains went to get dinner. When the tide was about half flood, they started for the cotton gin company's dock. Capt. Eldredge backed off about 150 feet, then turned, went on till he got the range the engineer had given, and then headed for the cotton gin company's dock, going slowly until the barge struck a rock. He did not make any soundings. The barge received serious injuries, for which damages are claimed herein. The libel charges three acts of negligence against the tug: First, in not avoiding the said rocks, they being well known to navigators on the Thames river and vicinity; second, in that the man in charge of the navigation of the tug was incompetent, and not familiar with the waters of the said Thames river and its tributaries; third, in not towing the said barge through the usual path or channel in said Thames river, and where there was a sufficient depth of water at all times for said barge.

The rock on which the barge struck was not buoyed, or shown on the government chart. Capt. Eldredge had examined the chart, and found soft bottom indicated, and no obstructions shown thereon, before he made any inquiries. Two questions are presented, namely: (1) Was the rock such a well-known obstruction that the master of the tug should be chargeable with knowledge thereof? (2) Was he negligent in failing to get further information? Five witnesses were examined on the first point. There is some confusion in their testimony between the rock on which the barge struck and another rock lying within about 50 feet of it; but this is not material, as either rock would be likely to be an obstruction to such a tug and tow going to the

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cotton gin company's dock. Hunt, a steamboat pilot, had known of these obstructions for 14 years. Scott, another pilot, knew of rock there, and had supposed it was all one reef, until after the accident, when he discovered there were two rocks, as aforesaid. Terry, a vessel broker, who is not a licensed pilot, but who, as master of vessels, had frequently gone to the cotton gin company's dock, had never heard of said rock, but he had not been there with a vessel for six years. Batewell, an experienced pilot, had never heard of this obstruction, but he had not taken a vessel to the cotton gin company's dock for 13 years. Colfer, who was there last in 1893 or 1894, always took a circuitous course in going in and out, but had never heard of any obstructions. "The pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. * * * He must also be familiar with all dangers that are permanently located in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of the changes in the current of the river, of sand bars newly made, of logs or snags or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity —his skilled knowledge—very seriously in the course of a long voyage. He should make a few of the first 'trips,' as they are called, after his return, in company with other pilots more familiar with the river." Atlee v. Union Packet Co., 21 Wall. 389, 22 L. Ed. 619. Tested by these requirements, the conduct of the master of the tug was negligent. The pilots familiar with this locality knew of this rock, or of the dangerous reef of which it appeared to be a part. It had been known for some years prior to this accident. Capt. Eldredge either should have known of it, or, never having gone to this dock before, he should have used the highest degree of care to avoid all risk due to his ignorance. If he did not choose, on this, his first trip, to secure the services of a competent pilot, he should at least have taken measures sufficient to acquaint himself with this obstruction, and should have assured himself by competent evidence of a safe passage around them. That he recognized this obligation is indicated by his admissions. He had hailed Capt. Scott's tugs, and failed to get the necessary information. Later, Capt. Barker told him if he would go to Capt. Scott's office he could probably find out the passage, or get some one to take them in. He declined to do this. His testimony on this point is as follows:

"When you go to a man and ask him a simple civil question like that, and he won't answer you [referring to his experience with Scott's tugs], you are disgusted with that man altogether, and you don't want any information from him at all. Q. You took the chances, then, on a landsman—is that it—giving you the information? A. I took the chances on information from men that were connected with the dock,—connected with the wharf,—and supposed to know the water around it and in the approach. Q. You took the chances, then, on getting your information from a land engineer, instead of from a navigator,—is that it? A. Well, that is what I did, because I would rely on it, and have relied on such information in a good many instances

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before; yes, sir. Q. Because you were disgusted with the man in the tugboat, who, you say, refused to answer you,—is that it? A. That is about it. I would not ask them any more about it."

Let a decree be entered for the libelants, and let the case be referred to a commissioner to ascertain the damages suffered.

In re BIG MEADOWS GAS CO.

(District Court, W. D. Pennsylvania. February 25, 1902.)

1. BANKRUPTCY—PROVABLE CLAIMS—UNLIQUIDATED DEMANDS.
Where the claim of a petitioning creditor, although made up of different elements, is based upon a single written instrument and the nonperformance of its covenants by the alleged bankrupt, it must be treated under the bankruptcy act as a single claim; and, where some of the elements are confessedly unliquidated, the claim as a whole is an unliquidated one, and subject to the limitations incident to a claim of that character.

2. SAME—PETITIONING CREDITORS—QUALIFICATION.
Under Bankr. Act 1898, § 63b, providing that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate," holders of unliquidated claims do not become "creditors" until their claims have been liquidated as therein provided; and hence such claimants, whose claims are not admitted, but disputed, cannot maintain a petition to have the alleged debtor adjudged an involuntary bankrupt.

In Bankruptcy. Sur certificate of W. R. Blair, referee, sitting as special master.

Geo. R. Wallace and Weil & Thorp, for petitioning creditors.
Edwin S. Craig, for alleged bankrupt.
Winternitz & McConahay, for Union Trust Co.

BUFFINGTON, District Judge. The scope of the certificate has, by consent of counsel, been enlarged so as to raise the question whether the petitioning creditors have standing as such. Their claim is based upon a certain written contract for the sale of gas, and it is assumed, for present purposes, that the rights of the parties of the first part to said contract have been assigned to the petitioning creditors, and the obligations of the parties of the second part assumed by the Big Meadows Gas Company. The answer of that company, amongst other things, denied the company was "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits"; averred that, as unliquidated claimants, the petitioners had no standing to file an involuntary petition against it; and alleged the petitioners were, under the contract, indebted to it in the sum of $60,000. This answer was adopted by the Union Trust Company, a judgment creditor of the Big Meadows Gas Company. Thereupon the court, without prejudice to the right of the Big Meadows Gas Company to question its jurisdiction, appointed the referee a special master to take the testimony, and report to the court findings of fact and law. On the hearing, a question arose as to the production by the Big Meadows Gas

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Company of certain of its books. That question was certified to the court for its opinion, and thereupon, by consent of counsel, the scope of the certificate was widened, as noted, so as to raise the question of the standing of the petitioning creditors as such to file this petition. Their claim consists of several elements, but they are all based upon a single contract, and alleged nonperformance thereof. The first element is for $7,300 for gas furnished and contracted to be paid for as follows: The second party "will, once each month, pay over to said first parties the full equal one-half of all sums and amounts received from the sale of gas, without any reduction or rebates for any cause whatever." The second element is for unliquidated damages averred as follows: "A claim for damages for the breach of said contract by said corporation in failing to take and sell gas continually and without intermission as provided in said contract, and in failing to buy and take gas from the leases mentioned therein so long as said leases continue and gas is found in paying quantities, and in otherwise violating said contract and failing to perform the covenants thereof." In that regard the contract provides as follows: "Second party agrees to operate said line, and to conduct and sell gas continually and without intermission, and in lieu thereof to pay first parties all reasonable damages for his neglect so to do. Second party agrees to buy and take the gas from said leases so long as said leases continue and gas is found in paying quantities, and that if he shall conduct gas from other territory through said line he will pay over to said first party the full equal one-half of the same realized from the sale thereof, the same as if the gas was produced on said leases, and was delivered to said second party by first party at the wells of said leases." The answer in that regard was that the petitioners were indebted to the gas company, under the contract, in "not less than $60,000.00 for labor, materials, and money paid out for and on behalf of the petitioners in and about the gas wells, operating the same, and the production of gas, and for damages in not furnishing gas in accordance with the contract." It will thus be seen that the petitioners' claim, while made up of several elements, is in fact one based upon a written instrument and nonperformance of its provisions. Now, where one has a claim based upon a written instrument, the bankrupt law treats it as a single claim, provides for its proof as such, and directs filing of the written instrument with the claim. Section 57, subd. "b," says: "Whenever a claim is founded on an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim." The petitioners then having a single claim, based on the elements noted, it is manifest that the confessedly unliquidated character of some of the elements make the claim, as a whole, an unliquidated one, and subject it as such to the limitations and statutory provisions incident to a claim of that kind. How and when is such claim liquidated and proved? Is liquidation its proof, is proof its liquidation, or are the two separate steps? The statute settles this. Subdivision "a" of section 63 defines, under five clauses, claims that may be proved; while subdivision "b" provides for the precedent liquidation, and thereafter for the proof, of unliquidated claims. The provision is: "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and

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may thereafter be proved and allowed against his estate." It will thus be seen the demand is proved after liquidation, and that prior thereto an application is to be made to the court for direction as to the manner of such liquidation. After careful and deliberate consideration of the question here involved, we have reached the conclusion that the unliquidated demand herein made only becomes a provable debt after it has been judicially ascertained and liquidated in the statutory method set forth. Such construction is in accord with other provisions of the act. The provisions requiring petitioning creditors should have claims aggregating $500 in excess of all securities evidence that congress felt there should be definite, ascertained claims, and that, too, in excess of all securities, as a foundation on which to base a petition to adjudicate one a bankrupt. Where a claim against another has not been judicially ascertained, and where its validity and certainty are evidenced by no paper, acknowledgment, or other admission of the debtor, it would offend our sense of right to allow such self-asserted claim to constitute sufficient ground for harassing another with a petition in bankruptcy. It will readily be seen that an averred but unfounded claim might be made an effective weapon to enforce an unjust demand, or even to bankrupt a struggling, but solvent, debtor. Of course, no such consequence would result from the case in hand. The property of the company has been sold at sheriff's sale; but the question raised is jurisdictional. It is therefore better for all parties that we should meet such question at the threshold rather than allow the case to proceed only to find at the end the court was without jurisdiction. Being of opinion the petitioners have no standing as petitioning creditors, an order may be prepared dismissing the petition. Our construction of the act finds support in Beers v. Hanlin, 3 Am. Bankr. R. 745, 99 Fed. 695; In re Morales, 5 Am. Bankr. R. 425, 105 Fed. 761; In re Henry Ulfelder Clothing Co., 3 Am. Bankr. R. 432, 99 Fed. 409; In re Brinckman, 4 Am. Bankr. R. 551, 103 Fed. 65; In re Silverman Bros., 4 Am. Bankr. R. 88, 101 Fed. 219; In re Peny-Van Colliery Co., 6 Ch. Div. 477. This view of the case renders it needless for us to pass on the question whether the Big Meadows Gas Company is "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits."

LEERBURGER v. UNITED STATES.

(Circuit Court, S. D. New York. March 11, 1902.)

No. 2,722.

1. CUSTOMS DUTIES—CLASSIFICATION OF GOODS—REVIEW.

On an issue whether silk was the component material of chief value in certain wearing material, so as to make it assessable under paragraph 301 of the act of August 28, 1894, or cotton, so as to make it assessable under paragraph 258, it appeared that at the hearing before the board of general appraisers the government introduced the assistant appraiser's report, to the effect that silk predominated. The importer introduced two witnesses who testified, from a casual examination, that cotton predominated. On behalf of the collector an analysis by a chemist was in-

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troduced, to the effect that he had made an examination of two samples cut from the importation, in one of which wool predominated, and in the other silk. *Held*, that as to the two samples a question of fact was made for the board, and that its decision sustaining the classification under paragraph 301 would not be disturbed.

2. SAME.

As to the remaining articles, it did not appear that the appraiser made any analysis before reaching his conclusion. On the other hand, evidence taken in the circuit court corroborated the testimony before the board that cotton predominated. *Held*, that the board's decision, sustaining the classification under paragraph 301, would be reversed.

Appeal by the Importer from a Decision of the Board of United States General Appraisers.

William B. Coughtry, for the importer.
Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in this case consisted of certain articles of ladies' wearing apparel known as "boleros." The collector assessed them for duty under paragraph 301 of the act of August 28, 1894, as wearing apparel, silk being the component material of chief value. The importer protested insisting that the articles imported should have been classified under paragraph 258 of the same act as wearing apparel of which cotton is the component of chief value. The sole question here is one of fact, whether cotton or silk is the component of chief value. A finding that cotton is the component of chief value will lead to a reversal of the board of general appraisers. A finding that silk is the component of chief value will lead to an affirmance.

It appears that at the hearing before the board the government introduced the report of the assistant appraiser to the effect that silk was the component of chief value. The importer introduced two witnesses who testified from a casual examination of the goods that in their opinion cotton largely predominated and was the component of chief value. On behalf of the collector an analysis by Chemist Streuli was introduced to the effect that he had made an examination of two samples cut from the importation, known as 1,062 and 1,088, in one of which, namely, 1,062, he found wool was the component of chief value, and in the other, 1,088, that silk was the component of chief value. Without stopping to consider upon which side the evidence preponderates it is entirely clear that as to these two samples there was a question of fact presented to the board, and under the rule early established in this circuit the court will not be justified in setting aside the finding of the board on a question of fact, there being evidence to sustain the finding. The rule in such circumstances is analogous to the rule which obtains where the court is called upon to review the finding of fact of a referee or the verdict of a jury. The finding should not be disturbed unless the court is convinced that there was no evidence to sustain it, or that it was clearly against the weight of evidence.

As to the remaining articles involved in this appeal there is no evidence whatever to sustain the finding of the board except the report of the assistant appraiser, which is a simple statement by the appraiser that he has examined the goods and finds that silk is the component of chief

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value. There is no evidence that the appraiser made an analysis before reaching his conclusion. On the other hand there were two witnesses examined before the board, and since their decision evidence has been taken in this court, the testimony being that of a witness who was not examined before the board, and also of Mr. Leerburger, who was so examined. The new tesimony corroborates the testimony before the board, that as to these importations cotton was the component of chief value and very largely predominated the silk. In other words, as to the samples not examined by the chemist the evidence is practically undisputed that cotton is the component of chief value.

Therefore, as to all of the importations involved in this appeal except the ones numbered 1,062 and 1,088, the decision of the board of appraisers is reversed, and as to those two, the decision is affirmed.

In re STEGAR.

(District Court, N. D. Alabama, N. D. January 23, 1902.)

BANKRUPTCY—RIGHT TO FILE VOLUNTARY PETITION—PENDENCY OF INVOLUNTARY PROCEEDING.

The filing of a petition in involuntary bankruptcy by creditors, upon which no action has been taken and to which the defendant has not appeared, does not debar him from his right to thereafter file a voluntary petition, the two being in different rights; and in such case the adjudication will be made in the voluntary proceedings, but the rights of the petitioning creditors will be protected by staying their proceeding, permitting them to prove their costs and expenses against the estate, and reserving to them the right to bring forward their petition if subsequently found necessary to protect rights which cannot be saved in the voluntary proceedings. The right will further be reserved to creditors to prove their claims and receive dividends in the voluntary proceedings, without prejudice to their rights under the creditors' petition should further proceedings be taken thereon, all such orders being within the equity powers of the court.

In Bankruptcy. On question certified by referee.

On the 11th day of January, 1902, J. A. Anderson & Co. et al. filed a petition in bankruptcy against Reuben Stegar. A subpœna was issued, but not served. Three days afterwards, Stegar, not having appeared in the involuntary proceeding, filed a voluntary petition, which, in the absence of the judge in the Middle district, was referred to the referee for adjudication. When the matter came on to be heard, the petitioning creditors pleaded the pendency of the prior involuntary proceeding in abatement of the subsequent voluntary proceeding, and insisted that the referee make an order accordingly. Stegar insisted, on the other hand, that the referee proceed to an adjudication upon his voluntary petition. The referee certified the case for instructions.

Cooper & Foster, for petitioning creditors.
James Pride, for respondent.

JONES, District Judge. The object of the law in giving a creditor the right to force his insolvent debtor into bankruptcy is to compel the just distribution of the insolvent's estate among creditors. If the petitioning creditors obtain this result, they cannot complain, so long as their rights are fully protected, that the distribution, instead of

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being effected on the creditor's petition, is accomplished upon the voluntary petition of the debtor. Ordinarily, adjudication on the debtor's own petition is the better mode, since it is quicker, less expensive, and less likely to lead to delay and unnecessary litigation.

Why, then, in this case, should not the cost and delay of litigation upon the prior involuntary proceeding be avoided by adjudication, which follows as matter of course under the voluntary petition? Nothing, so far as now appears, would be gained by adjudication on the involuntary proceeding, which could not be had on an adjudication under the voluntary petition; while the estate, if administered under the involuntary proceeding, will be burdened by cost, expense, and useless litigation, which would be avoided if adjudication passed on the voluntary proceeding. On the other hand, if the involuntary petition be defeated, nothing will be effected except profitless litigation and delay, and, it may be, damage to creditors. Manifestly, therefore, it is not to the advantage of creditors to press the involuntary proceeding further, unless it should become necessary to enforce some right which could not be saved under adjudication on the voluntary petition.

Creditors, by commencing the involuntary proceeding, incur liability for costs and attorneys' fees, and, if the petition be wrongfully filed, for damages. They also get in position to avoid preferences and transfers which might not be assailable on the adjudication under the later voluntary petition. The court cannot deprive petitioning creditors of these rights, or enlarge their liabilities, by dismissing the prior involuntary proceeding in order to administer the estate under the voluntary petition. How, then, are the rights of petitioning creditors to be saved, if they are not allowed to proceed, and the administration of the insolvent estate is had under the insolvent's voluntary petition, subsequently filed?

A debtor who, without appearing in an involuntary proceeding, subsequently files a voluntary petition, upon which he is adjudged a bankrupt, cannot complain of the filing of the involuntary petition. The court would never dismiss the creditor's petition under such circumstances; and unless the petition were dismissed, or petitioners withdrew it, there could not, under the plain terms of the bankrupt act, be any liability to the defendant. This liability out of the way, it would remain to save the creditors harmless as to costs and attorneys' fees. This is easily effected by directing an adjudication on the voluntary proceeding, staying the involuntary proceeding in the meanwhile, reserving to petitioning creditors the right to prove their costs and expenditures under the adjudication on the voluntary petition, with leave to bring forward the involuntary petition if subsequently it be found necessary to protect rights which could not be saved by adjudication under the voluntary petition. Such a decree, with further leave to creditors to prove their claims under the adjudication on the earlier involuntary proceeding, if it became necessary to bring it forward, notwithstanding such claims may have been proved, or dividends have been accepted, in the proceedings on the voluntary petition, would amply secure every possible right of the petitioning creditors.

Of the power of the court of bankruptcy to make such decrees

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there can be no doubt. Its power to mold its decrees upon the two petitions is as broad and flexible as that of a court of equity, if the petitions were pending there. There might, of course, be cases where a debtor, after going so far as to begin the trial of the issue on an involuntary petition, would properly be held to waive his right subsequently to file, or to proceed upon, his voluntary petition, until the involuntary proceeding has been tried and determined. Ordinarily, however, it is true that the debtor has the right to avail himself of the benefits of the bankrupt law on his own petition, and that this right cannot be forfeited or rendered ineffectual merely because the creditors' petition is first filed and pending undetermined when the debtor files his petition. A debtor has the undoubted legal right to contest the involuntary proceeding, which must necessarily be based upon some violation of the act, of which the debtor may not be guilty, and is therefore unwilling to be adjudged guilty, although desirous to have his estate distributed among creditors on his own petition. The debtor is not bound to postpone this right because of the involuntary proceeding, and may, unless he has waived the right, push his own proceeding, and at the same time contest the creditors' proceeding. A voluntary and involuntary petition are filed in different rights, and based on different grounds, though the effect of the adjudication may be the same in each proceeding. The two petitions not being filed in the same right, nor based on the same cause, and an adverse judgment to the petitioning creditors being no bar to an adjudication on the voluntary proceeding, the mere pendency of a prior involuntary petition, upon which there has been neither hearing nor adjudication, is not ground for abatement of the subsequent voluntary petition. The decisions, discussing the proper practice in cases like this, are not full, and are in conflict. The weight of authority supports the practice I have outlined, which, on business considerations, commends itself to courts of bankruptcy in the administration of estates.

The following order will be entered: On consideration of the case certified herein by the referee, it is ordered and adjudged as follows: (1) The referee will proceed to adjudicate Reuben Stegar a bankrupt on his own petition, and administer the estate thereunder as required by law. (2) Until the further order of the court, all proceedings will be stayed upon the petition filed by J. A. Anderson & Co. et al. on the 11th day of January, 1902, except service of subpœna upon the alleged bankrupt. (3) The adjudication of bankruptcy against Reuben Stegar on his own petition shall not prejudice any right obtained by petitioning creditors by the filing of their prior petition, and they may apply, at any time after the adjudication on the bankrupt's own petition, to bring forward their petition, if found necessary to protect rights of creditors which cannot be saved under the adjudication on the voluntary petition. (4) The proving of claims, or acceptance of dividends, under the adjudication upon the bankrupt's voluntary petition, shall not be deemed a bar or waiver of the right of creditors to prove their claims under an adjudication on the involuntary petition, if such should be made; and petitioning creditors may prove against, and be allowed out of, the assets of the bankrupt, under the administration upon his voluntary petition, their reasonable costs and

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fees in this behalf expended; and to that end the two petitions may be consolidated and treated as one proceeding, if it become necessary in the further progress of this matter.

CELY et al. v. GRIFFIN et al.

(Circuit Court, D. South Carolina. February 25, 1902.)

1. PROCESS—FEDERAL COURTS—SERVICE IN OTHER DISTRICTS.
   Except in suits of a local nature to enforce a lien or claim against property within the district, and upon a proper order, or in suits for infringement of a patent, there is no authority of law for the service of process issued by a circuit court of the United States outside of the district.
2. FEDERAL COURTS—JURISDICTION.
   A suit in equity to set aside a contract for the sale of a patent involves no federal question, and cannot be maintained in a federal court, where an indispensable party defendant is a citizen of the same state as complainant.

In Equity. On motion to quash the return and vacate service of process.

Charles Koonce, Jr., for the motion.
B. A. Morgan and Carey & McCullough, opposed.

SIMONTON, Circuit Judge. This case comes up on a motion to quash the marshal's return, and vacate and set aside service of process on Koonce, Leslie & Co., Samuel C. Koonce, and John S. Leslie, and each of them. Notice of the motion was given to, and same accepted by, counsel for complainants. The day and hour fixed for the hearing was 10 o'clock a. m. for this 25th February, 1902. Counsel for the motion appeared at 10 a. m., but, the counsel for complainant being absent, he waited until 1 p. m., after the arrival of all railroad trains which reach Charleston in the morning hours. The motion was then made and heard, defendants having put in a special appearance for this purpose.

1. The subpœna ad respondendum was issued from this court. The defendants making this motion are citizens and residents of the state of Pennsylvania, and were served at their homes in Pennsylvania by the marshal of the Western district of that state. The general rule is that the circuit court for each district sits in and for that district, and the process of a circuit court cannot be served without the district in which it is established without the special authority of law therefor. Toland v. Sprague, 12 Pet. 300, 9 L. Ed. 1093. The only case where this rule is not in force is when there is suit in equity commenced in any court in the United States to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, and one or more of the defendants is not an inhabitant of or found within said district, the court can make an order requiring such defendant to appear, answer, or demur on a day certain,—said order to be served on said absent defendant, if practicable; if not, to be published. Rev. St. U. S. § 738; and, also, the case of an action brought for the infringement of a patent,

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Noonan v. Athletic Club (C. C.) 75 Fed. 334. The bill in this case seeks an injunction against the sale of a patent right in which complainants allege they are co-owners with defendants.

2. The defendants, making this motion, claim their privilege as citizens of the Western district of Pennsylvania, to be sued only in the district of their residence. This right is unquestionable, under the act of 1887–88 (25 Stat. 433, § 1). "No civil suit shall be brought before either of said courts [the circuit or district courts] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

3. Examining the bill, it is brought by H. W. Cely and W. H. Cely, citizens of the district and state of South Carolina, against J. W. Griffin, a citizen of the district and state of South Carolina, and other defendants, among them R. F. Lindsay and J. L. Merritt, both of them alleged to be of Greenville, in the district and state of South Carolina. Examining the bill, it will be seen that J. W. Griffin is an indispensable party to the suit. The prayer of the bill is to set aside a contract made by Griffin with his codefendant Samuel C. Koonce. So he cannot be eliminated from the suit. As this court, except on federal questions, cannot entertain jurisdiction, except in controversies between citizens of different states, it cannot entertain jurisdiction in a controversy between two citizens of South Carolina. In the circuit court every person complainant must be able to sue, and every person defendant must be liable to be sued, in the federal court. Clearwater v. Meredith, 21 How. 489, 16 L. Ed. 201. When one of the original defendants in the circuit court, who is an indispensable party, is a citizen of the same state as the plaintiffs, the court can have no jurisdiction on the ground of citizenship. Peper v. Fordyce, 119 U. S. 469, 7 Sup. Ct. 287, 30 L. Ed. 435. There is no federal question in this case. True, it is with regard to a patent. But a federal question is presented only when it is to the infringement of a patent, and even then the suit can only be brought in the district of the residence of the defendant, or in any district in which the defendant shall have committed acts of infringement, and shall have a regular and established place of business. Act 1897 (29 Stat. 695); Desty, Fed. Proc. § 26a. See McMullan v. Bowers, 102 Fed. 494, 42 C. C. A. 472; Marsh v. Nichols, 140 U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. 413.

The motion is granted. Let an order be entered quashing the service of the subpœna, and dismissing the bill for want of jurisdiction, without prejudice.

THE ANCHORIA.

(District Court, S. D. New York. March 19, 1902.)

1. **SHIPS—LOADING APPLIANCES—CONDITION—DUTY OF OWNER.**
   It is the duty of a shipowner to keep his ship in such condition that the loading appliances may be reasonably used without being liable to catch on obstructions, and endanger a gangway man handling a whip.
2. **SAME—DEFECTS—DUTY TO WARN EMPLOYES.**
   Where several rungs of a stationary ladder on the ship projected beyond the side of the ladder, so that the loading appliances were liable

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to catch on them, and endanger the gangway man handling the whip, and he had no knowledge of the danger, it was the owner's duty to give him notice, so that he could refrain from exposing himself to the peril if he so wished.

3. SAME—SUFFICIENCY OF EVIDENCE.
The load on reaching the hold was received by an employé working there, who knew the condition of the ladder and the danger from the projecting rungs. He testified that the load was unslung a little forward of the ladder, and the sling hooked up and taken by him to the coaming of the hatch, out of danger from the ladder, etc., and he gave an unsatisfactory explanation as to why it caught on the rung. Testimony on the part of the claimant showed that the load was unloaded forward of the ladder, and in close proximity to it. *Held* to show that the load was unslung nearer the ladder than the employé was willing to admit, and that he negligently failed to keep it away from the projecting rungs.

4. SAME—DAMAGES—AMOUNT.
An employé injured by reason of a defective ladder on a ship was unconscious for several days. Among other wounds, he suffered a compound fracture of his right leg, necessitating several painful operations, as a result of which his leg was shortened about three inches, and remained stiff. He was permanently disabled for anything but very light work, which he could probably do only when sitting, and such work appeared difficult to obtain. He had been a healthy man, 44 years old, earning $3 a day, and $5 for night work, and had steady employment. *Held*, that $6,000 damages was reasonable.

5. SAME—NEGLIGENCE OF FELLOW SERVANT.
The contributory negligence of a fellow servant was no defense.[1]

In Admiralty.

Wilford H. Smith, for libelant.

Frederick E. Fishel (H. Snowden Marshall, advocate), for claimant.

ADAMS, District Judge. This is an action brought to recover damages for personal injuries suffered by the libelant while working on the steamship Anchoria, on the 11th day of August, 1899, between 9 and 10 o'clock in the morning. The steamer was being loaded at New York with lumber and iron, and the libelant was a gangway man in charge of the forward whip of No. 2 hatch. A span of rope ran between the masts of the vessel, about 25 feet above the deck, and was used to support four whips, two for hatch No. 2, and two for hatch No. 3. The whips were purchases or falls formed of ropes and blocks, with chain slings at the ends. They were operated by steam winches. The whips of No. 2 hatch at the time in question were being used to load iron, and it was the libelant's duty to stand on the main deck at the forward part of the hatch, and guide the whip, so that the cargo in the sling would not strike the hatch coamings of the decks as it descended with the load, and the sling would not catch as it came up empty. While he was performing this duty, and after he had guided a draft of iron into the lower hold, the bight of the sling in returning caught on a projecting rung of a stationary iron ladder running from the bottom of the hold to the under side of the deck above, about a foot forward of the coaming of the hatch. The

[1] Concurrent negligence of master and fellow servant, see note to Maupin v. Railway Co., 40 C. C. A. 236.

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effect of the catching was to instantly cause a tension on the fall which the libelant held, and jerk him from his place on the deck into the hatch, where he fell to the bottom of the hold, a distance of about 32 feet, causing the injuries for which he sues.

The ladder was about a foot and a half wide, and consisted of two upright sidepieces, with 10 or 12 rungs, which ran through holes in the sidepieces, and originally were welded smooth on the outside; but the starboard or inshore sidepiece of the ladder had in some way become bent towards the port side of the vessel, so that several of the rungs projected from 1½ to 3 inches on the inshore side. It was upon one of these that the sling caught. The ladder had been out of order in this way for several months or a year, to the knowledge of all who had occasion to use the hold, including the agent of the steamer who employed the men who worked at loading and discharging. No defense is interposed to the libelant's claim with respect to the condition of the ladder, but it was urged that the accident was the result of negligence on the part of the libelant and his fellow servants, in that they knew, or should have known, the condition of the ladder, and should have guarded against the sling catching on the rung.

The libelant was new to the work at this particular place, and was not notified or aware of the condition of the ladder. Nor was he, while doing the work, in such a position that he should, in the exercise of ordinary care, have observed its defective condition. It was the duty of the owner to keep the ship in such order that the loading appliances could be reasonably used without liability to catch on obstructions which would become sources of danger to the gangway man handling the whip. And, in the event of the existence of danger which was unknown to the gangway man, it was incumbent on the owner to give him notice to that effect in order that he might refrain from exposing himself to the peril, if he should be unwilling to take the risk. In neither respect was the duty of the employer fulfilled, and I hold that there was negligence for which the vessel is liable, and that there was no contributory negligence on the part of the libelant.

It appears that the libelant and the workmen in the hold were employed by the same master and were engaged in a common occupation. When this draft reached the hold, it was received by a man working there in receiving the cargo named White, who had been familiar with the condition of the ladder some months before this time, and had known of the danger from the projecting rungs when cargo was being loaded or unloaded. He said that this draft of iron was unslung a little forward of the ladder, and the sling hooked up and taken by him to the coaming of the hatch out of danger from the ladder, and that he then directed the winchman to go ahead, and had turned to walk back of the hatch, when the libelant fell; that he then noticed the sling caught on the projecting rung. He attempted to account for this by a motion of the span, incident to its use by the several whips which caused it to sway; but such explanation is not satisfactory. This witness said the iron was to be stowed as far forward as possible. Testimony on the part of the claimant shows

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that the draft was unloaded forward of the ladder and in close proximity to it. I think that the draft was unslung nearer the ladder than White was willing to admit, and that he negligently omitted to take proper precautions to keep it away from the projecting rungs.

The libelant's injuries were concededly very serious. He was unconscious for several days after the accident. Among other severe and painful wounds, he received a compound fracture of his right leg, rendering several operations necessary, during which he suffered intense agony. As a result of the operations, the leg was shortened about three inches, and remained stiff. In consequence of his injuries, he became permanently disabled for any but very light work, which he has been, and probably will be, only able to do when sitting. It appears that such work is difficult to obtain. At the time of the accident, he was a healthy man of 44 years of age, and earning $3 a day for day work, and $5 for night work, with steady employment. I consider $6,000 a reasonable allowance for his damages, under the circumstances.

The contributory negligence of a fellow servant is not a defense in a case of this kind, under the authorities. Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; Steamship Co. v. Carey, 119 U. S. 245, 7 Sup. Ct. 1360, 30 L. Ed. 354; Young v. Railway Co. (C. C.) 46 Fed. 160; Railway Co. v. Young, 1 C. C. A. 428, 49 Fed. 723; Kennedy v. Grace & Hyde Co. (C. C.) 92 Fed. 116; Thomas, Neg. 908.

Decree for libelant for $6,000, with interest from August 7, 1901, the time of filing the libel, and costs.

THE MISSISSIPPI.

(District Court, S. D. New York. February 28, 1902.)

1. SHIPPING—DAMAGE TO CARGO—NEGLIGENT STOWAGE.
A ship is liable for damage to cargo resulting from negligence in stowage, or in failing to properly cover a hatch to prevent leakage, notwithstanding any stipulations to the contrary in the bills of lading; nor is it relieved from such liability by the provisions of the Harter act.

2. SAME—GLYCERIN ABOVE DRY GOODS—INSUFFICIENT HATCH COVERING.
A steamship, on a voyage from London to New York, stowed a quantity of glycerin in iron drums in the orlop deck of a hold, while on the lower deck was a quantity of furs and skins. The drums were not so fastened as to prevent fore and aft motion, or to prevent their moving vertically in heavy weather; nor was the hatch of the orlop deck battened and calked, as were the hatches above. The ship encountered rough weather, and at the end of the voyage it was found that some of the drums had been chafed through and were empty, and that a quantity of the glycerin had washed over the coamings of the hatch, and damaged the goods below. *Held*, that in view of the dangerous character of glycerin as a cargo, owing to the frailty of the packages and the consequent liability of leakage, it was incumbent on the ship, if it stowed it above other cargo, to take proper precautions, both by securing it from shifting in heavy weather, and by rendering the hatch leading below absolutely tight, and its failure to do so was negligence, which rendered it liable for the resulting damage to the cargo below.

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In Admiralty. Suit to recover for damage to cargo.

Black & Kneeland, for libelants.
Convers & Kirlin, for claimant.

ADAMS, District Judge. Certain goods of the libelants, consisting of 45 bales of hatters' furs and skins, were shipped on the steamer Mississippi from London in February, 1897, consigned to the owners, in New York. The vessel sailed on February 5th, and arrived at New York on February 20th. These goods were injured by contact with glycerin, a part of the steamer's cargo, which escaped during the voyage from the iron drums in which it was contained, and this action was brought to recover the damages resulting therefrom. The contention of the libelants is that the injury was caused by fault and negligence on the part of the steamer in the loading, stowage, custody, and care of the cargo, in that (1) the iron drums containing the glycerin were not properly stowed, dunnaged, and secured; (2) the drums of glycerin were improperly stowed in the orlop deck above the libelants' cargo; and (3) the orlop deck hatch was not tight. The claimant denies any negligence, and asserts that the vessel met with a great storm and stress of wind on the voyage, which caused the iron drums to chafe against each other and leak, and that the injury was caused through the perils of the sea, and insufficient packages containing the glycerin, which causes of injury were covered by exceptions in the bills of lading. It alleges that the deck hatch was secured in a proper way, and the leakage was in consequence of the tarpaulin covering being torn by the dunnage, which was broken loose by the extraordinary action of the sea. A further defense is interposed, to the effect that it was provided in the bills of lading the shipowner was not to be liable for any damage to the goods on board capable of being covered by insurance, which was the case here; the goods having been actually insured. The Harter act was also pleaded.

The evidence establishes great severity of the weather on the voyage, and, with respect to the cargo, that glycerin was stowed in the orlop deck of No. 1 hold, and the damaged cargo in No. 1 lower hold, under the glycerin. When the vessel arrived in New York, it was found that a number of the drums were chafed through and empty; the glycerin having escaped so that it was from six inches to a foot deep on the orlop deck, and had washed over the coamings of the hatch of that deck upon the cargo in the square of the hatch below. The drums had been dunnaged and chocked when stowed, but not tommed or fastened down to prevent a vertical movement in heavy weather. Nor were the drums protected by a bulkhead to prevent fore and aft motion. The dunnage and chocks were not sufficient to secure the drums, and they became loose. The dunnage and chocks, being broken up in small pieces and strewn all over the deck, formed a pulpy mass, which got into the scupper pipes, preventing the escape of the glycerin in that way to the bilges of the ship, and thus causing the washing of the glycerin over the coamings of the hatch. It also appears that glycerin is considered a dangerous cargo, especially liable to leakage from the frailty of the packages, and for such reason

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it is prudent to place it in the bottom of the carrying vessel. In this case it was the last of the cargo put into the hatch in question, and, instead of being in the bottom of the ship, was on the deck above. Under such circumstances, being placed above dry cargo without cargo on top to hold it in place, it was especially incumbent upon the carrier to adopt proper devices to meet the contingencies of the voyage, both by securing the cargo from shifting in heavy weather, and rendering the hatch leading below absolutely tight. In neither of these respects was the duty of the ship fulfilled. Only the usual method of stowing was adopted. The hatch, though covered with a tarpaulin, was not battened and calked, as were the hatches above, but left without any proper means of averting danger in case of the escape of the glycerin, excepting by the drainage scuppers, which proved to be insufficient.

It is urged with great vigor by the claimant that the libelants have not sustained the burden of proof to show negligence; but I think the circumstances, in connection with the testimony of the ship's officers, given when the matter was fresh in their minds, are sufficiently convincing that proper precautions were not taken by the vessel. If I am correct in the findings of negligent stowage and a leaky hatch, they are conclusive of the case, without regard to the other questions involved. The Niagara, 16 Blatchf. 516, 528, 529, Fed. Cas. No. 10,221; The Cimbria (D. C.) 13 Fed. 89; The Bitterne (D. C.) 35 Fed. 927; The Dunbritton, 19 C. C. A. 449, 73 Fed. 352, 366; The Aspasia (D. C.) 79 Fed. 91; Id., 26 C. C. A. 372, 80 Fed. 1003; The Frey (D. C.) 92 Fed. 667; Knott v. Worsted Mills, 179 U. S. 69, 73, 21 Sup. Ct. 30, 45 L. Ed. 90.

Decree for libelants, with an order of reference.

In re BURNS.

(Circuit Court, W. D. Arkansas. Ft. Smith Division. March 3, 1902.)

1. CRIMINAL LAW—SENTENCE—CONFORMITY TO VERDICT.
   In criminal cases the judgment must strictly conform to the verdict, to which nothing can be added by intendment.

2. SAME—INSUFFICIENCY OF VERDICT.
   Under the decisions of the supreme court of Arkansas, construing the criminal laws of the state prior to their adoption by congress in the Indian Territory, a person indicted for maiming, under Mansf. Dig. § 1594 (Ind. T. Ann. St. § 937), may be convicted and sentenced under section 1566 (Ind. T. Ann. St. § 909), which provides for the punishment of an assault "with intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition"; and a verdict of guilty of an "aggravated assault and battery" is sufficient to warrant a sentence under such section, the words "aggravated assault" having acquired a technical meaning in the state as denominating the offense therein defined; but a verdict finding defendant guilty of "an assault with a deadly weapon" is not, since it fails to find essential elements of the offense, and such a verdict warrants the imposition of sentence for no offense greater than assault.

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1. HABEAS CORPUS—EXCESSIVE SENTENCE—RIGHT TO DISCHARGE.
Where a sentence has been imposed which neither the verdict nor the statute authorized the defendant is entitled to discharge on a writ of habeas corpus.

On Petition for Writ of Habeas Corpus and Return Thereto.

W. H. Korniegay, for the petitioner.
James K. Barnes, U. S. Dist. Atty.

ROGERS, District Judge. The petitioner John W. Burns was indicted in the United States court for the Northern district of the Indian Territory for the crime of maiming, and upon plea of not guilty and trial the following verdict was rendered: "We, the jury, find the defendant guilty of an assault with a deadly weapon. J. W. Bird, Foreman,"—and was sentenced by the court, upon that verdict, to be imprisoned in the United States jail situated at Ft. Smith, Ark., and to pay a fine of $200 and costs. An exception was taken to the entry of that judgment upon the foregoing verdict. The indictment charged, in substance (omitting formal parts), that said Burns did, feloniously, unlawfully, and with his malice aforethought, discharge and shoot off a certain gun loaded with gunpowder and leaden bullets, towards, against, and into the right leg and body of one Homer Lay, and did then and there, by means of the said gun so loaded with gunpowder and leaden bullets as aforesaid, so discharged and shot off as aforesaid, towards, against, and into the right leg and body of him the said Homer Lay as aforesaid, wound and disable him, the said Homer Lay, contrary to the form of the statute, etc.

By act of congress certain statutes of Arkansas were adopted in the Indian Territory, and among others the statute regulating the crime of maiming. Section 1594 of Mansfield's Digest of the Statutes of Arkansas (section 937, Ind. T. Ann. St.) reads as follows:

"If any person shall, from malice aforethought, shoot, stab, cut or in any manner wound and disable any person, he shall be deemed guilty of maiming."

It could not be said that the verdict in this case was rendered under that statute, but it was rendered under section 1566 Mansf. Dig. (section 909, Ind. T. Ann. St.), under the head of "Assault—Battery—Aggravated Assault—Assault with Intent to Murder," which section reads as follows:

"If any person assault another, with intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition, he shall be adjudged guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than fifty nor exceeding one thousand dollars, and imprisoned not exceeding one year."

It is provided by section 1564, Mansf. Dig. (sections 907, 908, Ind. T. Ann. St.), that simple assault shall be punished by fine not exceeding $100, and by the following section the crime of assault and battery is punished by fine not exceeding two hundred dollars; "provided, this section shall not be construed to apply to assault and batteries of an aggravated character." All these sections of the statutes were

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put in force, by the act of congress referred to, in the Indian Territory, and were in force when the foregoing verdict was rendered.

In Guest v. State, 19 Ark. 405, Guest was indicted under the same statute under which the defendant in the case at bar was indicted, and a verdict was rendered of "an aggravated assault and battery." In that case it was held that:

"Upon an indictment for a felony, the accused may be convicted of a misdemeanor where both offenses belong to the same generic class, where the commission of the higher may involve the commission of the lower offense, and where the indictment for the higher offense contains all these substantive allegations necessary to let in proof of the misdemeanor."

See, also, Cameron v. State, 13 Ark. 712; State v. Cryer, 20 Ark. 64; State v. Nichols, 38 Ark. 551; Davis v. State, 45 Ark. 359.

I do not doubt the soundness of the principle announced in Guest v. State, supra, and especially is that true where a statute is in force such as is found in sections 2288 and 2289 of Mansfield's Digest of the Statutes of Arkansas (also in force in the Indian Territory,—sections 1631, 1632, Ind. T. Ann. St.), where it is provided, in substance, that all injuries to the person, by maiming, wounding by an assault, whether malicious or from sudden passion, and whether attended or not with intent to kill, shall be deemed degrees of the same offense, and where one is indicted for an offense consisting of different degrees he may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment. If, therefore, the jury in the case at bar thought that the defendant was guilty of an "aggravated assault and battery," that verdict would have sustained the sentence imposed in this case. But the jury did not find that the defendant was guilty of an "aggravated assault and battery." The jury found that he was guilty of an "assault with a deadly weapon." Is the one equivalent to the other? clearly not. The words "aggravated assault" have come to have a specific and definite meaning under the laws of Arkansas, and that was recognized in the case of Guest v. State. Guest v. State, supra, was decided prior to the passage of the act of congress adopting parts of Mansfield's Digest as the law of the Indian Territory, and by the decision of that court, interpreting its own statute, the courts in the Indian Territory should be bound in interpreting the same statute.

Section 1566 of Mansfield's Digest was taken from the Revised Statutes, and was enacted in 1838, and has been in force in Arkansas ever since, no change having ever taken place in it, except in the original act the crime was called a "high misdemeanor," whereas in the present statute, as adopted in the Indian Territory, the word "high" is omitted. But the preceding section of Mansf. Dig. § 1565 (also in force in the Indian Territory,—sections 908, 909, Ind. T. Ann. St.), is as follows:

"Any person who shall be convicted of an assault and battery shall be fined in any sum not exceeding two hundred dollars: provided, that this section shall not be construed to apply to assaults and batteries of an aggravated character."

The foregoing section of Mansfield's Digest, as it was originally enacted by the legislature of Arkansas, read, immediately after the

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words "aggravated assault" at the end of that section, as follows: "In which the fine under existing laws could not be as low as ten dollars,"—making the proviso read as follows: "That this section shall not be construed to apply to assaults and batteries of an aggravated character, in which the fine under existing laws could not be as low as ten dollars." This act of January 6, 1857, makes use of the word "aggravated" in connection with an assault for the first time in the statutes of Arkansas or the decisions of its courts, and it will be seen, by comparing the penalty fixed by this section of the statute, that the proviso could have no application whatever to any other assault known to the system of jurisprudence in Arkansas than that described in section 1566 (section 909, Ind. T. Ann. St.), for the reason that every other assault except that described in section 1566 might be punished by a fine of less than $10, while that described in section 1566 could not be punished by a fine of less than $50, and also involved imprisonment.

It may be observed in this connection that the case of Guest v. State, supra, in which it was held that one indicted for the crime of mayhem might be convicted of an aggravated assault and battery, was decided in 1858, the year following the enactment of this statute. Why the language above referred to was omitted by the digesters in Gantt's Digest and in Mansfield's Digest I am not advised, but it would seem that the statute of January 6, 1857, by making use of the term "aggravated," and the subsequent decision of Guest v. State (1858), made it unnecessary to retain the language which was dropped in order to define what statute the proviso applied to. It may be also observed that the seventh paragraph of chapter 45 of Mansfield's Digest of the statutes of Arkansas (paragraph 7, c. 19, Ind. T. Ann. St.), is entitled "Assault—Battery—Aggravated Assault—Assault with Intent to Murder." The words "aggravated assault," contained in this title, were never found in the digests of Arkansas prior to 1858. They appeared for the first time in Gantt's Digest of the Statutes compiled in 1874, and have been continued in all the subsequent digests. It may be also observed that the term "aggravated assault" appears in the following cases: Sturdivant v. State, 59 Ark. 267, 27 S. W. 6; Bryant v. State, 41 Ark. 359; and thus it appears that this term has a definite and technical meaning in the jurisprudence of the state, and manifestly applies to the crime defined by section 1566, Mansf. Dig. (section 909, Ind. T. Ann. St.); but the words "assault with a deadly weapon" have found no specific or technical lodgement, either in the statutes of Arkansas or in the opinions of its courts.

It is true that, in Bryant v. State, Chief Justice English (the larger part of whose professional life was spent upon the bench) denominated the offense for which Bryant was indicted as an "aggravated assault," and afterwards in the body of that opinion, in alluding to certain instructions refused by the court, said: "The third [instruction] defined an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury,"—substantially in the language of the statute under which the indictment was drafted; and this is the only instance in which I have found that the words, "assault with a deadly weapon," have been used in the remotest degree as designating

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a crime, and manifestly this reference could not be properly treated in that way. An assault with a deadly weapon is necessarily a part of an aggravated assault, under the statute referred to, but an assault with a deadly weapon does not necessarily involve all the elements of an "aggravated assault." Something more is required to constitute an aggravated assault than that the assault was made with a deadly weapon. It involves no difficulty, and no stretch of the imagination, to suggest innumerable cases in which a man might commit an assault with a deadly weapon where the circumstances of the assault did not show an abandoned and malignant disposition, and where no considerable provocation appears; but a man could not be found guilty of an aggravated assault under this statute unless it appears that the assault was made with intent to inflict upon the person of another a bodily injury, and that there was no considerable provocation, or the circumstances of the assault showed an abandoned and malignant disposition. Four elements are necessary to constitute an aggravated assault, under this statute. There must be an assault; it must be made with a deadly weapon, instrument, or other thing; it must be done with the intent to inflict upon the person of another a bodily injury; and it must occur where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition. The verdict of the jury does not cover any of the elements of this offense except the first two, viz., that an assault has been committed, and with a deadly weapon.

In civil cases no judgment can be rendered which does not conform to the verdict. Surely, in criminal cases, a judgment cannot be sustained or upheld which is made to rest upon something that is to be added to the verdict. To support the verdict in this case, it is necessary to add to the verdict that this assault was committed with the intent to inflict a bodily injury, and either under circumstances where no considerable provocation appeared, or where the circumstances of the assault showed an abandoned and malignant disposition; or, if this be not done, then we are called upon to infer, because the jury said the assault was committed with a deadly weapon, that it was committed under the circumstances I have just named. But no inference can be added to a verdict to support a judgment,—a judgment must conform to the verdict. If it be said that the jury clearly indicated by the use of the word "deadly weapon" that it found the defendant guilty of an "aggravated assault," the answer is that nothing can be added to a verdict by intendment. In criminal cases the verdict must be responsive to the issues raised by the allegations in the indictment and the defendant's plea thereto, and the judgment must strictly conform to the verdict, and impose no other or greater punishment than the statute under which the verdict is found authorizes. The author says in 2 Am. & Eng. Enc. Law, p. 965:

"An 'aggravated assault' has been defined to be, at the common law, one that has, in addition to the mere intent to commit it, another object which is also criminal; but it may be doubted whether at common law the term had a technical and definite meaning. It seems rather to have been a phrase used by the commentators and text writers in contradistinction to 'common assault,' to include all those species of assault which, for various reasons, had come to be regarded as more heinous than common assaults, or had been

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singled out and made the subject of special legislative provisions. In the criminal codes of some of the states of the Union, the term 'aggravated assault' is given a definite and peculiar meaning of its own. Norton v. State, 14 Tex. 393. Using the term in the large and general sense, not only assaults with certain prescribed intents, but also assaults by stabbing, wounding, shooting, or by any use of a deadly weapon, are aggravated assaults, in some states made felonious."

The same author, at page 970, states:

"By statute, in most of the states, one class of aggravated assaults is made to depend upon the character of the weapon used in the assault. The provisions of the statute are varied. Some statutes are directed against the use of deadly or dangerous weapons, 'with an intent to kill a human being or to commit a felony upon the person or the property of the one assaulted,' or 'with intent to inflict grievous bodily harm,' while, under other statutes, the mere use of the weapon, without reference to the intent with which it is employed, is sufficient." "Under statutes which make the intent with which the weapon is used a constituent element, the use of the dangerous or deadly weapon, with intent to inflict bodily harm, constitutes the gist of the offense, as distinguishing the act from an ordinary assault. Therefore the mere possession of a deadly weapon, without using it or the intent to use it, will not constitute the offense, nor will the intent without the use. But under statutes which declare the crime complete by the mere use of a dangerous or deadly weapon, it is unnecessary to allege or prove any intent whatsoever."

Manifestly, under section 1566, Mansf. Dig. (section 909, Ind. T. Ann. St.), it is not only necessary to prove that the weapon is a deadly weapon, but it is also necessary to show the intent to use it and the circumstances under which it is used,—that is to say, that it was under such circumstances as showed an abandoned and malignant disposition, or where no considerable provocation had appeared,—and therefore to find that a man is guilty of an assault with a deadly weapon fails to respond to what is essential to constitute an aggravated assault, under that statute. The words "deadly weapon," contained in this verdict, should be treated as surplusage, and the verdict be treated as a verdict for an assault. As before stated, the punishment for an assault is a fine not to exceed $100, and any other punishment in excess of that was wholly unauthorized in law, and therefore void.

The question now arises whether or not on habeas corpus, a sentence having been imposed which neither the verdict nor the statute authorized, the defendant should be released. That question came before this court in the case of In re Christian (C. C.) 82 Fed. 199, and was given the most careful, painstaking, and exhaustive research, and answered in that case in the affirmative, and therefore I am not disposed to re-examine that question. Those who are interested will find the reasoning and the cases supporting that opinion cited in the opinion itself.

The defendant alleges in his petition, and it is not denied in the return, that he has been confined in prison over 30 days, solely for the nonpayment of the fine and costs imposed against him; that he is unable to pay the same or any part thereof, and that he has not any property exceeding in value $20; that he has no property in any way conveyed or concealed or in any way disposed of for his future use and benefit; that the United States attorney for the Northern district of the Indian Territory, as well as the United States attorney for the Western district of Arkansas, have been notified of this application,

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and that he has not made the application contemplated in section 1042 of the Revised Statutes of the United States to a commissioner of this court, for the reason that the commitment on its face does not appear to be solely for the nonpayment of fine and costs, but the judgment rendered in this case does not order the defendant to be imprisoned for the fine and costs. I am of the opinion, therefore, that so much of the sentence imposed upon the defendant, and the judgment rendered in pursuance thereof, as was in excess of the sum of $100 was void, and that the defendant ought to be discharged; and it is so ordered.

NOTE.

Since this opinion was delivered my attention has been called to the fact that congress on the 1st of March, 1889, enacted literally section 1594 of Mansfield's Digest of the Statutes of Arkansas, for the Indian Territory. 25 Stat. 787, § 25. This statute was passed long prior to the act putting in force Mansfield's Digest of the Statutes of Arkansas in the Indian Territory; but it was long after the decision of Guest v. State, supra, and therefore does not affect the principle decided in this case, nor the soundness of the opinion.

In re SMITH.

(District Court, N. D. Georgia. February 10, 1902.)

No. 806.

BANKRUPTCY—INVOLUNTARY PETITION—ADVERSE CLAIMANT OF PROPERTY—RESTRAINT—POWER OF COURT.

Where property, claimed to belong to one against whom an involuntary petition in bankruptcy is filed, is also claimed by a third person, who is about to remove it, the court, on petition of the creditors, will restrain such third person from removing such property or making any change therein.

In Bankruptcy.

Slaton & Phillips, for petitioning creditors.
Julius L. Brown, for J. W. Dunford.
John Clay Smith, for bankrupt.

NEWMAN, District Judge. As this case now stands, the petitioning creditors ask the court to issue a restraining order to prevent J. W. Dunford from removing or changing in any way the present condition of the fixtures in the premises at No. 79 South Broad street, Atlanta, Ga. The power of the court with reference to property which is claimed to be a part of the assets of the bankrupt is fully determined in Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. In the opinion by the court it is said:

"If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property, and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of congress to prevent this evil. It therefore provides that, as soon as the petition in bank-

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ruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt, and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant, wherever found, so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee, when appointed, as a sufficient reason for failing to take possession of it. Sharpe v. Doyle, 102 U. S. 686, 689, 690, 26 L. Ed. 277. A like decision was made in Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984."

There can be no question of the power of the court between the time an involuntary petition in bankruptcy is filed and the selection of a trustee to make proper orders to protect and guard the bankrupt's estate for the benefit of creditors, as may be proper and right under the facts presented. Of course, the court will not unduly interfere with property claimed by third persons, and will not interfere at all with bona fide sales for fair consideration, and which are not obnoxious to the provisions of the bankruptcy act.

In this case it is sufficient to say that the facts are such as to make it proper for the court to maintain the existing status until a trustee in bankruptcy can be selected, and can take such steps as may be proper in the interest of the creditors of the alleged bankrupt.

It is ordered, therefore, that J. W. Dunford be restrained from removing any of the fixtures from the premises described, from encumbering the same, or from making any change whatever in the present status, so far as the fixtures in said room are concerned.

GUITERMAN et al. v. UNITED STATES (two cases).

STRAUSS et al. v. SAME.

(Circuit Court, S. D. New York. March 12, 1902.)

Nos. 3,046, 3,018, and 3,019.

1. CUSTOMS DUTIES—CLASSIFICATION—MUFFLERS COMPOSED OF COTTON AND SILK.

Mufflers composed of cotton and silk are not classifiable under Act 1897, par. 314, as "wearing apparel composed of cotton or other vegetable fibre, or of which cotton or other vegetable fibre is the component material of chief value,"—since paragraphs 388 and 312 both relate expressly to "handkerchiefs or mufflers."

2. SAME.

Mufflers composed of cotton and silk are dutiable under Act 1897, par. 388, covering "handkerchiefs or mufflers composed wholly or in part of silk," and not under paragraph 312, covering "handkerchiefs or mufflers composed of cotton," though the cotton is the component material of chief value of the mufflers in question.

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Appeals by the Importers from Decisions of the Board of United States General Appraisers.

Albert Comstock, for the importers.
W. Usher Parsons, Asst. U. S. Atty.

COXE, District Judge (orally). No question of fact is involved here. It is agreed upon both sides that the articles imported are mufflers composed of cotton and silk, cotton being the component material of chief value. The proportion of the silk varies in the different samples from 5 per cent. in one instance to 47 per cent. in another. The precise percentage is immaterial, for the reason that, as stated, it must be conceded that the cotton in every one of the samples is the material of chief value.

The collector assessed duty under paragraph 388 of the act of 1897, which provides for the article by name, the paragraph reading "handkerchiefs or mufflers composed wholly or in part of silk." The importers have protested under paragraph 312, which also provides for the article by name, the paragraph reading "handkerchiefs or mufflers composed of cotton." There is also an alternative protest under paragraph 314, the importers insisting that if the mufflers are not composed of cotton they are "wearing apparel composed of cotton or other vegetable fibre, or of which cotton or other vegetable fibre is the component material of chief value."

I do not think it is necessary to discuss paragraph 314 for the reason already stated, that the article is specifically designated under both of the paragraphs first alluded to.

Counsel for the importers, as I understand it, contends that paragraph 388 should be construed as if it read "handkerchiefs or mufflers composed wholly or in chief part of silk"; and that paragraph 312 should be construed as if it read "handkerchiefs or mufflers composed of cotton, or of which cotton is the component material of chief value." We have in this case to compare these two paragraphs, one of them providing specifically for mufflers composed of cotton, and the other for mufflers composed wholly or in part of silk. I know of no authority that will justify the court in holding that such a specific descriptive clause as is contained in paragraph 388 can be ignored and the inquiry permitted whether cotton or silk is the component of chief value. That question is eliminated by the clear and definite language of this paragraph. In other words, a muffler composed in part of silk is clearly assessable under paragraph 388, and such a muffler cannot be assessed under paragraph 312 as an article composed of cotton. There can be no question as to the component material of chief value where the importations are assessed under a paragraph relating to a manufacture wholly or in part of silk.

The decision of the board of general appraisers is affirmed.

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STEINHARDT et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 12, 1902.)

No. 2,934.

CUSTOMS DUTIES—METAL BEADS.

Metal beads should be assessed under Act 1897, par. 193, as articles composed wholly or in part of iron, steel, or other metal, and not under paragraph 408, as articles composed wholly or in part of beads.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Albert Comstock, for the importers.
Charles D. Baker, Asst. U. S. Atty.

COXE, District Judge (orally). The articles imported in this case are metal beads. The collector after first assessing them under paragraph 193 of the act of 1897, reliquidated the entry and assessed them under paragraph 408 of the same act, as "articles composed wholly or in part of beads." The importers protest insisting that they should have been assessed under the paragraph first chosen by the collector, namely, as "articles composed wholly or in part of iron, steel or other metal."

It is entirely clear that these metal beads are not articles composed wholly or in part of beads, because they happen to be strung upon a cotton thread. Indeed, it is not strenuously argued for the collector that such is the correct construction of paragraph 408. The contention of the importer is correct and the beads in question should be assessed under paragraph 193 of said act.

The decision of the board of general appraisers is reversed.

McKESSON et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 12, 1902.)

No. 3,020.

CUSTOMS DUTIES—CLASSIFICATION—CRUDE SULPHIDE OF ANTIMONY.

Crude sulphide of antimony is classifiable under Act 1897, par. 476 of the free list, covering "Antimony ore, crude sulphite of," and is not assessable under section 6, as a "non-enumerated article manufactured in whole or in part," the word "sulphite" being regarded as a misprint for "sulphide."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

J. S. Tompkins, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The importation in question is conceded to be crude sulphide of antimony. The collector assessed it as a "non-enumerated article, manufactured in whole or in part," under section 6 of the act of 1897. The importers insist that it should

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have been classified under paragraph 476 of the free list, which provides for "Antimony ore, crude sulphite of."

It is admitted on all sides that the word "sulphite" in the tariff is a misprint for the word "sulphide," as no chemist or expert on either side of the controversy knows of such a substance as sulphite of antimony. Sulphide of antimony is well known to all the witnesses. It seems to be the product of a process by which the gangue or slag is separated from the ore by heat. The importation here is such a product; the rock and slag has been removed and the ore is imported. It is also conceded that if the paragraph of the free list read crude sulphide of antimony it would aptly describe the importation in controversy. In view of the similar provisions in previous acts it is to me entirely clear that this was precisely what congress intended. There is no other substance known in the art as crude sulphide of antimony except the importation in question. It would be a strained construction to interpret paragraph 476 precisely as if the words "crude sulphite of" were omitted, and as if the paragraph applied only to antimony ore. The court should give some significance to the concluding phrase "crude sulphite of"; and it necessarily follows that if this be done it can apply only to the subject of this importation. There is no other substance to which the words quoted can apply.

The decision of the board of general appraisers is reversed.

In re FULTON CLUB.

(District Court, N. D. Georgia. February 8 1902.)

BANKRUPTCY—SOCIAL CLUB.

An incorporated club whose principal object is social intercourse, any business conducted by it being merely incidental, is not "engaged principally in * * * trading," and is not the subject of involuntary bankruptcy.

Petition for Involuntary Bankruptcy.

Mayson, Hill & McGill, for petitioning creditors.

Kilpatrick & McClelland, Slaton & Phillips, and J. H. Gilbert, for objecting creditors.

NEWMAN, District Judge. A petition has been filed by certain creditors, asking that the Fulton Club of Atlanta be declared an involuntary bankrupt. Creditors having adverse interests have raised the question as to whether or not this club is the subject of involuntary bankruptcy. The charter of the club, and the evidence offered as to the manner in which it is conducted, all go to show that it is a social club, its principal object is social intercourse, and any business conducted by it is a mere incident. Being a corporation, it is conceded by counsel for the parties that, as it clearly does not come within any of the other classifications (section 4b), it must be "engaged principally in * * * trading." This cannot be said of it. Such trading (if it can be called trading) as was carried on by this club was only among its members, was not for gain, and was a mere feature of

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the club, and not its main purpose. It must be held not to be the subject of involuntary bankruptcy, and the petition against it will be dismissed.

In re INDEPENDENT THREAD CO.

(District Court, D. New Jersey. March 24, 1902.)

INVOLUNTARY BANKRUPTCY—CORPORATIONS—RIGHT TO FILE PETITION.

A corporation, not being entitled to go into voluntary bankruptcy under Bankr. Act, § 4, and not being subject to involuntary bankruptcy, except on petition of three of its creditors, under section 59, cannot procure one of its creditors to assign part of its claim to third persons in order to create a sufficient number of creditors to join in an involuntary petition, its other creditors not being willing to file such petition.

In Bankruptcy.

Dill & Baldwin, for petitioners.

Robert M. Boyd, Jr., Ward Church, and Arthur H. Bissell, for James E. Mitchell.

KIRKPATRICK, District Judge. It appears from the testimony produced before the court in this cause that the Independent Thread Company was indebted to the Hartford Thread Company in about $6,000; that it was desirous of having its assets distributed in accordance with the provisions of the bankrupt act; and that for that purpose its directors passed a resolution setting out that it was unable to pay its debts, and expressing its willingness that an adjudication should be made. Under section 4 of the bankrupt act, the Independent Thread Company was not entitled to its benefits as a voluntary bankrupt. Neither could it, under section 59, be adjudged an involuntary bankrupt except upon the petition of three of its creditors. The Hartford Thread Company alone could not procure an adjudication of bankruptcy. So, acting under the advice of counsel who was also counsel for the Hartford Thread Company, the Independent Thread Company executed and delivered to the Hartford Thread Company its two promissory notes, of $100 each, to be credited in part payment of its indebtedness to the Hartford Thread Company. Thereupon immediately, and, as was testified to by counsel, for the sole purpose of qualifying them as creditors of the Independent Thread Company, the Hartford Thread Company indorsed the said notes, and delivered them, one each, to Messrs. Brown and Hawkins, who thereupon joined in filing the petition for this adjudication of bankruptcy. The alleged act of bankruptcy consists of a resolution of the board of directors of the Independent Thread Company admitting the inability of the company to pay its debts.

It will be seen that the Independent Thread Company was desirous of being adjudicated bankrupt. This it could not accomplish by filing a petition on its own behalf, and a sufficient number of creditors were not willing to file a petition asking that they be adjudged bankrupt. Therefore, acting in co-operation with the Hartford Thread Company, the plan above set out was adopted for the purpose of creating them.

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Obviously, this petition was filed by the procurement of the Independent Thread Company. All the steps which enabled it to be filed were taken at the instigation of their counsel, and at their request, for the purpose of evading the requirements of the statute. For this and other reasons objection is filed by intervening creditors to an adjudication of bankruptcy, and I am of the opinion that the objection is well taken. If an adjudication were made under these circumstances, it would, in effect, amount to a nullification of that part of section 4 of the bankrupt act above referred to, and permit a corporation, by acting in collusion with a single creditor, to obtain the benefits of the law which the legislature saw fit to deny them.

Let an order be entered dismissing the petition.

KNOEDLER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,999.

CUSTOMS DUTIES—PAINTINGS—AMERICAN ARTISTS—REGULATION OF TREASURY DEPARTMENT.

The regulation prescribed by the secretary of the treasury that an artist can live abroad only five years, with right to have his paintings admitted free of duty, under Tariff Act 1897, par. 703, as the product of an American artist residing temporarily abroad, cannot be sustained.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). This controversy arises with regard to the paintings of an American artist, Mr. Ridgway Knight. The collector assessed them for duty under paragraph 454 of the act of 1897. The importer protested insisting that they should have been admitted free under paragraph 703 of the same act as "the production of an American artist residing temporarily abroad." Accompanying the invoice was an affidavit by Mr. Knight, stating that he is a citizen of the United States, that by profession he is an artist, that his permanent place of residence is Philadelphia, and that his temporary residence is Poissy, France. The vice deputy United States consul general residing at Paris refused to receive the certificate presented by Mr. Knight, for the reason that it was not in compliance with the regulations prescribed by the secretary of the treasury, in that it showed that the artist had resided in France for a period longer than five years. It cannot be successfully contended that the secretary of the treasury was justified in making the arbitrary limitation of five years. This being so it is for the court to determine upon the facts whether the residence abroad is temporary or permanent. The affidavit of Mr. Knight, while not as full as it might be as to his intention regarding his residence abroad, is probably deficient in this particular, for the reason that he followed the form pre-

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scribed by the secretary of the treasury. There is, however, no proof to contradict his statement that his permanent residence is in Philadelphia and that he is only temporarily residing in France.

Since this decision of the board the court is informed that the secretary of the treasury upon a reconsideration of the facts and the law has ruled that this same artist is entitled to free entry of his works under the paragraph in question. It is gratifying to note the further fact that the board subsequently to the decision in the case at bar, upon affidavits stating the facts with greater detail and accuracy, also reached the conclusion that Mr. Knight is an American artist residing temporarily abroad. G. A. 4,727, decision, filed July 16, 1900. It appears, therefore, that the court, the board and the treasury department are in accord upon the question involved.

The court is of the opinion that the paintings in question should have been admitted free of duty. The decision of the board of general appraisers is reversed.

UNITED STATES v. JACKSON et al.

(Circuit Court, S. D. New York. March 18, 1902.)

CUSTOMS DUTIES—CLASSIFICATION—BRECCIA.

The question being one of fact, decision of board of general appraisers that an importation was "breccia," and therefore enterable free of duty under Tariff Act 1897, par. 508, instead of being dutiable under paragraph 114, will not be disturbed, having ample evidence to sustain it.

Appeal by the United States from a Decision of the Board of General Appraisers.

Henry C. Platt, Asst. U. S. Atty.
Howard T. Walden, for the importers.

COXE, District Judge (orally). The merchandise in question was assessed for duty under paragraph 114 of the act of 1897 as "marble in block, rough or squared only." The importers insist that it should be permitted to enter free of duty under paragraph 508 of the same act as "breccia, in block or slabs." It is conceded on both sides that the question before the court is a question of fact. The board of general appraisers heard all the evidence and have reached the conclusion that the merchandise is in fact "breccia." There is ample testimony in the record to sustain this finding, and the court sees no reason for disturbing it.

The decision of the board of general appraisers is affirmed.

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REISS et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,861.

CUSTOMS DUTIES—FISH.

Assessment of duties on the contents of cans, under Tariff Act 1897, par. 258, as "fish known as anchovies," is proper, though the cans are labeled "Appetit-Sild," the appraiser's return that the contents is "fish known as anchovies" not being contradicted by evidence, though witnesses state that it has been known and sold as "Appetit-Sild," and that in Norwegian "sild" is synonymous with "herring."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Albert Comstock, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The collector assessed duty upon the articles in controversy under the first clause of paragraph 258 of the act of 1897, which provides for "fish known or labeled as anchovies, sardines, sprats," etc. The importer insists that duty should have been assessed under the last clause of the same paragraph, which provides for "all other fish in tin packages." The fish imported are packed in round tin boxes labeled "Appetit-Sild." There is nothing upon the boxes directly or indirectly indicating what their contents is other than the name just mentioned. The appraiser's return states that the contents of the boxes is "fish known as 'anchovies.'" There is no evidence in the case one way or the other to contradict this finding of the appraiser. The importer has called no witness to testify as to the contents of the boxes, although a number of witnesses state that it has been known and sold as "'Appetit-Sild," and that in the Norwegian language "sild" is synonymous with "herring."

The court is of the opinion that the board correctly found upon this testimony that the packages contained anchovies, and that they were properly assessed for duty under the language "fish known as 'anchovies.'" Being anchovies, the presumption is conclusive that they are known as such.

The decision of the board of general appraisers is affirmed.

WOLFF et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,800.

CUSTOMS DUTIES—MOHAIRS.

Mohair braids made of the hair of the Angora goat are not woolen goods, within Tariff Act 1894, par. 297, suspending till January 1, 1895, reduction of duties on such goods.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

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Albert Comstock, for the importers.
Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in question consist of mohair braids made of the hair of the Angora goat. The importers insist that they were properly dutiable under paragraph 286 of the act of 1894. They were imported February 12, 1894, and withdrawn for consumption in October, 1894, the act of 1894 in the meantime having gone into effect. The collector assessed them for duty under the act of 1890, and refused to give the importer the benefit of the reductions of the act of 1894, upon the ground that the importations were manufactures of wool, as to which the reduction was suspended until January 1, 1895, by paragraph 297 of said act of 1894. Upon the evidence before the board their conclusion was correct; but since that decision evidence has been taken in this court which proves beyond question that the importations were as above stated, and were not wool. The decision of the board must be reversed within the doctrine of U. S. v. Klumpp, 169 U. S. 209, 18 Sup. Ct. 311, 42 L. Ed. 720, and Oppenheimer v. U. S. (C. C.) 90 Fed. 796.

In re KLAPHOLZ et al.

(District Court, E. D. Pennsylvania. March 21, 1902.)

No. 1,113.

BANKRUPTCY—PRIORITIES—WAIVER OF LIEN.

A manufacturer of clothing, though having had a lien for the full amount of his debt on clothing sold by him to a bankrupt, was nevertheless not entitled to priority of payment out of the fund in the trustee's hand produced by a sale of all the bankrupt's property, including the clothing manufactured by him and by third persons, and various other articles, made by a receiver under an order of court, where he had notice of the sale, but did not ask to have his clothing sold separately, and where there was no evidence concerning the price for which it sold.

In Bankruptcy.

Howard E. Heckler, for a creditor.
Henry W. Wessel, for trustee.

J. B. McPHERSON, District Judge. Conceding, for present purposes, that the claimant had a lien for the full amount of his debt upon the clothing shipped October 2, 1901, I am nevertheless of opinion that he cannot be awarded priority of payment out of the fund in hand, for the following reasons: The fund was produced by the sale of all the bankrupt's personal property, including the clothing manufactured by the claimant, clothing manufactured by other persons, and various other articles; and there is no evidence concerning the price for which the suits in question were sold. The claimant had notice of the sale, which was made by the receiver under an order of court, and was afterwards duly confirmed without objection; and he should have asked the court to direct this clothing to be sold separately, in order that the

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fund thus produced might be earmarked, and the validity of his claim upon it be considered. The court had no knowledge that he was asserting a lien for the manufacture of these goods, and, as they had passed out of his possession into the custody of the receiver, it was his duty to make seasonable claim to priority of payment. Otherwise he must be held to have taken the risk that the goods might be sold in such a manner that the proceeds might be indistinguishably mingled with the proceeds of the other property of the bankrupt; In re Gerry (D. C.) 112 Fed. 957.

The referee is instructed to disallow the claim to priority.

THE FREY.

(District Court, E. D. Pennsylvania. March 24, 1902.)

No. 9.

INJURY TO SERVANT—DEFECTIVE APPLIANCE—JOINT NEGLIGENCE—DIVISION OF DAMAGES.

While libelant was removing ashes from the stoke room of a steamship, the bucket, which was attached to a chain with two hooks, and, when filled, was hoisted through a ventilating shaft, fell, injuring him. The hooks were obviously inadequate to hold the bucket, and on several occasions it had slipped off and fallen while being lowered. Libelant had been warned of the danger of standing under the ventilator while the hoisting was going on. While the bucket was being lowered, he stood under the ventilator, when the bucket slipped off the hooks and fell on his head. *Held*, that the steamship was negligent in supplying inadequate hooks, and libelant was also negligent in standing under the ventilator at the time he was injured, and hence the damages must be divided.[1]

In Admiralty.

Joseph Hill Brinton, for libelant.
Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. This is an action brought to recover damages for personal injuries done to the libelant in November, 1900, while performing the duty of removing ashes from the stoke room of the steamship Frey. The facts are as follows: The ashes are removed from the stoke room through a ventilator that leads from the deck. The ventilator is constructed of sheet iron, and is about 2½ feet in diameter. Through this the bucket in which the ashes are hoisted is lowered by a winch, to which is attached a chain fall. At the end of this fall is an iron ring, from which run two short chains, each ending in a hook which passes through an ear upon the side of the bucket. Upon the day in question, the bucket had been emptied, and was being lowered to the stoke room to be refilled. The ship was at sea and rolling heavily, and during the passage of the bucket down the ventilator, the motion of the vessel caused the bottom of the bucket to strike upon the slightly projecting rivets that fasten

[1] Negligence of both master and servant, see note to Wm. Johnson & Co. v. Johansen, 30 C. C. A. 678.

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the plates of the ventilator together, thus detaching it from the hooks and causing it to fall. The libelant avers that he was not standing under the ventilator, but several feet away, and that the bucket in its descent struck a bracket upon a bulkhead that was immediately below the ventilator, and rebounded from that point, thus striking him upon the head and doing the injuries complained of. I am unable to take this view of the evidence. As I read the testimony, it shows clearly that the bucket could not possibly have taken this course, and I am obliged, therefore, to come to the conclusion that the libelant was standing under the ventilator, and was thereby negligently exposing himself to a known danger. The bucket had fallen upon several former occasions, and he had been warned, even if his senses did not sufficiently tell him, that to stand under the ventilator, while the process of hoisting was going on, was to expose himself to serious risk. To my mind, his own negligence is plainly apparent, but I think that the negligence of the steamship is equally clear. It consists in the use of obviously inadequate hooks to hold the bucket fast in its ascent and descent. Similar hooks were shown to the court upon the hearing, and I have no difficulty in declaring that a careful regard for the safety of the men at the bottom of this air shaft would have employed some other device. Several kinds of safe hooks were known and used at the time this injury happened, but these were straight hooks without the proper curvature to prevent the bucket from becoming detached, and a mere inspection makes it evident that, if the bucket met even a slight obstruction in its descent, it would probably be disengaged. In fact, it had thus been overturned a number of times before the day in question, and these falls were notice to the ship that something was wrong and called for a remedy. After the libelant was injured, proper hooks were obtained, and no further difficulty has been experienced.

Both parties being at fault, the damages must be divided. A decree may be entered in favor of the libelant, and the cause will then be referred to a commissioner to take such further testimony concerning the damages to be awarded as the parties may offer.

ARNOLD et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 11, 1902.)

No. 2,091.

CUSTOMS DUTIES—MERCHANDISE COMPOSED OF SILK AND WOOL.

Merchandise composed of silk and wool, silk being the component material of chief value, cannot be classified under Tariff Act 1890, par. 414, as a "manufacture of silk or of which silk is the component material of chief value"; being within the proviso of that paragraph declaring that "all such manufactures of which wool * * * is a component material shall be classified as manufactures of wool."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

William B. Coughtry, for the importers.
Henry C. Platt, Asst. U. S. Atty.

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COXE, District Judge (orally). It is conceded that the merchandise which is the subject of this controversy is composed of silk and wool, silk being the component material of chief value. It was classified by the collector under paragraph 395 of the tariff act of 1890, as "women's and children's dress goods, * * * composed wholly or in part of wool, worsted," etc. The protest insists that the collector should have classified the goods under paragraph 414 of the same act as a "manufacture of silk, or of which silk is the component material of chief value." Paragraph 414 contains a proviso as follows: "Provided that all such manufactures, of which wool, or the hair of the camel, goat, or other like animal, is a component material, shall be classified as manufactures of wool." Manufactures of wool under this proviso are covered by paragraph 392 of the same act. The protest in question does not refer to the latter paragraph. It being conceded upon this proof that the merchandise contains worsted as a component material, the court is clearly of the opinion that it is covered by the proviso and cannot be classified as a manufacture of silk under paragraph 414.

It follows that the decision of the board of general appraisers should be affirmed.

UNITED STATES v. LEHN et al.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,741.

CUSTOMS DUTIES—DULCIN—CHEMICAL COMPOUND.

Dulcin, being a chemical compound, is dutiable as such under Tariff Act 1897, par. 3, and not as saccharine, under paragraph 211, it being a distinct article, and of a different chemical composition, though similar to saccharine in character and use.

Appeal by the United States from a Decision of the Board of United States General Appraisers.

Charles D. Baker, Asst. U. S. Atty.
Albert Comstock, for the importers.

COXE, District Judge (orally). The decision of the board of general appraisers is affirmed upon the opinion delivered by General Appraiser Wilkinson, which is as follows:

"The merchandise is dulcin. It was assessed for duty as saccharine at $1.50 per pound and 10 per cent. ad valorem under paragraph 211 of the act of July, 1897, and is claimed to be dutiable as a chemical compound at 25 per cent. under paragraph 3. Saccharine and dulcin are both derived from coal tar, and are similar in appearance, character, and use; but each is a distinct article, manufactured under a specific patent and of a different chemical composition. Saccharine is anhydro-ortho-sulphamin-benzoic acid, while dulcin is para-phenetol-carbamid. Dulcin might be classified by similitude as saccharine but for its enumeration as a chemical compound. We find that it is a chemical compound, and sustain the protest. Reference is made to Arthur v. Lahey, 96 U. S. 112, 24 L. Ed. 766."

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PAGE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 14, 1902.)

No. 3,105.

CUSTOMS DUTIES—CLASSIFICATION—STEEL TUBES—FINDING OF GENERAL APPRAISERS.

Finding of the board of general appraisers that imports were steel tubes, finished, dutiable under Tariff Act 1897, par. 152, will not be disturbed; it not being wholly unsupported by proof, or clearly against the weight of evidence.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

J. P. Tucker and W. B. Coughtry, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in this case consist of steel tubes. The collector classified them under paragraph 152 of the act of 1897 as "steel tubes, finished, not specially provided for in this act." The importers protested, insisting that they should have been classified under paragraph 135 of the same act as "steel billets"; and an alternative protest under the same paragraph, that they should have been classified as "steel in all forms and shapes, not specially provided for in this act."

A large amount of testimony was taken before the board of general appraisers and they reached the conclusion that the articles in question are drawn steel tubes, finished. This was a question of fact determined upon conflicting evidence before the board, and within the rules established in this circuit their finding should not be disturbed, it being the rule not to interfere with the findings of the board upon questions of fact unless wholly unsupported by the proof or clearly against the weight of evidence. Additional testimony has been taken in this court, but it does not affect the proposition that the question still depends upon conflicting testimony. The court may add, however, after considering the testimony, that it concurs with the conclusion of fact reached by the board.

The decision of the board of general appraisers is affirmed.

MARSCHING et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,960.

CUSTOMS DUTIES—LAME.

An importation consisting of metallics produced by cutting lame into very minute scales, of definite size, is properly assessed as lame, under Tariff Act 1897, par. 179, first clause, and not as an article made of lame, under the last clause thereof, providing for laces, embroideries, braids, galloons, trimmings, or other articles made of lame.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

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Albert Comstock, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The importation in this case consists of "metallics produced by cutting lame into minute pieces of definite size." It was assessed for duty under the last clause of paragraph 179 of the act of 1897. The importer insists that it should have been assessed under the first clause of the paragraph. The first clause of paragraph 179 provides for "tinsel wire, lame or lahn, made wholly or in chief value of gold, silver or other metal, five cents per pound." The last clause provides for "laces, embroideries, braids, galloons, trimmings, or other articles made wholly or in chief value of tinsel wire, lame or lahn, bullion, or metal threads." There is no satisfactory definition in the record of the words "lame" or "lahn." The Century Dictionary defines "lame" as follows: "A plate; a blade; a thin plate; see lamina." "Lamina" is defined in the same dictionary as "a thin plate or scale; a thin plate of wood, metal, etc.; a leaf, layer," etc. In the form imported the lame consists of very minute scales, which might almost be considered powder. The court is of the opinion that in this form the importation cannot be regarded as an article made wholly or in chief value of lame. It is not an article made of lame; it is lame itself in a comminuted form. But even if this interpretation be incorrect, it is entirely clear within the well recognized doctrine of noscitur a sociis that it cannot be classed among the articles made of lame which congress intended to cover by the last clause in question, for that clause relates to laces, embroideries, braids and other similar articles.

It follows that the contention of the importer is correct and that the decision of the board of general appraisers must be reversed.

WOOLWORTH v. UNITED STATES.

(Circuit Court, S. D. New York. March 14, 1902.)

No. 2,831.

CUSTOMS DUTIES—COMMERCIAL DESIGNATION—EVIDENCE OF USAGE.

To warrant a finding that imports, otherwise not toys, are commercially known as such, and so should be classified under Tariff Act 1897, par. 418, there must be proof of a usage, definite, uniform, and general, and not partial, local, or personal; and testimony of employés of an importing retail house, whose knowledge is confined to what has been known or done by such house, is not enough.

Appeal by the Importer from a Decision of the Board of United States General Appraisers.

Albert Comstock, for the importer.
Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in controversy are small lanterns made of metal and glass, metal being of chief value. The collector assessed them for duty under paragraph 193 of the act

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of 1897, as "non-enumerated articles, composed wholly or in part of iron, steel, lead, etc." The importer insists that they should have been classified under paragraph 418 of the same act as "toys." The board of general appraisers found as matter of fact that the articles were not toys. Evidence has been taken in this court of which it is sought to predicate a finding by the court that they have been commercially known as toys. Proof necessary to establish commercial usage has been characterized by the supreme court in the case of Maddock v. Magone, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482, as follows:

"Necessarily, commercial designation is the result of established usage in commerce and trade; and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local or personal."

The evidence in this case is clearly within the exception last stated. It is "partial, local and personal." It is confined entirely to the evidence of two employés of the importing house of F. W. Woolworth, which is conceded to be a retail house, and the knowledge of the witnesses is confined exclusively to what has been known or done, by the particular house in question. In other words, there is no evidence tending to show how these articles have been regarded by importers and large dealers in the commerce of this country.

The decision of the board of appraisers is affirmed.

UNITED STATES v. BRAY.

(District Court, W. D. Missouri, C. D. March 18, 1902.)

RETAIL LIQUOR DEALER—SELLING WITHOUT PAYING TAX.

One may be convicted of carrying on the business of a retail liquor dealer without payment of the required tax, in violation of Rev. St. U. S. § 3242, as amended, though the article is put up in bottles and labeled as an appetizer, and he did not know its nature when he bought it, it in fact containing a large per cent. of alcohol, and nothing of a curative character, and the circumstances of purchases from him being such as to show that his customers are buying it merely as an intoxicant.

Wm. Warner, U. S. Atty., for the United States.
Silver & Brown, for defendant.

PHILIPS, District Judge (charging jury). The defendant stands indicted for carrying on the business of a retail liquor dealer without having paid to the government the required tax. The statute of the United States (Rev. St. § 3242, as amended) under which this prosecution is conducted defines a "retail liquor dealer" to be a person who sells foreign or domestic distilled spirits, wines, or malt liquors in less quantities than five gallons. The question to be answered by your verdict is whether or not the article in evidence, alleged to have been sold by the defendant under the name of "Diggs' Appetizer," comes within the letter and spirit of the statute. The defense is that the article in question is a useful medicinal preparation, manufactured and sold solely for its curative, or supposed curative, qualities as a medicinal preparation. A manufacturer may put up preparations containing supposed curative elements, containing herbs or roots, or other

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substances, supposed to possess the virtue of curing or relieving disorders of the human body; and he may use in the preparation thereof such a per cent. or quantity of alcohol or distilled spirits as may, in his honest judgment, be necessary to extract the virtues of such herbs or ingredients employed, and to hold the same in solution, although it may be more or less than is contained in some tinctures. And if such preparation be contained in bottles with appropriate labels, indicating their medicinal qualities, and they are sold by retail merchants in good faith, as a medicinal preparation in the bottle, to be used by the purchaser for such purpose as and where the purchaser sees fit to use it, although such preparation may contain (as shown by analysis) a large per cent. of alcohol, which, if drunk in large quantities, produces an intoxicating effect, such facts alone would not be sufficient to warrant a conviction of the vender for the violation of said statute. But if as a matter of fact such preparation contains a large per cent., say as much as 30 per cent., as indicated by the evidence in this case, of alcohol, and the other ingredients of such bottle consist of nothing more than sugar and water, combined with some other substance like an herb, or the like, which other substance is inoffensive and possessing no curative quality or character, and that such preparation, although sold by the bottle, was sold by the vender as a beverage, or with knowledge of the fact that those purchasing it are buying it merely as a beverage, and because of the spirituous liquor contained in it, to realize its intoxicating or exhilarating influence as a beverage, such facts would constitute a sale of distilled spirits, within the meaning of the statute. The law looks to substance, and not to shadows or forms. This revenue law cannot intentionally be evaded by the use of mere names or catchwords, or disguises. If the manufacturer or retail merchant who sells it knows that the preparation contains 30 per cent. of intoxicating spirituous liquors, and the other 70 per cent. is composed of merely sugar and water and some herb or ingredient of an ineffective character, possessing no quality of a curative virtue, and is aware of the fact that it is being bought by the purchasers as a beverage, who desire it because of its exhilarating and intoxicating character, he is entitled to no more protection under the law than if he were selling weak cocktails or toddies. If such practices are to be indulged under the guise of a printed label, designating the bottle as containing a medicinal preparation of an asserted curative property, and sold under the mere pretext of being a medicinal preparation, knowing that it is being bought by the purchaser merely as a beverage, because of the large per cent. of distilled spirits it contains, and not sold and bought as medicine, the statute under which this indictment is founded would be easily evaded and practically nullified,—as much so as if the party were selling toddies or cocktails made up of whisky, water, sugar, with a slice of lemon or orange, or other palatable vegetable, mixed therewith. Whether or not the defendant had knowledge of the composition of the preparation in question, and knew that it was being sold and bought merely as a beverage, because of the quantity of alcohol it contained, and not for medicinal purposes, is a question of fact, to be ascertained and determined by the jury from all the facts and circumstances in evidence. Although a retail mer-

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chant might buy such bottles from a manufacturer under the belief, begotten of representations made to him by the manufacturer, or by the labels placed upon such bottles, that it was a mere patented or prescriptive medicine, yet if, as a matter of fact, such preparation contains a large per cent. of alcohol, not designed, and not necessary, to extract the virtues of any medical herbs or substances employed, and to hold the same in solution, and that the witnesses who have testified in the case were buying it, not for medicinal purposes, but solely because of the distilled spirits or alcohol it contained, that because of this fact his sales of such bottles were greatly increased, this would be a violation of the spirit of the statute in question; and the fact that such bottles bore labels indicating that the contents were medicinal in their character, and possessed curative virtues, would be no protection to him as a retail liquor dealer. Knowledge is a question of fact. And when the circumstances attending the transaction of such sales are of such a character as should excite enquiry on the part of the vender as to the character of the article being sold and the purpose for which it was being bought, such as to excite in a reasonably prudent person a conscious conviction that the article being sold is, because of the fact that it contains such large quantities of alcohol as to make it desirable to the purchaser as an intoxicant, and is being sold and bought on that account, the law authorizes the jury to infer from such facts and circumstances the existence of actual knowledge on the part of the vender. A man, when conscious of the existence of a fact, cannot shut his eyes and say that he does not see it. He is presumed to see and to know that which is obvious to the senses, and the real character of which would be known to him if he would look and think. Although the defendant in this case may not have known when he bought the bottles in question from the manufacturer that they were other than what the labels indicated, yet if in the use and sales thereof he became aware of the fact that the preparation was being bought by his customers, not as medicine, but as a beverage, because of their containing alcohol, and that he was enjoying large sales thereof because of the presence of a large quantity of alcohol therein, which constituted the principal and substantial basis in its use as a beverage, this subsequently acquired information and knowledge should have put him upon enquiry, and an investigation into the real quality and character of this preparation. The analysis made of one of the bottles manufactured by Diggs in his factory at St. Louis, discloses the fact that the half-pint bottles sold by him contained over 30 per cent. of pure alcohol (equal to 63.77 of proof whisky) and .67 per cent. of water, and about 2 per cent. or more of glucose, with some aromatic flavor, to give it color. Some four witnesses testified to having bought large numbers of bottles of this preparation from the defendant or his clerks; that they drank the contents of the bottles, some of them on the premises or near there; that they did not buy them as medicine, but solely as a beverage to drink because of the intoxicating effect; that they contained a large quantity of alcohol; and that the drink was intoxicating in a large degree in the use. And, as evidence that the defendant knew that these bottles contained intoxicants, it appears that complaint was made to him by a parent or parents of some

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minors, and he was asked not to sell "the stuff" to them; and defendant, on the witness stand, stated that he refused, and gave orders to his clerks not to sell it to minors, because he did not want them around him "creating a nuisance." In addition to this the label on the bottles, while commending it as a specific for many of the disorders of the human body, contained the suggestive warning not to be used "as a beverage"; thus indicating that the manufacturer knew that it was liable to be used as a beverage, and advising the vender thereof, which was a most cunning suggestion that it could be used by purchasers as a beverage.

The jury returned a verdict of guilty.

MILES et al. v. UNITED STATES.

(Circuit Court, N. D. Georgia. February 19, 1902.)

No. 1,608.

UNITED STATES—BUILDING CONTRACT—CONSTRUCTION—EXTRA COMPENSATION.

An original bid was made by plaintiffs for the construction of a court house and post office building for the United States out of stone, brick, and terra cotta for a certain sum, and afterwards an alternative bid for the construction of the same building out of marble for a greater amount. In the specifications for the building originally submitted, provision was made for certain iron beams and girders to go over openings for doors and windows in order to strengthen the building. The specifications for the alternative bid recited that the work must be performed in strict compliance with drawings to be furnished, "including all necessary changes on account of said proposed construction." *Held*, that the provision quoted was for the benefit of the government, and that, though the evidence tended to show that iron beams were not usually required in marble buildings, the government had the right to require their use, and was not liable for extra compensation.

Suit for Extra Work and Material Furnished for the Savannah Court House and Post Office Building at Savannah, Ga.

Frazer & Hynds and Dorsey, Brewster & Howell, for plaintiffs.
Geo. L. Bell, Asst. U. S. Dist. Atty.

NEWMAN, District Judge. This is a suit brought by the plaintiffs against the United States to recover the value of certain materials furnished and certain work done in the construction of the United States court house and post office building at Savannah, Ga., which they say was not provided for or embraced in the contract they made with the government. The bid made by the plaintiffs on August 22, 1895, for the construction of the court house and post office as originally planned, which was a stone, brick, and terra cotta building, was accepted, and a contract entered into on August 26, 1895, by which the government agreed to pay the plaintiffs $117,000 for the building as then planned. An alternative bid was then made for the same building constructed of marble for $215,000. The construction of the building with the first story of stone and the other stories of brick and terra cotta was commenced. At the instance of the citizens of Savannah, the work was suspended, after it had been commenced, in

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order that an appropriation might be obtained from congress sufficient to justify the construction of the building of marble. A satisfactory appropriation was obtained, and on October 18, 1895, a contract was entered into between the plaintiffs and the government for the construction of the building of marble for $209,000. In the specifications for the building originally submitted, when it was to have been constructed of stone, brick, and terra cotta, provision was made for certain iron beams or girders to go over the openings for doors and windows in the building, the purpose being to support and strengthen the walls, and avoid any weakness caused by such openings. The specifications for the alternative bid for constructing the building of marble, so far as material here, are as follows:

"Detail drawings, showing in full the construction, will be furnished the successful bidder, and the work must be performed in strict accordance therewith, including all necessary changes on account of said proposed substitution."

After the marble construction had been commenced, when informed that these iron beams would still be required, the contractors entered into correspondence with the supervising architect's office, claiming that, inasmuch as the building was being constructed of marble, these beams and girders were not at all necessary, and that, as it involved a considerable additional expense to them, they should not be required to put them in. Considerable data was furnished by the contractors to the government officials going to show the strength of a marble building, and that these beams or girders over openings were not usual in a marble building, and were not in any way necessary to support the building. The reply of the government officials substantially was that the beams or girders did not give the building, even when constructed of marble, a factor of safety above that which the government required. On the trial here evidence was introduced by both parties. Both Mr. Miles and Mr. Bradt, who have had large experience in the construction of buildings, testified as witnesses. They also had the evidence of several practical builders and several expert architects. All of their testimony was to the effect that these iron beams or girders were unnecessary in a marble building, and that they would not expect, if they were contracting to build a marble building such as was finally constructed at Savannah, to be required to put these iron beams over the openings. The representative of the supervising architect's office, whose duty it was to visit this building and supervise its construction, testified that he considered these iron supports to be necessary and proper, and that, in his opinion, the building would not have been sufficiently strong without them. The acting supervising architect testified that, in his opinion, the structural steel and iron required to be put in the building was necessary to the stability of the building. From the evidence submitted the facts necessary to a determination of this case seem to be: (1) That the iron beams or girders over the openings in the walls of the building were clearly provided for in the specifications of the contract for the construction of the building of stone, brick, and terra cotta. (2) There was nothing whatever in the alternative proposal for the construction of a marble building as it was originally made, or in the contract sub-

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sequently made for the erection of the marble building, between these contractors and the government, which eliminated these iron beams. (3) The iron beams would not have been usually required over openings in constructing a marble building in this section of the country, or perhaps generally. (4) The evidence does not show satisfactorily that these beams would not be required in a first-class building as erected by the United States government. On the contrary, some of the evidence shows, and it may, perhaps, be fairly treated as a matter of common knowledge, that buildings erected by the United States for public purposes, such as court houses and post offices, are of an unusually substantial character, and that an unusual factor of strength and safety is required in their construction.

Conclusions of Law.

The question for determination here is, have the plaintiffs the right, under these facts, to recover for the cost of placing these iron beams in the building at Savannah? The plans for the stone, brick, and terra cotta building showed these iron beams, and there was no express agreement whatever, when the change to marble was made, that the beams would be left out. The plaintiffs claim that because they were not really necessary to the strength of the building, and would not usually be required in a building of that character, as testified to by builders and experts here, therefore they had the right to assume, in making their bid, that the beams would be left out. They claim that the expression, "including all necessary changes on account of said proposed substitution," in the clause from the specifications in the alternate marble bid, which has been quoted, justified them in expecting that such things as were not necessary when the change to marble was made would be left out of the building, and that they had the right to anticipate and to rely upon this in making their bid for the marble construction. It is clear that this stipulation as to "necessary changes" is for the benefit of the government; that is, the government required the contractors proposing to do this work to say that, if the change from stone, brick, and terra cotta to marble should be made, they would do the work in accordance with the details to be furnished, including all necessary changes which the representatives of the government might deem necessary. If the contract had stated, or if they had used language which would mean, that, if there should be a change from stone, brick, and terra cotta to marble, then the contractor would be entitled to have such changes as would make the construction of the building such as was usual and customary in a marble building, there might be some ground for the contention here made, but I am wholly unable to find anything like that in the language here used, or the connection in which it is used. The only possible ground for claiming extra compensation in this case is that the representatives of the government required an unusual, and possibly an extraordinary, factor of strength in the building; and this is not sufficient, in my opinion, to justify a recovery in view of the fact that these iron beams or girders appeared in the specifications for the stone, brick, and terra cotta building, and there was no stipulation whatever that they would be left out if and when the change to marble should be made. The govern-

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ment should be held, of course, to fair compliance with contracts it enters into for government work, but only to this. And the contention that the representatives of the government engaged in supervising the construction of this building did not have the right to require these iron beams to be retained when the change in the character of construction was made would not be warranted by anything in the contract, or, in my opinion, by any just view of the law applicable to the case.

There are three general propositions of law set out in the interesting brief filed by counsel for the plaintiffs in this case. The first is that contracts made with the United States are controlled by the same general law that controls contracts between individuals; second, that, if there be doubt as to the meaning of a contract, the doubtful expression should be construed more strongly against the party who uses it in drawing up the contract; and, third, that, where doubtful or ambiguous language is contained in a contract, evidence of the usage or custom as to the matter embraced in the contract at the place where it is to be executed is admissible as forming a part of and entering into the contract. It is not necessary to gainsay any of these propositions. On the contrary, they may all be admitted without in any way interfering with the view heretofore expressed as to the merits of this controversy. Seeing these beams in the specifications for this building, for the contractors to assume that they would be taken out by the supervising architect's office when the change to marble was made because the contractors had not seen them before in marble construction, seems to me to have been unwarranted. On the contrary, it would appear that they were put upon fair inquiry, at least, before bidding, knowing these beams were a part of the construction, as to whether they would be retained when the change was made.

In my opinion, therefore, the plaintiffs are not entitled to recover in any view of the case, and judgment must be entered against the plaintiffs and in favor of the United States.

ARROTT v. STANDARD MFG. CO.

(Circuit Court, W. D. Pennsylvania. April 2, 1902.)

No. 16.

PATENTS—INFRINGEMENT—BILL OF COMPLAINT—SUFFICIENCY.

In a suit in equity for the infringement of a patent, a bill of complaint setting forth the making of the invention by complainant, his fulfillment of the statutory terms entitling him to letters patent, his due application therefor, and the grant thereof to him, and alleging that complainant has been, and, but for defendant's infringement, and others of like character, would still be, in the undisturbed enjoyment of the exclusive privileges secured to him, etc., is sufficient, and need not aver, in set words, complainant's ownership of the patent at the date of the filing of the bill.[1]

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[1] Pleading in infringement suits, see note to Caldwell v. Powell, 19 C. C. A. 595.

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In Equity. Sur demurrer to bill. See 113 Fed. 389.

Christy & Christy, for complainant.
Lyon & McKee, for defendant.

ACHESON, Circuit Judge. The causes of demurrer insisted on are:

"Second. That said complainant, in his bill of complaint, does not aver that he now is, or at the time of the filing of said bill was, the owner of said letters patent and invention. Third. That said complainant, in his bill of complaint, does not aver that he now is, or was at any time, the owner of said letters patent and invention, or of any rights or privileges thereunder."

In support of these propositions counsel cites Krick v. Jansen (C. C.) 52 Fed. 823, and Lettelier v. Mann (C. C.) 79 Fed. 81. But it is enough to say that in the former of these cases the plaintiff, it seems, was not the patentee, as here, and what his precise statement as to the ownership was does not appear; and in the latter case, manifestly, the court was influenced, if not controlled, by decisions of the local courts as to the equity practice in the state of California in framing bills. Now, it is true that this complainant's ownership of the patent in suit at the date of the filing of his bill is not averred in the bill in the set phrases of the demurrer, but in substance and legal effect such ownership is averred. The bill particularly sets forth the making of the invention by the complainant; his fulfillment of the statutory terms, conditions, and requirements entitling him to letters patent therefor; his due application for the same, and the grant thereof to him; and, going beyond this, the bill avers that the complainant has been, and but for the defendant's infringement complained of and others of like character would still be, in the undisturbed possession, use, and enjoyment of the exclusive privileges secured to him by the patent; and he makes profert of the letters patent. Proof of the matters alleged would make out a prima facie case for relief. More, therefore, the complainant was not bound to aver. If since the issue of the patent he has lost title, by assignment or otherwise, that is a matter to be shown in defense. That the averments of the bill are sufficient to put the defendant upon its answer, I cannot doubt.

The demurrer is overruled, with leave to the defendant to answer the bill within one week.

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MEMORANDUM DECISIONS.

BALTIMORE & O. R. CO. v. JOY. (Circuit Court of Appeals, Sixth Circuit. January 13, 1902.) No. 311. In Error to the Circuit Court of the United States for the Northern District of Ohio. Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

PER CURIAM. Action for personal injuries sustained through alleged negligence of the railroad company by John A. Hervey while a passenger. The injury occurred in Indiana. The action was brought in Ohio. Pending the action the plaintiff died. On application of the administrator of said Hervey, he was permitted to revive and prosecute same as administrator. This revivor was excepted to and assigned as error. Upon an interrogatory certified to the supreme court, that court has answered that there was no error in the revivor. 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677. The case having been submitted alone upon this question, it is now ordered that the judgment be affirmed.

BENZIGER et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. February 7, 1902.) No. 12. Appeal from the Circuit Court of the United States for the Southern District of New York. W. Wickham Smith, for appellants. Chas. D. Baker, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed on opinion of court below. 107 Fed. 257.

BLUE v. FILER. (Circuit Court of Appeals, Sixth Circuit. January 13, 1902.) No. 968. In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio. Benjamin F. James, for plaintiff in error. J. O. Troup, for defendant in error. Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

PER CURIAM. Action for personal injuries sustained while in the service of the defendant. Upon the conclusion of the whole evidence the trial judge directed a verdict for the defendant. We find no error in this instruction. The reasons given for so directing a verdict, as set out in the record, amply vindicate the action of the court below, and do not need to be supplemented by us. The other errors assigned upon questions arising upon the admission and rejection of evidence have been examined. The court finds none of them well taken. Affirmed.

BOISE CITY v. WILSON et al. (Circuit Court of Appeals, Ninth Circuit. March 10, 1902.) No. 699. Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho. C. C. Cavanah, for appellant. Alfred A. Fraser, for appellee. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This cause was submitted to the court below upon the pleadings and an agreed statement of facts, from which it appeared that the assessments for the municipal improvement in question were levied in accordance with what is known as the "front-foot rule"; and the court, being of the opinion that under the decision of the supreme court in the case of Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, assessments so levied were necessarily invalid, gave the complainants judg-

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ment. On the authority of French v. Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, Wight v. Davidson, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900, and similar decisions decided at the same time and reported in the same volume, explaining, if not qualifying, the case of Village of Norwood v. Baker, the judgment is reversed, and cause remanded, with directions to the court below to enter judgment for the defendant.

BRUCE v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 30, 1901.) No. 1,538. In Error to the District Court of the United States for the District of Wyoming. Willard Teller (Mr. Clayton C. Dorsey, on the brief), for plaintiff in error. Timothy F. Burke, for defendant in error. Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge. Bruce, plaintiff in error, was an employé of John C. Teller, engaged in the work of cutting timber for him under the circumstances disclosed in the case of Teller v. U. S. (decided at this term of court) 113 Fed. 273. This case was argued with that, and submitted on the same briefs. No facts or principles are invoked in behalf of Bruce other or different from those urged in favor of Teller. Accordingly, the judgment of the trial court sentencing him to pay a fine of $500 is, on the authority of Teller v. U. S., supra, affirmed.

BRYAN et al. v. HUNTINGTON. (Circuit Court of Appeals, Fourth Circuit. February 10, 1902.) No. 283. Appeal from the Circuit Court of the United States for the District of West Virginia, at Parkersburg. Z. T. Vinson and W. K. Cowden, for appellants. Maxwell Evarts and F. B. Enslow, for appellee. Before SIMONTON, Circuit Judge, and MORRIS and BOYD, District Judges.

PER CURIAM. Considering the assignments of error in this case and the arguments of counsel thereon, it is ordered the appeal be dismissed, and the decree of the circuit court affirmed. The reasons for this action will be filed hereafter.

THE C. D. BRYANT. (Circuit Court of Appeals, Ninth Circuit. February 21, 1902.) No. 769. Appeal from the District Court of the United States for the District of Hawaii. Andrews, Peters & Andrade, for appellant. Nathan H. Frank and Kinney, Ballou & McClanahan, for appellees. Upon application of counsel for appellant, and upon motion of N. H. Frank, appeal ordered dismissed.

CENTRAL TRUST CO. et al. v. RICHMOND & D. R. CO. Appeal of GOODSON. (Circuit Court of Appeals, Fourth Circuit. November 9, 1901.) No. 406. Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville. Charles A. Moore, for appellant. Charles Price, for appellee. Order of the circuit court set aside, and remanded, with directions to the lower court to reinstate petition, with costs to petitioner.

THE E. LUCKENBACH (three cases). (Circuit Court of Appeals, Second Circuit. February 24, 1902.) Nos. 106–108. Appeals from the District Court of the United States for the Southern District of New York. These causes come here upon appeals from decrees of the district court, Southern district of New York, dismissing the libels (109 Fed. 487), which were brought to recover for damages sustained by scows while in tow of the steam tug

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E. Luckenbach in Hampton Roads, about 10 a. m., October 31, 1900. Samuel Park, for appellants. Le Roy S. Gove, for appellees. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The facts are quite fully stated in the opinion of the district judge. In one respect his statement of them is fairly open to criticism. The testimony hardly warrants the finding that there was a sudden increase of wind; but we concur with him in the conclusion that the allegations of fault on the part of the tug are supported mainly by the wisdom that comes after the event. It would have been good judgment to stay in port. It would have been good judgment to turn back at Sewall's Point, when return was feasible and safe; but we are not prepared to say that in deciding to push on the master of the tug displayed such bad judgment as would amount to recklessness or negligence. The tows were staunch, well-built scows, two-thirds to three-fourths loaded; there was a government inspector along, who apparently was authorized, in the event of urgent necessity, to allow dumping short of the designated ground. The catastrophe was precipitated by the breaking of a bridle rope furnished by the tow, which seems to have been in very poor condition. Although the storm had not finally broken, the wind had gone down very much before they started from the haven they had put into overnight, and according to the weather records it continued to fall much lower during the two hours ensuing their departure. The master made a mistake in pushing on beyond Sewall's Point, but we concur with the district judge in the conclusion that it was not an error of judgment so gross as to justify a finding of negligence. The decree is affirmed, with costs.

FORCE v. SAWYER-BASS MFG. CO. et al. (Circuit Court of Appeals, Second Circuit. March 10, 1902.) No. 131. Appeal from the Circuit Court of the United States for the Eastern District of New York. H. A. West, for appellant. Henry Schreiber, for appellees. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Affirmed, on opinion of the circuit court. 111 Fed. 902.

THE FRIESLAND. (Circuit Court of Appeals, Second Circuit. February 25, 1902.) No. 91. Appeal from the District Court of the United States for the Southern District of New York. For opinion below, see 104 Fed. 99. H. G. Ward, for appellant. Wilhelmus Mynderse, for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. We concur in the conclusion reached by the court below that the claimant failed to exercise the due diligence required by the condition of the bill of lading. Although the peculiar susceptibility of cast iron chests thus used in connection with closets was so well known that brass valve chests are now generally substituted therefor in steamers of this class, the claimant had elected to retain and continue the use of these cast iron chests in the Friesland during a period of nine years. The usual examination was made previous to this voyage, but it was not sufficient to determine whether the defect which caused the damage existed. Claimant's chief excuse for such inadequate inspection, that the valve chest was so situated that examination of the interior was difficult, only serves to emphasize the fault. The cause of the difficulty was the adjustment of two pipes in one space between two frames, whereby the opening in the top of the valve chest was so crowded as to prevent exterior visual examination. There were, however, other practicable methods of examination, as pointed out by the district judge in his opinion, none of which were followed. The decree is affirmed.

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GOLDSTEIN v. LUND et al. (Circuit Court of Appeals, Ninth Circuit. February 25, 1902.) No. 747. Appeal from the District Court of the United States for the Second Division of the District of Alaska. Morton E. Stevens, for appellant. Lorenzo S. B. Sawyer, for appellees. Upon motion of L. S. B. Sawyer, appeal ordered dismissed, pursuant to the provisions of rule 23, for failure to print record.

THE JAMES D. LEARY v. THE EVELYN. (Circuit Court of Appeals, Second Circuit. February 7, 1902.) Nos. 104, 105. Appeals from the District Court of the United States for the Southern District of New York. J. Parker Kirlin, for the J. D. Leary. Chas. C. Burlingham, for Bull and others. Albert Wray, for dredging company. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed, without interest or costs, on opinion below. 110 Fed. 685.

JOHNSON et al. v. BARBER. (Circuit Court of Appeals, Fifth Circuit. January 28, 1902.) No. 1,065. Appeal from the Circuit Court of the United States for the Eastern District of Texas. Edgar Watkins and W. A. Wimbish (F. C. Jones, on the brief), for appellants. T. J. McMurray, for appellee. Before McCORMICK and SHELBY, Circuit Judges.

PER CURIAM. We are of opinion that the decree of the circuit court is right, and that there is no error in the record. It is therefore affirmed.

In re LEACH. (Circuit Court of Appeals, Seventh Circuit. December 21, 1901.) No. 855. Petition for Revision of Proceedings in Bankruptcy in the District Court of the United States for the District of Indiana. William J. Vesey, for petitioner. Marshall, McNagny & Clugston, for respondent. Dismissed on stipulation of counsel.

McALLISTER et al. v. SOUTHERN PAC. CO. (Circuit Court of Appeals, Second Circuit. March 10, 1902.) No. 133. Appeal from the District Court of the United States for the Eastern District of New York. Maxwell Evarts, for appellant. Nelson Zabriskie, for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Affirmed, on opinion below. See 111 Fed. 933.

THE McDONALD. THE JOHN LANG. (Circuit Court of Appeals, Second Circuit. January 7, 1902.) No. 20. Appeal from the District Court of the United States for the Southern District of New York. Le Roy S. Gove, for libelant. Amos Van Etten, for claimant. Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. Decree of district court affirmed, with interest and costs. See (C. C. A.) 112 Fed. 681.

In re MAINS. (Circuit Court of Appeals, Ninth Circuit. March 7, 1902.) No. 804. Petition for Writ of Habeas Corpus. Petition denied.

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In re MAINS. (Circuit Court of Appeals, Ninth Circuit. March 12, 1902.) No. 805. Petition for Writ of Habeas Corpus. Petition denied.

MARINE INS. CO. v. GRAHAM & MORTON TRANSP. CO. (Circuit Court of Appeals, Seventh Circuit. January 24, 1902.) No. 690. Appeal from the District Court of the United States for the Northern District of Illinois. Charles C. Kremer, for appellant. Robert Rae and Louis C. Ehle, for appellee. Same decree entered in this cause as in Chicago Ins. Co. v. Graham & Morton Transp. Co., 48 C. C. A. 397, 109 Fed. 352, per stipulation of counsel.

METCALF v. AMERICAN SCHOOL FURNITURE CO. et al. (Circuit Court of Appeals, Second Circuit. February 4, 1902.) No. 90. Appeal from the Circuit Court of the United States for the Western District of New York. Frederick Seymour, for appellant. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree affirmed in open court, with instructions to allow plaintiff 30 days to amend, on payment of costs. For opinion below, see 108 Fed. 909.

REPUBLIC OF COLOMBIA v. CAUCA CO. et al. CAUCA CO. v. REPUBLIC OF COLOMBIA. (Circuit Court of Appeals, Fourth Circuit. February 4, 1902.) Nos. 407, 423. Cross Appeals from the Circuit Court of the United States for the District of West Virginia, at Clarksburg. William G. Johnson, for Republic of Colombia. Hugh L. Bond, Jr., and John W. Beaumont (Cowen, Cross & Bond and Edward H. Murphy, on briefs), for Cauca Co. et al. Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

PER CURIAM. We have carefully considered the opinion of the circuit court, the subject-matter of appeal in these two cases. We can add nothing to the clear statement of the facts of the case made by the learned judge who delivered the opinion of the court (106 Fed. 337), and we can add nothing to the reasons which led him to his conclusion, in which conclusion we entirely concur. The decree of the circuit court is affirmed.

TERLINDEN v. AMES. (Circuit Court of Appeals, Seventh Circuit. March 1, 1902.) No. 849. Appeal from the District Court of the United States for the Northern District of Illinois. A. C. Umbreit and Albert C. May, for appellant, and William Vocke, for appellee. Dismissed for want of jurisdiction.

TRAIN et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 4, 1902.) No. 27. Appeal from the Circuit Court of the United States for the Southern District of New York. Albert Comstock, for appellant. D. Frank Lloyd, for the United States. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Decision of circuit court affirmed, on opinion below. 107 Fed. 261.

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UNITED STATES v. KLIPSTEIN et al. (Circuit Court of Appeals, Second Circuit. January 7, 1902.) No. 64. Appeal from the Circuit Court of the United States for the Southern District of New York. D. Frank Lloyd, for appellant. Albert Comstock, for appellee. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The new testimony does not present a different case from that which was before us in U. S. v. Roessler & Hasslacher Chemical Co., 39 C. C. A. 651, 99 Fed. 552. Decision of circuit court affirmed.

UNITED STATES v. McCOY et al. (Circuit Court of Appeals, Ninth Circuit. March 3, 1902.) No. 708. In Error to the Circuit Court of the United States for the Southern Division of the District of Washington. Wilson R. Gay, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty. W. T. Dovell, for defendants in error. Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This case has been before this court before, and was returned to the lower court, with directions to take further proceedings therein. U. S. v. McCoy, 44 C. C. A. 125, 104 Fed. 669. There is nothing in the present record showing any error in the subsequent proceedings taken in pursuance of such directions. The judgment of the circuit court is therefore affirmed.

UNITED STATES v. McGIBBON et al. (Circuit Court of Appeals, Second Circuit. February 7, 1902.) No. 22. Appeal from the Circuit Court of the United States for the Southern District of New York. Chas. D. Baker, for the United States. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed, on opinion of court below. 107 Fed. 265.

UNITED STATES v. WADDELL et al. (Circuit Court of Appeals, Second Circuit. December 3, 1901.) No. 73. Appeal from the Circuit Court of the United States for the Southern District of New York. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Affirmed on consent in open court.

THE VICTORIA. (Circuit Court of Appeals, Second Circuit. January 7, 1902.) No. 2. Appeal from the District Court of the United States for the Southern District of New York. For opinion in district court, see 88 Fed. 524. Amos Van Etten, for appellant. Le Roy S. Gove, for appellee. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Decree of district court affirmed, with costs.

WITHEROW v. CARNEGIE STEEL CO. (Circuit Court of Appeals, Second Circuit. February 5, 1902.) No. 117. Appeal from the Circuit Court of the United States for the Southern District of New York. H. M. Hitchings, for appellant. John R. Bennett, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. Dismissed in open court for lack of jurisdiction.

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BURGER et al. v. TRIPLER et al. (Circuit Court, S. D. New York. December 21, 1901.) Motion to strike demurrer from the files, for decree pro confesso, and to allow demurrer to stand as a pleading. James C. Chapen, for the motion. H. A. West, opposed.

LACOMBE, Circuit Judge. The defendant was in default, and his demurrer improperly filed. He presents an excuse for his default, and prays that it may be opened. This application is granted, and he is given to and including December 27th to demur, plead, or answer; issue, however, to stand as of June rule day, and defendant to file stipulation to complete his proofs under any plea or answer which he may file within 90 days after complainants close their prima facie proofs.

GOAT & SHEEPSKIN IMPORT CO. v. UNITED STATES (two cases). (Circuit Court, S. D. New York. March 14, 1902.) Nos. 1,715, 1,871. Appeals by the Importers from Decisions of the Board of United States General Appraisers. Albert Comstock, for appellants. Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The decision of the board of general appraisers is affirmed on two grounds: First, that the protest is insufficient; and, second, that the facts bring the cases within the decision in U. S. v. China & Japan Trading Co., 18 C. C. A. 335, 71 Fed. 864.

INTERNATIONAL TOOTH CROWN CO. v. KYLE. (Circuit Court, S. D. New York. January 20, 1902.) Philip B. Adams, for petitioners. Charles K. Offield, Offield, Towle & Linthicum, Dickerson & Brown, and Walter D. Edmonds, for complainant.

TOWNSEND, District Judge. This cause having been heard upon the petition of Allan G. Bennett and others to vacate and annul the decree heretofore entered herein, and upon affidavits and arguments of counsel in behalf of the said petitioners and the said complainant, International Tooth Crown Company, and it appearing to the court that the proceedings therein were procured by collusion between the complainant, International Tooth Crown Company, and the defendant, James Orr Kyle, and that there was no real controversy between them, it is hereby ordered, adjudged, and decreed that the said decree, to wit, the decree entered on or about the 1st day of January, 1900, be, and the same is hereby, vacated and annulled, and that this cause be dismissed. It is further ordered that said International Tooth Crown Company pay the disbursements incurred in the said application for vacation of said decree. Nothing herein contained shall be construed as implicating any of the solicitors or counsel for complainant; for they are exonerated from all knowledge of or participation in said collusion.

McINTYRE v. WESTERN UNION TEL. CO. (Circuit Court, S. D. New York. September 24, 1901.) Motion for Preliminary Injunction. Drury W. Cooper, for the motion. H. A. West, opposed.

LACOMBE, Circuit Judge. This motion is now denied upon the following terms, viz.: That defendant on November 1, 1901, and monthly thereafter, file in this court sworn statements showing how many of the devices complained of have been used by it, where in such use the device was twisted as shown in the patent. In the event of failure to file such affidavits, or affidavits showing that none were twisted, complainant may renew this application.

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NORTON v. HARTFORD et al. HARTFORD v. NORTON et al. (Circuit Court, S. D. New York. January 2, 1902.) In Equity. On motion for preliminary injunction. John J. Crawford and T. S. Ormeston, for the motion. John W. Griggs and Edward P. Brown, opposed.

LACOMBE, Circuit Judge. The plaintiff in the second suit may take an injunction pendente lite as prayed, provided he will file security in the amount of $150,000, conditioned that he will pay whatever may be found due from him to the estate of George F. Gilman, with leave to the defendants to move to have the security increased, if the cause be not submitted to the court on final hearing during the year 1902, by reason of any delay on the part of complainant. If such security be given, and injunction order taken, the motion for a receiver in the first suit will be denied. If said Hartford elects not to give such security, the motion for injunction in the second suit will be denied, and the court will, in the first suit, appoint George H. Hartford and another person, to be selected by the court, joint receivers as prayed.

SHADBOLT v. LIBBY. (Circuit Court, S. D. New York. December 19, 1901.) William C. Prime, for the motion. George F. Canfield, opposed.

HAZEL, District Judge. The evidence in this case afforded no logical basis for the verdict of $3,000, rendered in favor of the plaintiff. It indicates that the jury found that plaintiff was authorized to make the contract, and that but for the failure of the defendants to accept the contract, which they had authorized the plaintiff as their agent to negotiate, the contract would have been consummated by the purchasers, but that the purchasers would only have paid the sum of $15,000 thereon, whereas the contract called for a cash payment of $60,000. There is no reasonable basis for the finding that only $15,000 of the $60,000 would have been paid. It follows, therefore, that the damages awarded are inadequate, and for that reason the verdict must be set aside, with costs to abide the event.

END OF CASES IN VOL. 113.

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